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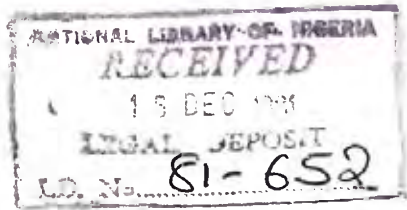
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1841-1973

To my Father and my
brothers Christian and Edwin
who were killed in October 1967
in the Nigerian Civil War

PRIVY COUNCIL JUDGMENTS

Opinions of the Judicial
Committee of the Privy Council
in Appeals from West Africa
1841 to 1973



by

OLISA CHUKURA, S.A.N., LL.B. (LOND.)

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PREFACE

The 254 judgments contained in this volume are the opinions of the Judicial Committee of the Privy Council in all appeals from Nigeria (95), Ghana (124), Sierra Leone (29) and The Gambia (6) to the Privy Council from 1841 to 1973. Of these 215 have been traced to the regular law reports. Before now the others (39) have probably not been reported. The bulk of the material in this Report was collected in 1968 and 1969 and the editing was completed early in 1976.

The Table of Cases records in detail the various reports in which the judgments can be found. For the previously unreported opinions, the relevant Privy Council particulars are given. There has also been included a comprehensive Index of Subject-Matter.

This Report serves a twofold purpose: first, it is in some way a history of the association of the four *Anglophone* West African Commonwealth countries with the United Kingdom in their various stages of growth from being merely colonial possessions to their attaining full self-governing status, during which period the judicial framework and outlook of the Privy Council remained virtually consistent. Secondly, by including *all* the pronouncements of the Privy Council in *all* the appeals which were heard by the Committee for the Countries concerned it brings together the judicial wisdom distilled in these opinions and perpetuated in 174 different volumes of law reports. This collection therefore not only presents an historical and judicial panorama, but is also a repository in which the elements of our jurisprudence, slowly but firmly established over a period of 132 years, are preserved.

I would like to thank most gratefully, Mr. Dixon, the librarian of the Privy Council, for throwing the doors of the library open to me in December 1975 and in particular making copies of the judgments available to me. I would also like to thank Mr. Shaw, "George" and "Paddy" of the same library for the special attention which they paid to my requirements and which made my task not only less burdensome but pleasant as well.

O.C.

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13th November 1980

REPORTS INCLUDED IN THE WORK AND THEIR ABBREVIATIONS

- A.C. Law Reports: Appeal Cases—published by the Incorporated Council of Law Reporting for England and Wales, London: from 1980—(current).
- All E.R. The All England Reports—published by Butterworth & Co. Ltd., London: from 1936—(current).
- All E.R. (Rep.) The All England Reports (Reprint)—published by Butterworth & Co. Ltd., London: from 1558—1936.
- All N.L.R. All Nigeria Law Reports—published by The National Committee on Law Reporting Nigeria: from 1961—(current).
- Cox C.C. A. W. Cox's Criminal Law Cases 1843—1945.
- E.R. The English Reports—published by Stevens & Sons Ltd., London.
- F.C. Selected Judgments of the Full Court of the Gold Coast Colony 1926—29, Government Printer Accra, 1931.
- G.L.R. The Ghana Law Reports—published by the General Legal Council, Accra.
- J.P. Justice of the Peace 1837—(current)—England.
- Jur. (N.S.) Jurist Reports, New Series; 12 volumes: 1885—67—England.
- L.J.P.C. Law Journal, Privy Council: from 1865—(current)—England.
- L.R.P.C. Law Reports, Privy Council, 6 volumes 1865—75—England.
- L.T. Law Times Reports, 177 volumes: 1859—1947—England.
- Moo.P.C.C. Moore's Privy Council Cases, 15 volumes: 1836—63—England.
- N.L.R. Nigeria Law Reports—published by the Government of Nigeria: 1881—1955.
- P.C. Judgments of the Judicial Committee of the Privy Council on Appeal from the Gold Coast Colony—Government Printing Office, Accra, 1929: 1874—June 1928.
- R.P.C. Reports of Patent Cases: 1884—(current)—England.
- Ren. Renner's Gold Coast Reports—published by Sweet & Maxwell Ltd., London (1915).
- S.J. Solicitors' Journal: from 1856—(current)—England.
- S.L.L.R. The Sierra Leone Law Reports—published by Sweet & Maxwell, London, for the Government of Sierra Leone.
- T.L.R. The Times Law Reports from 1884—England.
- W.A.C.A. West African Court of Appeal Reports: 15 volumes—1936—55.
- W.A.L.R. West African Law Reports—published by the West African Law Publishing Co., Achimota, Ghana.
- W.L.R. The Weekly Law Reports—published by the Incorporated Council of Law Reporting for England and Wales, London.
- W.N. Weekly Notes—published by the Incorporated Council of Law Reporting for England and Wales, London.
- W.R. Weekly Reporter, 54 volumes: 1852—1906—England.

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SMITH v. SIERRA LEONE (JUSTICE OF)

MAGNUS SMITH APPELLANT
AND
THE JUSTICE OF SIERRA LEONE RESPONDENT

[ON APPEAL FROM THE COLONY OF SIERRA LEONE]

3 Moo.P.C. 361; (1841) 13 E.R. 147

1841 Jan. 8 Lord Brougham, Sir Lancelot Shadwell V.-C.,
Erskine J., Rt. Hon. Dr. Lushington

An Order of the Recorder's Court in the Colony of Sierre Leone, disbaring and striking off from the Rolls a practitioner of that Court, for alleged contumelious conduct, on Appeal reversed and rescinded.

Semble: A fine imposed by a Court of Record for contempt of Court cannot be remitted by this Court of Appeal.

This was an Appeal against three several Orders made by the Judges of the Court of the Recorder of Freetown, in Sierra Leone, by which the Appellant, a practitioner duly admitted to practise in the Colony, had been fined, imprisoned, disbarred, and struck off the rolls of the Court, and ordered to pay certain costs under the following circumstances: -

In the year 1835, the Appellant, Mr. Smith, in his character of Attorney and Advocate, was engaged on behalf of the Defendant in a suit wherein Henry Edward Harper was Plaintiff, and Phillip Hillier Defendant. The action was brought, among other things, to recover the amount of certain goods, and was tried in the Recorder's Court of Freetown, on the 21st of October, 1835, before Mr. Rankin, the then Chief Judge, and Mr. Salter, one of the Assistant Judges of the colony, and a jury empanelled in the customary manner.

During the trial, objections were taken by the Appellant to the admission of certain evidence tendered by the Plaintiff as being inadmissible, which, after argument, were allowed. The Judge, however, in summing up, left the evidence objected to, to the jury, in consequence of which the jury gave a verdict against the Appellant's client for a larger amount than they would otherwise have done.

On the 14th of November, 1835, the Appellant, according to the practice of the Court of the Recorder of Sierre Leone, served the Chief and Assistant Judge and the opposite party's Attorney and Advocate, with notice of motion for a new trial, upon the ground of misdirection by the Judge on the points objected to at the trial.

On the 18th of November, the Appellant moved and obtained a rule Nisi, to show cause why a new trial should not be had. This rule was granted by the same Judges who had presided at the trial.

The rule came on for argument on the 23rd of December, 1835, before the Court of the Recorder of Freetown, which consisted of the Chief Justice, Mr. Rankin, and the two Respondents, Major Blenkarne and Mr. Lewis, the Assistant Judges, when the Appellant urged the grounds of his application, but being interrogated by the Chief Judge as to the particular words he used in directing the jury, and required to give his answer in a particular form, which he respectfully declined, he was ordered to be fined in the sum of £20, and committed to the custody of the Sheriff till the fine was paid. Under this order the Appellant remained in confinement in the common goal of the Court for a fortnight.

No decision was at this time made upon the application for a new trial; but on Wednesday, the 30th of December, the Court, in the absence of the Appellant (he being in prison), discharged the rule, with costs, which were ordered to be paid by him personally, unless an exculpatory affidavit was filed by him before the next sitting of the Court.

On the same day, the Court made an Order, directing the Appellant to file an affidavit before the next Saturday. This order was served upon him in prison, and at nine o'clock on Saturday evening, the day on which he was limited to make his defence, he transmitted to the Clerk of the Court an affidavit in reply, with a note, informing the officer of the Court of his inability to swear to the affidavit, by reason of his being in close custody, and requesting that the Chief Justice would be pleased to appoint the clerk, or some other person, a commissioner, for the purpose of enabling him to be sworn to such affidavit.

No notice was taken of this application, or of the receipt of the affidavit by the Clerk of the Court until Monday afternoon, when the Appellant was informed, by a letter from that officer, that the Court had refused his application respecting the swearing of his affidavit, but that an application to the Court the following morning might perhaps be attended to. The Appellant accordingly addressed a letter on the following day to the Clerk of the Court, requesting to be informed whether he was at liberty to attend the Court for the purpose of being sworn to his affidavit. No notice was taken of this second application, nor was he then sworn to the contents of the affidavit, but on the same day he was served with a rule to show cause why he should not be struck off the roll of the practitioners of the Court. The rule was subsequently amended by the Court of its own accord, directing certain further words to be inserted, and the time therein enlarged.

On the 7th of January, 1836, the Appellant obtained his discharge from prison by payment of the fine inflicted on him by the order of the 23rd of December, 1835, and immediately procured the affidavit, which had been previously made by him, and tendered to the Court before the Order Nisi for striking him off the rolls had been made, and also a further affidavit, in opposition to that rule, to be sworn.

The Appellant appeared at the next sitting of the Court, on Monday, the 11th of January, 1836, the Court being then composed of the Chief Justice Mr. Rankin, and the Respondents, Major Blenkarne and Mr. Lewis, as Assistant Judges, and showed cause against making the rule absolute. The Court, however, on the 15th of January, made an order, directing the Appellant to be struck off the rolls of the practitioners of the Court.

Against this order the Appellant presented a Petition of Appeal to Her Majesty in Council. The Petition being against a personal grievance, was presented through the Secretary of State, and, after considerable delay, by an Order in Council of the 5th of March, 1840, and it was referred to the Judicial Committee of the Privy Council.

Mr. Rankin, the Chief Justice, died some time in August, 1839. The other Respondents Major Blenkarne and Mr. Lewis, put in printed Cases, purporting to be answers to the Appellant's Petition, but which were not upon oath, or verified by any evidence.

The allegations of the Petition, as above stated, were supported by affidavits of the Petitioner, and copies of the notices of motion, and minutes of the proceedings, and others made in the Court of Sierra Leone, were produced by the Appellant.

On the 23rd of May, 1840, The Petition came on for hearing, but was postponed on the application of the Respondents' solicitor, and ordered to

stand over, to enable them to obtain certain evidence, alleged to be important to their defence, and which it was stated could not be obtained previously.

This evidence consisted of the affidavits of the solicitor of the Plaintiff in the cause of *Harper v. Hillier*, and of Lieutenant-Colonel Campbell, a former Governor of the Colony. The first admitted the general facts and circumstances of the case as stated in the Appellant's petition, but give, as it appeared, an exaggerated account of the Appellant's manner and address to the Chief Justice, on moving for a new trial and which constituted the offence for which he was fined, imprisoned, and disbarred.

The second was an affidavit by the late Lieutenant-Governor, without pretending to specify any particular act or offence, was only inculpatory of the Appellant, and did not affect the merits, of which the Appellant was necessarily ignorant.

The Appellant filed affidavits sworn by himself in answer to the allegations contained in the affidavit of the Plaintiff's solicitor, and produced also the affidavits of Lieutenant-Colonel Alexander Findlay, a former Governor, and Commander of the Forces at Sierra Leone; of Lieutenant-Colonel Alexander Frasser, formerly Commander of the Forces, and for many years a resident in the colony; Captain Alexander Findlay and Captain William Lardner, both of Her Majesty's service, and for some time residents in Sierra Leone,—in refutation of the statement contained in the affidavit of Lieutenant-Colonel Campbell, and in respect of the character and bearing of the Appellant.

No affidavits were filed by the Respondent in reply, and upon this evidence the case came on for hearing.

Sir William Follett, Q.C., and Mr. Edmund F. Moore, for the Appellant, contended that the course taken by the Appellant in objecting to the evidence given at the trial of the cause of *Harper v. Hillier*, and moving the Court of the Recorder for a new trial, on the grounds stated in his notice of motion, was in strict accordance with the law and practice of her Majesty's Courts, as administered in this country and in the colony of Sierra Leone; and cited *Dixon v. Yates* (7 Barn. and Add. 313), and *Tatham v. Wright* (2 Russ. and Myl. 145), and after examining the proceedings and evidence, and commenting on the affidavits, they insisted that the treatment of the Appellant by the Court, in fining, imprisoning, and imposing upon him the payment of costs, and subsequently striking him off the roll of practitioners of the Court, was unjust, illegal, and oppressive, wholly unwarranted by the circumstances of the case, and not only entailing a grievous and irreparable injury upon him, but calculated to impair and bring into disrepute the due administration of justice in the colony.

Mr. Hoggins, for the Respondents, insisted that the orders and proceedings against the Petitioner, were legal and proper, and ought not to be rescinded: and, on behalf of the Respondent Lewis, he contended that having taken no part in the previous proceedings complained of, though present, and constituting part of the Court, at the time the order was made for striking the Petitioner off the rolls of the practitioners, he was improperly implicated and named in the Appellant's Petition: and he contended that the same ought to be dismissed, with costs. He cited *Ex p. Elsam* (3 Barn. and Cress. 597).

LORD BROUGHAM. Their Lordships have fully considered the whole of the evidence before them in this case, and have attended also to everything that has been urged by counsel on both sides with great anxiety, in consideration of the nature and circumstances of the case. They are clearly

Smith v. Sierra Leone

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of opinion that the order for striking Mr. Smith off the rolls was without any foundation whatever, ought not to have been made, and must be rescinded. They are however of opinion that they can make no order respecting the fine imposed by the Court below upon Mr. Smith, but their Lordships are clearly of opinion, upon the whole of the evidence in this cause, that there is nothing whatever to affect, in any respect, the character of Mr. Smith. Upon the costs here they can make no order.

Mr. Moore—Your Lordships' Judgment will reinstate Mr. Smith in his practice in Sierra Leone, with an unimpeached character, which is all we are anxious for.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. When an appeal lies generally, 3 Leave to appeal. Considered in *M'Dermott v. British Guiana* (Judges of) (1868) L.R. 2 P.C. 363, 364; 5 Moo.P.C.(N.S.) 466; and see *Smith v. Sierra Leone* (Justices of) (1848) 7 Moo.P.C. 175; *Rainy v. Sierra Leone* (JJ.), (1852-53) 8 Moo.P.C. 47; and note to *Re Antigua* (Justices of), (1830) 1 Knapp 269.]

JAMES LOGAN AND JOHN MOORE APPELLANTS

AND

LIEUT. GODOLPHINE JAMES BURSLEM, THE OFFICERS AND CREW OF H.M. SHIP VIPER AND THE QUEEN RESPONDENTS

THE SHIP GUIANA

[ON APPEAL FROM THE VICE ADMIRALTY COURT OF SIERRA LEONE]

(1842) 13 E.R. 312

1842 Nov. 28, 29

Lord Campbell, Sir Herbert Jenner Fust, Knight Bruce V.-C., Rt. Hon. Dr. Lushington

The 5th Geo. IV, c. 113, sec. 29, enacts that no Appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty (with the exception of the Cape of Good Hope and eastward thereof) unless an Inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. By the 3rd and 4th Wm. IV, c. 41, the appellate jurisdiction given by the previous Statute to the High Court of Admiralty was vested in the Judicial Committee of the Privy Council; but which Court, from its constitution, had no jurisdiction over the appeal until the Petition of Appeal was referred to them by the Crown.

The Appellant presented, on the 16th of July, 1841, a petition of Appeal from a decree of condemnation pronounced on the 12th of August, 1840, by the Vice-Admiralty Court of Sierra Leone, against a vessel engaged in the Slave Trade, contrary to the provisions of the 5th Geo. IV, c. 113. The Appeal was not referred by Her Majesty to the Judicial Committee until the 11th of August, 1841, one day before the year expired, and notice of such reference was not given by the Clerk in Council until the 13th of the same month, one day after the twelve months had expired, when the Appellant applied for and obtained an Inhibition. On protest against the Appeal; Held,—

1st. That the 5th Geo. IV, c. 113, was incorporated in the 3rd and 4th Wm. IV, c. 41 [4 Moo.P.C. 294].

2nd. That the Appellant having failed to procure, in compliance with the 29th section of the 5th Geo. IV, c. 113, an Inhibition to issue within twelve months from the sentence, was barred his Appeal; the provisions of that section being imperative, and leaving no discretion in the Court to relax the operation of the Act [4 Moo.P.C. 295].

This was originally a cause instituted in the Vice-Admiralty Court at Sierra Leone, on behalf of Lieutenant G. J. Burslem, the Commander, and the Officers and Crew of Her Majesty's schooner of war *Viper*, and our Sovereign Lady the Queen, against the said brig or vessel *Guiana*, seized by Her Majesty's ship of war on the 26th of March, 1840, together with her tackle, apparel, furniture and the goods, ware, and merchandize laden on board her, for forfeiture and condemnation and penalties; by reason of her being at the time of such seizure engaged in the Slave Trade, contrary to the provisions of Stat. 5 Geo. IV, c. 113.

Proceedings having been taken against the said vessel on the 12th of August, 1840, the Acting Judge and Commissary, by his introductory decree, pronounced the said brig *Guiana* to have been at the time of the seizure thereof engaged in the Slave Trade, contrary to the provisions of the above Statute, and as such, subject and liable to forfeiture and condemnation; and condemned the said brig, her tackle, etc., as forfeited; and pronounced that the shippers of the goods, wares and merchandize laden on board the said brig, were liable to the penalty due by law, that is to say, double the value of the said goods, wares, and merchandize, and that the said goods, wares and merchandize, should be held in deposit until the said penalty was paid: and on the 19th day of the month, the said Acting Judge decreed, that the cargo should be sold, evidence having been given that the same was deteriorating in value.

In the month of October, 1840, information reached the owners of the vessel that she had been condemned; but in consequence of delays in the transmission of the process, copies of the proceedings did not reach this country until the 20th of July, 1841.

In the meantime, and on the 30th of June, 1841, an Appeal from the decree of sentence was interposed before a notary and witness by the Appellants' Proctor, on behalf of James Logan and John Moore, the owners of the said brig *Guiana*: as also on behalf of Manuel Francisco Topez (a Brazilian subject), the owner of the cargo.

On the 16th of July, 1841, the Appeal, together with the usual petition to Her Majesty in Council, praying that the same might be referred to the Judicial Committee, was lodged in the registry of the High Court of Admiralty. This petition was laid before the Queen in Council on the 11th of August, one day before the expiration of the year from the date of the sentence or decree of condemnation, and referred by Her Majesty on the same day to the Judicial Committee.

Notice of such reference was not, however, given to the Appellants' Proctor before 13th, the day on which the Registrar of the Court of Admiralty received intimation thereof.

In the meantime, and on several occasions subsequent to the 16th of July, when the Appeal and Petition had been lodged, the Appellants' Proctor attended in the registry of the Court of Admiralty and Appeals, and requested the Registrar to attend before some Surrogate to the Judicial Committee of the Privy Council, in order that the usual Inhibition might be decreed; but the Registrar declined to do so, on the ground that, until the Appeal and Petition had been answered, it was incompetent for any Surrogate to decree an Inhibition, or to do any act in furtherance of the Appeal.

In consequence of this refusal on the part of the Registrar, and no notice having been given of the reference by Her Majesty in Council until the 13th of August, the Inhibition could not be decreed until more than twelve months had elapsed from the date of the Decree.

See now 7 and 8 Vict., c. 69, s. 9. An order in council is annually issued referring to the Judicial Committee all appeals on which petitions may be presented to H.M. in Council during the twelve months next after the date of such order.

By the 29th section of the 5th Geo. IV, c. 113, it is provided,

"that no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced: except when such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal."

By 3 and 4 Wm. IV, c. 41, s. 2,

"all appeals or applications in Prize Suits, and in all other suits or proceedings in the Court of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America, and other His Majesty's dominions, or elsewhere abroad, which may now, by virtue of any Law, Statute, Commission, or Usage, be made to the High Court of Admiralty in England, or to the Lords Commissioner in Prize Cases, shall be made to His Majesty in Council, and not to the said High Court of Admiralty in England, or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time, wherein such appeal might, if this Act had not been passed, have been made to the said High Court of Admiralty or to the Lords Commissioners in Prize Cases respectively; and all Laws or Statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to His Majesty in Council."

By sec. 20, it is enacted,

"That all appeals to His Majesty in Council shall be made within such time, respectively, within which the same may now be made, where such time shall be fixed by any law or usage; and where no such law or usage shall exist, then within such time as shall be ordered by His Majesty in Council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for His Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to His Majesty in Council."

By the Orders in Council of the 9th of December, 1833, made under the general power of this Act by His Majesty in Council, for the more convenient conducting of appeals and applications in Prize Suits, and in all other suits or proceedings in the Court of Admiralty or Vice-Admiralty, it was ordered and directed,

"That all such appeals, applications, suits, or complaints in the nature of appeals as aforesaid, shall be conducted in the same manner and form, and by the same persons and officers, and the same might have been conducted if such appeals, applications, suits, or complaints in the nature of appeals, had been made as heretofore to the said High Court of Admiralty, the said High Court of Delegates, or to the said Lords Commissioners in Prize Cases respectively."

And it was further ordered and directed,

“ That it shall and may be lawful for any four or more of the members of the said Judicial Committee of His Majesty’s Privy Council to appoint such of the Advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty (as now are, or hereafter shall be, duly and lawfully admitted Surrogates of such Courts respectively), to be Surrogates of the said Judicial Committee of His Majesty’s Privy Council, and that it shall and may be lawful for such Surrogates or any one or more of them who shall be so appointed as aforesaid, in all such appeals, applications, suits, or complaints in the nature of appeals as aforesaid, to administer such oaths or affirmations, and to do and perform all such other acts, matters and things, and to make all such orders for the forwarding the said appeals, applications, and acts, or complaints in the nature of appeals, in their usual stage, preparatory to the final hearing thereof by the said Judicial Committee, as shall be found necessary, or have heretofore been done and performed or made by the Surrogate of the said Arches Court of Canterbury, and of the said High Court of Admiralty, in cases of appeal, applications, suits, or complaints in the nature of appeal, made and presented to such Court respectively, or by the Surrogates of the said Lords Commissioners in Prize Cases in appeals, applications, suits, or complaints in the nature of appeal, made and presented before the said Lords Commissioners.”

And it was further ordered,

“ That upon any appeal, application, suit, or complaint in the nature of appeal, as aforesaid, being entered in the registry of the High Court of Admiralty and Appeals, a petition by or on behalf of the Appellants shall forthwith be presented to His Majesty in Council, praying that the said petition and appeal may be referred to the Judicial Committee of the Privy Council, to hear the same, and to report their opinion thereupon to His Majesty in Council, and upon such reference having been made, notice thereof shall be forthwith transferred to the registry aforesaid ” (see these Orders, 2 Knapp P.C. xx).

On the 3rd of September, 1841, the usual Inhibition, Citation, and Monition, were decreed, to which the Respondents appeared under protest on the 21st of April, 1842, and a Proctor was assigned to bring in his Act thereon.

Accordingly, on the 27th of April, the Act on Protest was brought in by the Respondents’ Proctor, setting forth the circumstances of the seizure and condemnation of the vessel for breach of the Act, 5 Geo. IV, c. 113, and the clause therein limiting the time of appeal, and submitting that, inasmuch as the sentence of condemnation was a sentence of a Court of Vice-Admiralty, neither at nor eastward of the Cape of Good Hope, and the Inhibition served was not decreed within twelve months of the sentence; by the express words of the Act, no appeal could be prosecuted therefrom.

To this Proctor on behalf of the Appellants, replied, admitting the seizure as set forth in the Act on Protest of the Respondents, and the circumstances and date of the sentence of condemnation, but submitted that the Inhibition was applied for twenty-six days within the period prescribed by the 29th section of the 5th Geo. IV, c. 113, and alleged that he was prevented from obtaining a decree for the issue of the said Inhibition within the time limited by the Statute, by invincible necessity, and by the impossibility of being able to compel Her Majesty to convene a meeting of Her Most Honourable

Privy Council, inasmuch as from the altered state of the law subsequent to the passing of the 5th Geo. IV, c. 113, it is now only after a reference emanating from Her Majesty in Council, to the Judicial Committee of the said Privy Council, that any Inhibition could be decreed in any cause of appeal from any sentence of a Vice-Admiralty Court; and he alleged that at the time of the passing of the said Statute, 5 Geo. IV, c. 113, the High Court of Admiralty was the appellate jurisdiction from all Vice-Admiralty Courts; and it was competent for any Proctor exercent in the High Court of Admiralty, to attend on any day prior to the expiration of the twelve months from the date of the decree intended to be appealed from, before one of the Advocates of the Civil Law, who are Surrogates of the Judge of the High Court of Admiralty, to pray the usual Inhibition, which would then have been decreed and issued as of course; but that when the appellate jurisdiction of the High Court of Admiralty became transferred by 2 and 3 Wm. IV, c. 91, and 3 and 4 Wm. IV, c. 41, to Her Majesty in Council, it became essential, in the first instance to petition Her Majesty in Council to refer the appeal to the Judicial Committee of the said Privy Council; and it has been said and is still maintained by the Registrar of the High Court of Admiralty and of the Appeals, that until such petition and appeal are referred to the Judicial Committee as aforesaid, no advocate has power, as Surrogate of the Judicial Committee or otherwise, to decree an Inhibition, or to do any act in any cause of appeal so referred as aforesaid; and that it is recited in all such Inhibitions, that the appeal and Inhibition have been so referred; and after setting forth the particulars of his requesting the Registrar to attend with him before a Surrogate, in order to obtain the prohibition, and his refusal, he alleged

“ that he had complied with the provisions of the said Statute of 5 Geo. IV, c. 113, to the utmost of his power, and had advanced *cy-près* to an exact compliance with them, and that he was only prevented by imperious necessity, and a delay originating in the highest quarter, which he could not control, from fulfilling them to their technical and literal extent; and he humbly submitted that even in the administration of the most unbending laws, no one is held to the fulfilment of an impossibility.”

Dr. Addams and Mr. Butt, for the Respondents,¹ relied, in support of the Protest against the right of appeal, on the 29th section of the 5th Geo. IV, c. 113, and insisted that the Inhibition not having been applied for and decreed within twelve months from the time when the decree or sentence of condemnation was pronounced, the appeal interposed could not be prosecuted, and must be dismissed with costs.

Mr. Burge, Q.C. and Dr. Phillimore, for the Appellants, contended that the application for the Inhibition within the time limited by the Statute, though the same was not decreed, was, under the circumstances, and in consequence of the provisions of the Statutes 2 and 3 Wm. IV, c. 92, and 3 and 4 Wm. IV, c. 41, a sufficient requisition with the terms of the 29th sec. of 5 Geo. IV, c. 113. They insisted also that neither the seisor or the Crown could be heard upon the Protest. They cited *Day v. Savage* (Hob. 87), the *City of London v. Wood* (12 Mod. 669, Plow.Com. 176), *Dr. Bonham's Case* (8 Co.Rep. 107), *Muter v. Chipchase* (1 Moo.P.C. 1).

¹ The Respondents' Counsel, being for the Protest, claimed and were allowed to begin, according to the practice of the Court of Admiralty. Their Lordships, however, remarked that such allowance was not to be drawn into a precedent, as it was against the practice uniformly observed in this Court.

LORD CAMPBELL (29th Nov. 1842). This cause originated in the Vice-Admiralty Court of Sierra Leone. It was a proceeding for the condemnation of the ship *Guiana*, by reason of an alleged infraction of the Slave Trade Act. On the 12th of August, 1840, a decree was made by that Court, pronouncing that there had been such infraction, and decreeing that the ship, her tackle, apparel and furniture were forfeited; and that certain penalties were incurred by the owners of the cargo. Against that decree there has been an appeal, which is now before us, by the owners of the ship. Information of this decree or sentence was received by the owners of the ship in the month of October, 1840, and they took no judicial step until the 16th of July, 1841, when they lodged an appeal in the Admiralty Court, and a Petition under the Privy Council Act, praying that it might be referred to the Judicial Committee. There was no answer received to that petition until the 13th of August, one day after the year expired, the answer being dated the 11th of August, the day before it expired. On the 3rd of September, 1841, an Inhibition was decreed and issued; but between the 16th of July and the 11th of August there had been several applications made for the purpose of obtaining the Inhibition. The question is, whether, under these circumstances, this Appeal can be prosecuted.

It is contended on the part of the seizors of the ship, that the Appeal cannot be prosecuted. We may at once dispose of one objection that is made on the part of the Appellants, namely, that the seizors or the Crown cannot be heard. Their Lordships are clearly of opinion, that, according to the principle of decided cases, the seizors have a right to be heard, and to make any objection which the law affords them, to the Appeal being prosecuted. The question then is, whether the claimants of the ship have a right to prosecute this Appeal; and that depends upon the construction of two Acts of Parliament, and of certain Orders in Council. The first Act of Parliament is the 5th of Geo. IV, c. 113, s. 29, which enacts,

“ that no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except, etc.”

And so the law stood until the Act was passed constituting this tribunal, the Judicial Committee of the Privy Council.

By the 2nd section of the 3rd and 4th Wm. IV, c. 41, it is enacted [the learned Judge here read the section (*ante* [4 Moo.P.C.], p. 287)]. So that the 5th of Geo. IV, c. 113, is to be considered as incorporated in the 3rd and 4th Wm. IV, c. 41. Then, according to the power vested in the Privy Council, there are certain Orders made to regulate the mode in which Appeals shall be prosecuted, whereby in such Appeals as this, it is ordered that there shall be a petition lodged in the place where the Court of Admiralty is held, and a petition to the Sovereign, praying that the case may be referred to the Judicial Committee. Now upon these Acts of Parliament, and Orders, the question arises whether, there having been no Inhibition decreed until the 3rd of September, 1841, the Appeal can be prosecuted.

It is first said that this is a case in which we have a discretion – that on account of the great hardship arising to the parties, if that construction is to be put upon the Acts of Parliament, there is a discretion vested in the Judicial Committee, to relax the operation of this Act of Parliament, the 5th Geo. IV, c. 113. In this particular instance, their Lordships are clearly of opinion that they have no such discretion; that they are imperatively

bound, by the express words of the Act; that they can only construe them; and that when they have arrived at what they consider a just construction of them, whatever the effect may be, that must take place. Indeed, it was probably with a view to take away that discretion from the Court, and to obviate the numerous applications which formerly were made, that this enactment was introduced into the Act, that in no case shall the appeal be prosecuted, "unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." That took away all discretion; and unless the conditions in every case to which that Act applies have been performed, the Court has no jurisdiction to hear the appeal.

What, then, is the true construction to be put upon this Act of Parliament, coupled with that which follows, the 3rd and 4th of Will. IV, c. 41? Their Lordships are of opinion, that unless the Inhibition be both applied for and decreed within twelve months from the time when the decree and sentence was pronounced, the appeal cannot be prosecuted; and their lordships are of opinion, that this is a case to which that enactment does apply, and that the Inhibition must be considered as not obtained until after the expiration of twelve months. Indeed, that is broadly admitted on the part of the Appellants, because that which is stated by their Proctor, in their Act on Protest, is, "that he was prevented from obtaining the said Inhibition within the time limited by the said Statute, by invincible necessity." He admits that he was prevented from obtaining it, and he says it was by invincible necessity; but he admits that the Inhibition was not decreed in this cause till the 3rd of September. Then, if it is necessary that the Inhibition should be decreed on or before the 12th of August, 1841, the appeal cannot be prosecuted.

Was it therefore, necessary that the Inhibition should be procured on the 12th of August, 1841? Such is clearly the literal and grammatical construction of the words, "unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree of sentence was pronounced." Their Lordships would have been most happy if any construction could have been put upon this Act of Parliament, so as to allow this appeal to be prosecuted, but they have no power to dispense with the enactment of the Legislature.

As to what has been said of an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose, that what the Legislature has enacted is reasonable; and all, therefore, that we can do, is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice and absurdity, another construction possibly might be put upon them, but still it is a question of construction, and there is no power of dispensation from the words used.

There have been several suggestions thrown out, all deserving great consideration, as to how we could construe this section of the Act of Parliament, and still admit the appeal. First, it has been suggested, that instead of "the Inhibition shall be applied for and decreed within twelve months," it might be, "or decreed within twelve months;" but it seems to us, that that construction would be using an unwarrantable liberty with the language which the Legislature has employed; and that, in fact, it would be putting out of the Act of Parliament, entirely, these words "and decreed within twelve months," because then the same construction would be put upon that enactment as if the words only were "if the Inhibition shall be

applied for within twelve months;" because they are not two separate, independent acts, one of which may take place without the other—applying for and obtaining the Inhibition, the Inhibition cannot be obtained unless it is applied for; therefore, if you were to say "or decreed within twelve months," it would be really striking out, which we have no authority to do, the words "and decreed," from the Act of Parliament.

Then, it has been suggested whether you might not use the words, "unless the inhibition shall be applied for and decreed," where it is possible. But the Legislature has always supposed that it would be a possibility that this should be done; and we think that in putting such a construction on the enactment, we should be interpolating words without any authority whatsoever.

It has been said, that you might refer the application of such a clause to the case where there has been a Court called into existence, which might grant the Inhibition; and that the year should date, not from the decree, but from the time that the Court has been called into existence, which could grant the Inhibition; but then the Act of Parliament is, "unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced." Now there is scarcely any case in which there could be a Court capable of granting an Inhibition immediately after the sentence has been pronounced, certainly there are many cases in which no such Court could exist. With regard to what took place before the Judicial Committee Act passed, where there was an appeal from the High Court of Admiralty to the Court of Delegates, it must have been at least some days, or weeks, or months, before there could have been a petition presented to the Crown for a Commission of Delegates, and the Commission executed and accepted by those to whom it was addressed. Then, with reference to an appeal from the Vice-Admiralty Court abroad to the High Court of Admiralty in England, it must have been weeks and months, very often, before there could be an appeal brought from the Vice-Admiralty Court to this part of the world, lodged in the High Court of Admiralty in England, and then, an opportunity occurring, of applying for an Inhibition, and an Inhibition being decreed. It seems to us, therefore, that there are no means, either of omitting words, or of adding words, that will authorise us in putting the construction upon the Statute which is contended for.

Their Lordships regret that the Appellants should be shut out from the opportunity of having their appeal heard; but, however great that hardship may be, that cannot alter the law. It has been said, that hard cases make bad law; and their Lordships must guard against inclinations that Judges may feel, on the ground that there may be a pressure of the law in any particular case. The Courts must look at general rules, and be governed by them. It gives us less regret, however, in this case, because there was, as it seems, very considerable laches on the part of the Appellants. They heard of the condemnation in the month of October, and they took no judicial step until the month of July following; and between the 16th of July and the 12th of August, if they had made the usual applications to the officers who superintend these matters, we have no doubt at all that there would have been a reference by the Queen in Council to the Judicial Committee before the year expired. It seems to us, therefore, that they themselves are to blame if there is any hardship. However that may be, their Lordships are of opinion that the Act of Parliament has imposed a condition which has not been complied with, and that, therefore, the appeal cannot be prosecuted. It is not, however, a case for costs.

Logan and Moore v. Burslem etc. & The Queen

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6 Practice, a. On point (i) as to right to being (4 Moo.P.C. 292), cf. *Henfrey v. Henfrey* (1842) 4 Moo.P.C. 29; (iii) as to appeals to H.M. in Council, see note to *Murter v. Chipchase* (1836) 1 Moo.P.C. 3; s. 29 of 5 Geo. IV., c. 113, is repealed by the Slave Trade Consolidation Act 1873 (36 and 37 Vict. c. 88).]

MANOEL FRANCISCO LOPEZ AND OTHERS
AND

APELLANTS

LIEUT. GODOLPHINE JAMES BURSLEM,
THE OFFICERS AND CREW OF
H.M. SHIP VIPER AND
THE QUEEN

RESPONDENTS

THE SHIP GUIANA

[ON PROTEST AGAINST AN APPEAL FROM THE VICE ADMIRALTY
COURT AT SIERRA LEONE]

(1843) 13 E.R. 318

1843 Nov. 28, 29

Lords Langdale, Campbell, Knight Bruce V.-C.,
Rt. Hon. Dr. Lushington

The 5th Geo. IV, c. 113 (the Slave Abolition Act), sec. 29, enacts that no appeals shall be prosecuted from any sentence of any Court of Admiralty or Vice-Admiralty (except in any Vice-Admiralty Court at the Cape of Good Hope or to the eastward thereof), unless an Inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. Held to apply to foreigners as well as British subjects [4 Moo.P.C. 305].

Protest against an appeal sustained; the Appellants (Brazilian subjects) the owners of the cargo on board a vessel seized and condemned under the 5th Geo. IV, c. 113, having failed to procure an Inhibition to issue within twelve months from the date of the condemnation.

The British Parliament have no power to legislate for foreigners out of the dominions and beyond the jurisdiction of the Crown; yet it can by Statute fix the time within which application must be made for redress, to the tribunals of the Empire. This being matter of procedure, becomes the law of the forum, by which all mankind are bound [4 Moo.P.C. 305].

The facts of this case, so far as the owners of the vessel *Guiana* were concerned, are fully detailed in the preceding case. (*Logan v. Burslem* (1842) 13 E.R. 312.) The present appeal differed in no respect from the former, except that it was the appeal of the owners of the cargo laden on board the vessel, and seized and condemned therewith, who were Brazilian subjects.¹

The Respondents, as in the preceding case, appeared under Protest of the

¹ In pursuance of the 6th and 7th Vic. 38, s. 1, which enacted that appeal, etc., might be heard by not less than three Members of the Judicial Committee of the Privy Council, under a special order of Her Majesty, the following Order in Council was made in this case:

29th section of 5 Geo. IV, c. 113, the Appellants not having procured an Inhibition to issue within twelve months after the condemnation pronounced by the Admiralty Court at Sierra Leone.

The question raised by the Protest against the right to appeal, and argued, was whether the Appellants, the owners of the cargo on board the *Guiana*, being Brazilian subjects, and the vessel captured at sea, were amenable to the provisions of the Statute 5 Geo. IV, c. 113. The Appellants contended that they were amenable only to the treaties entered into between this country and the Brazils for the suppression of the Slave Trade, and that, consequently, the Vice-Admiralty Court at Sierra Leone had no jurisdiction under the Statute to have made any decree whatever in that cause, so far as concerned the cargo; but that if any breach of treaty had been committed, it should have been referred to the British and Brazilian mixed Commission Court at Sierra Leone, as the tribunal specially appointed and provided for that purpose. The Respondents submitted that the suggested distinction between the present appeal, being that of the cargo, and the case of the brig *Guiana*, decided against in the previous appeal, was not such a distinction as to warrant any different of Judgment in the two appeals.

Mr. Thesiger, Q.C., and Dr. Addams, in support of the Protest, and Mr. Burge, Q.C., and Dr. Phillimore, for the Appeal, relied upon the following authorities: *The Le Louis* (2 Dobson 210); *The Hercules* (2 Dobson 353); *The Fabius* (2 Rob. Adm. 245); *The Carell and Magdalena* (3 Rob. Adm. 58); *The Cazador* (2 Moo. P. C. 15).

“ Victoria R

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, etc. To our trusty and wellbeloved James, Lord Wharnccliffe, the Lord President of our Privy Council, and to our trusty and wellbeloved Privy Councillors, being Members of the Judicial Committee of our Privy Council. Whereas by an Act passed in the present year of our Reign, intituled, ‘ An Act to make further Regulations for facilitating the hearing of appeals and other matters by the Judicial Committee of the Privy Council, ’ it was amongst other things enacted, ‘ That in any appeal, application for prolongation or confirmation of Letters Patent, or other matter referred, or hereafter to be referred, by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty by Order in Council, or special direction under Her Royal Sign Manual, having regard to the nature of the said appeal or other matter, and in respect of the same, not requiring the presence of more than three Members of the said Committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the Members of the said Judicial Committee, subject to such other rules as are applicable, or, under this Act, may be applicable, to the hearing and making Report of appeals and other matters by four or more of the Members of the said Judicial Committee:’ Now know ye, that we, reposing great trust and confidence in your knowledge and integrity, have ordered, and do by these presents order, pursuant to the powers vested in us by the said recited Act, that the matter of a certain appeal from a decree of the Vice-Admiralty Court at Sierra Leone, touching the seizure and condemnation of the ship *Guiana* and cargo, be accordingly heard by not less than three of you, being Members of the Judicial Committee of our Privy Council, subject to such rules as are applicable to the hearing and making report on appeals and other matters by four or more of the Members of the Judicial Committee of our Privy Council.

Given at our Court at Windsor, the 4th day of August, in the seventh year of our Reign.

By Her Majesty’s Command,
J. GRAHAM. ”

Upon the above Order in Council being read,

Lord Brougham (5th August, 1843 (present: Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington) observed, that it was to be distinctly understood, that the late Act, 6th and 7th Vic. c. 38, which was now for the first time brought into operation, is only applicable to matters of inferior importance. There must be an Order in each case.

The Order was however not acted on, the cause as above stated being subsequently heard by four Members of the Judicial Committee. [S. 1 of 6 and 7 Vict. c. 38, was repealed by the Statute Law Revision Act, 1891 (54 and 55 Vict. c. 67.)]

THE CAMPBELL. This is an appeal by certain persons, alleged to be Brazilian subjects, and owners of the cargo laden on board the British ship *Guiana*, against a sentence of the Vice-Admiralty Court at Sierra Leone, by which that ship was condemned as forfeited, for being engaged in the Slave Trade, contrary to the provisions of the Statute 5 Geo. IV, c. 113, and the shippers of the goods on board were found liable to the penalty of double the value thereof.

An objection has been made that the appeal cannot be received, on the ground that the condition imposed by the 29th section of that Act, respecting the prosecution of appeals, has not been complied with; and the only question now to be decided is, whether the appeal can be received.

I need not say that their Lordships must lean strongly against any such objection and that it would be particularly satisfactory to them that the Appellants should be heard against the sentence in this case, as they are said to be foreigners. But we can only, to the best of our ability, put a construction on the Statute by which our jurisdiction is regulated; and if it appears to us that this Statute forbids us to receive the appeal, we are bound, however reluctantly, to dismiss it.

The Statute 5 Geo. IV, c. 113, was passed to consolidate the Acts relating to the abolition of the Slave Trade; and the 29th section enacts that

“ no appeals shall be prosecuted from any decree or sentence of any Court of Admiralty or Vice-Admiralty, touching any of the matters provided for in this Act, unless the Inhibition shall be applied for and decreed within twelve months from the time when such decree or sentence was pronounced, except where such decree or sentence shall be passed in any Vice-Admiralty Court at the Cape of Good Hope, or to the eastward thereof, in which case eighteen months shall be allowed for the prosecution of the said appeal. ”

In this case the sentence was pronounced by the Vice-Admiralty Court at Sierra Leone, on the 17th of August, 1840, and the Inhibition was not decreed till the 3rd of September, 1841.

Their Lordships have already decided that for this reason the owners of the ships were not entitled to prosecute their appeal. The Counsel for the owners of the cargo have attempted to distinguish their case from that of the owners of the ship, on several grounds; but I regret to say, that their Lordships, after great deliberation, think that the cases are not distinguishable, and that the former decision (to which they adhere) must govern the present.

In the first place, it is contended that the owners of the cargo are not bound by the enactment, because they are foreigners. The British Parliament certainly has not general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, but it cannot be doubted for a moment that a British Statute may fix a time within which application must be made for redress to the tribunals of the empire. This is matter of procedure and becomes the law of the forum. On matter of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of forum. If a law were made upon this subject, working oppression and injustice to the subjects of a foreign State, that State might make representations and remonstrances against this law to our Government; but while it remains in force, Judges have no choice but to give it effect. Had it been shown to us ever so clearly, that in this case the condition required could not have been complied with, if it has clearly, absolutely, and universally been imposed,

we should have no power to dispense with it. At the same time, it is a great consolation to us to consider such an appeal, and that it may well be defended on the principles of which there are laws of prescription in all civilised countries, fixing the time within which suits shall be commenced, or appeals prosecuted. In the present case, nothing has been said of the circumstances which led to the delay in decreeing the Inhibition; but in the former case, it appeared that the delay mainly arose from the laches of the agents of the Appellants in not sooner taking the proper steps for obtaining it.

The Appellants, as owners of the goods, must rely upon a part of sentence, by which it is declared that the goods shall be held in deposit till the penalty is paid. This, they contended, is contrary to the Act of Parliament, therefore not provided for in the Act; and, therefore, they say it entirely takes the case out of the operation of the 29th section. But the question at present is, not whether the sentence is justified by the Act, but whether it touches any of the matters provided for in the Act. Now, the 4th section of the Act provides, that a ship employed in the Slave Trade shall be forfeited; and the 7th section provides, that the shippers of goods to be employed in the Slave Trade shall forfeit double the value. The sentence below finds that the *Guiana*, at the time of her seizure, was employed in the Slave Trade, contrary to the provisions of the 5th Geo. IV, c. 113, and condemns her as forfeited, and pronounces that the shippers of the goods on board are liable to the penalty of double the value of the said goods, as the penalty due by law; and that the goods shall be held in deposit till the penalty is paid. Whether this sentence be or be not according to the Act, are the Appellants justified in saying that it is not a sentence touching any of the matters provided for in the Act? The Judge of the Vice-Admiralty Court may be mistaken in supposing that a lien could be claimed on the goods for the penalty; but can it be successfully contended, that the remedy for the penalty on the goods, in respect of which the penalty was incurred, was not a matter touching the penalty and the goods? Are we to have a previous argument, as to whether this part of the sentence ought to be reversed before we decide whether the appeal can be heard. The construction of the clause of limitation contended for by the Appellant, would render it perfectly nugatory; for in every case, it might be contended that the clause does not apply, if the sentence be erroneous; and the sufficiency of the sentence would be argued and determined on the Protest against receiving the appeal. If, indeed, the sentence contained a separate and distinct matter, not touching any of the provisions of the Act, although it did contain other matter touching those provisions; we think the clause would not apply to the sentence so far as the former matter is concerned, and that, *pro tanto*, the appeal might be received, although the condition about the decreeing of the Inhibition had not been complied with; but we cannot consider that the holding of the goods in deposit for the penalty is any such separate and distinct matter, and we make no doubt that it touches the penalty which the Act imposes. If this part of the sentence is utterly void, as contended for, the goods cannot be lawfully detained for the penalty, and the question may perhaps be tried in an action of trover, or for money had and received. Their Lordships think that it cannot be tried on this appeal, either alleged as a substantive ground for reversing the sentence, or as a ground for receiving the appeal. We know, by experience in this place, that the sentences of the Vice-Admiralty Courts are often very informal, and it would be most perilous to captors and seizors, if such informalities might be taken advantage of, by appeal, at any distance of time. It was probably to guard

against this that the Legislature has anxiously made the limitation as to the time of appealing to apply in language so comprehensive to all sentences touching any of the matters provided for by the Act; and we are of opinion that we should by no means be justified in putting a construction upon it, which would entirely defeat its object.

It was further argued, that the Vice-Admiralty Court at Sierra Leone had no jurisdiction in this case, and that we ought, therefore, to reverse the appeal; and, indeed, it was said we ought at once to reverse the sentence, or to declare it null. I did not exactly understand how we were to come to the conclusion that the Vice-Admiralty Court had no jurisdiction over this British ship for an infraction of the British Statute, or how the case could have been brought before the mixed British and Brazilian Commission. But the Appellants do not deny that there are supposable facts which would give the Vice-Admiralty Court at Sierra Leone jurisdiction over the whole case, and till the appeal is received and heard, how can we know that these facts did not actually exist, and were not the foundation of the sentence? But suppose that a total want of jurisdiction were established, the clause of limitation is not applied to sentences of Courts acting within their jurisdiction; and this sentence, if it were pronounced by a Court not having jurisdiction, would not the less be the sentence of a Vice-Admiralty Court, touching matters provided for by the Slave Trade Abolition Act.

A number of cases were cited to us, showing what that great Judge, Lord Stowell, had said and done when he had to review sentences of Vice-Admiralty Courts, bad for want of jurisdiction; but all these cases were regularly before him, upon an appeal duly brought and prosecuted and in none of them did the question arise which we have to decide, whether the appeal ought to be admitted upon the construction of an Act of Parliament for limiting the time for appealing. I apprehend, therefore, that in this stage of the proceedings, the argument arising from a supposed want of jurisdiction in the superior Court must be quite unavailing.

In the pardonable excess of a very laudable zeal, a power was imputed to this Court, which the learned Counsel for the Appellants on reflection must be aware does not belong to us. It was said that as a supreme tribunal, acting on the law of nations, we were to remedy all the grievances of foreigners, arising from the acts of Colonial Courts, which may in any shape be brought before us. But in reality, we are not sitting merely as a Court of Appeal from a Vice-Admiralty Court—strictly bound by Acts of Parliament, as much as the lowest Court of Justice in the kingdom. We cannot reverse or alter a sentence till it is regularly before us on appeal, and we cannot receive an appeal if, as in the present case, a previous condition prescribed by the Legislature has not been complied with.

I, for one, should have been well pleased if an attempt which was made in the last session of Parliament, to allow this appeal to be heard by altering the law for these particular Appellants, had succeeded. A clause in a Bill for this purpose passed one House of the Legislature without opposition, but was not approved of by the other, on the ground, as I was informed, that an inquiry it was found that if the agents employed had done their duty, the

1. After the decision in the appeal of Lopez v. Burslem (ante [4 Moo.P.C.], (p. 284)) in matters by the Judicial Committee of the Privy Council, "was brought in the House of Lords By sec. 11 of this Bill it was enacted, " That in all cases wherein a petition shall have heretofore lodged as aforesaid, but the usual Inhibition and Citation shall not have decreed within the aforesaid respective periods, the said Courts shall have full power to proceed, and their Majesty shall adjudicate." Courts

Inhibition might easily have been obtained in due time. But however that may be, the general law stands unaltered, and upon the just construction of that law their Lordships are of opinion that the appeal cannot be received. They will therefore humbly recommend to Her Majesty in Council that the appeal should be dismissed, as prayed by the Respondents.

[Mews' Dig tit. PARLIAMENT, A. INTERNAL MANAGEMENT, 2 Powers of. s.c. 4 St.Tr.(N.s.) 1331. On point (i) as to appeals to H.M. in Council, see note to *Muter v. Chipchase* (1836) 1 Moo.P.C. 3; and see *Logan v. Burslem*, 4 Moo.P.C. 284; (ii) as to ex territorial legislation and application of English law, see *Jefferys v. Boosey* (1854) 4 H.L.C. 815; *Macleod v. A.H.G. of New South Wales* [1891] A.C. 455; Forsyth's Gas.Const. Law 238; Ilbert, *Government of India*, p. 410; Archbold's Crim.Pl., 22nd Ed., pp. 34 *et seq.*; (iii) as to *lex fori*, see note to *Ruchkmaboyl v. Mottichund* (1852-4) 8 Moo.P.C. 41; and Forsyth's Cas.Const. Law 249.]

THOMAS JENNINGS APPELLANT
AND
HENRY WORSLEY HILL RESPONDENT

THE AUGUSTA

[ON APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE]

(1844) 13 E.R. 345

1844 Feb. 20

Lord Campbell, Sir Herbert Jenner Fust,
Rt. Hon. Dr. Lushington, Rt. Hon. T. Pemberton Leigh

A party attached for non-payment of costs decreed against him in an Appeal under the Slave Trade Act (5 Geo. IV, c. 113), in which the Crown and the Captors were the Respondents; upon supersedeas by the Crown, ordered to be discharged out of custody: notwithstanding the Captors' objection to the Crown receiving costs out of the proceeds of the sale of the vessel condemned.

By the 44th sec. of the 5th Geo. IV, c. 113, the Captors of a vessel employed contrary to the provisions of the Act, are only entitled to a moiety of the proceeds of the sale thereof, after deducting the costs of prosecuting (4 Moo.P.C. 372).

This was a motion to relax and supersede an attachment issued against Thomas Jennings, the Appellant, for not obeying a monition for payment of costs decreed on appeal under the following circumstances;

The Appeal was from a sentence of the Vice-Admiralty Court at Sierra Leone condemning the vessel (the *Augusta*) her tackle, etc., upon a charge of aiding and abetting the slave-trade, contrary to the 5th Geo. IV, c. 113. The Appeal was heard before their Lordships (The Lord President (Lord Wharnclyffe), Lord Brougham, Lord Campbell, and the Right Hon. Dr. Lushington) on the 5th of April, 1843, when the sentence of the Court

had been decreed within the aforesaid respective periods, notwithstanding any protest entered into or determined upon by the said Judicial Committee. "

When the Bill was sent down to the House of Commons, a Select Committee was appointed by that House " to inquire into the facts attending the delay in extracting the Inhibition in the case of the ship *Guiana*, and dismissal of the appeal, in the said case, by the Judicial Committee of the Privy Council. " The Select Committee, after examining witnesses, reported to the House that there did not appear sufficient grounds to sustain the above section (which had been imported into the Bill to meet the exigency of the case of the *Guiana*). The section was accordingly struck out of the Bill (see 6th and 7th Vic. c. 38).

below was affirmed, and the Appellant, Jennings, condemned in costs of the Appeal (the judgment rested entirely on the facts and evidence in the cause, and contained no new principle of law as applicable to such cases).

On the 7th of July, 1843, a monition issued against Jennings for payment of these costs. The monition was served personally, and, on the 7th of December, having been returned, and the Appellant certified in contempt for not having obeyed it, an attachment was issued against him. Under this attachment, Jennings was taken into custody and lodged in the Queen's Bench Prison. On the 18th of January, 1844, the costs of the Crown were directed to be paid out of the proceeds remaining in the registry; and on the same day one moiety of the net proceeds after deducting the costs of the Crown, was directed to be paid to the Respondent, the Captor, pursuant to the 44th sec. of the 5th Geo. IV, c. 113.

On the 8th of February, Nicholl, Her Majesty's Procurator-General, in pursuance of the directions of the Lords Commissioners of Her Majesty's Treasury, alleged before the Surrogate, that he would proceed no further under the attachment decreed against the said Jennings and consented to the same being superseded. The Protector for the Respondents, the Captors, refused to attend the Surrogate, whereupon the matter was referred to the Judicial Committee.

Dr. Addams now moved to discharge Captain Jennings for the attachment.

The Queen's Advocate (Sir John Dodson), for the Crown, offered no opposition; but Dr. H. J. Nicholl, for the Respondent and others, the Captors—Opposed the motion contending that by the 44th section¹ of the 5th Geo. IV, c. 113, one moiety of the proceeds of the condemned vessel vested in the Captors at the time of the seizure, and that if the Crown was entitled to deduct the costs out of the proceeds, it would defeat the object of the Act. The sum might perhaps be paid by the Crown, upon a petition of right.

LORD CAMPBELL. In this case their Lordships are of opinion that the warrant of arrest should be superseded, and that Captain Jennings is entitled to be discharged. Captain Jennings has been arrested for costs decreed to the Crown on an Appeal in this matter in which the Crown is prosecutor. Their Lordships are of opinion, that the Crown has a right to supersede the proceed which issued at its own instance. Their Lordships are of opinion, that the Crown must be supposed to have done what is necessary to satisfy itself that the process should be superseded. We find it

¹ This section is in the following terms: "And be it further enacted, That the proceeds of all ships and goods seized, prosecuted, and condemned, for any offence against this Act, except in such seizures as shall be made at sea by the Commanders or Officers of Her Majesty's ships or vessels of war, shall be divided, paid, and applied as follows: that is to say, after deducting the charges of prosecution from the gross amount thereof, one third of the net proceeds shall be paid into the hands of such persons as His Majesty, his heirs and successors, may please to appoint, for the use of His Majesty, his heirs and successors; One third part thereof to the Governor or Commander-in-Chief of the Island, Colony, Plantation, Settlement, or Territory, where the said seizure shall have been made or prosecuted; and the other third part thereof to the person or persons who shall lawfully seize, inform, and prosecute the same to condemnation. And in case of seizures made at sea by the Commanders or Officers of His Majesty's ships or vessels of war, one moiety of the said net proceeds, after deducting the charges of prosecution as aforesaid, shall be paid into the hands of such person as His Majesty, his heirs and successors, may please to appoint, for the use of His Majesty, his heirs and successors and the other moiety to the Commanders or Officers of His Majesty, his ships or vessels of war who shall have made the seizure and prosecuted the same to condemnation, subject, nevertheless, to such distribution in the seizures made by the Commanders or Officers of His Majesty's ships or vessels of war, whether at sea or otherwise, as His Majesty his heirs and successors, shall think fit to order and direct by any Order or Orders in Council, or by any proclamation or proclamations to be made for that purpose."

thus stated in the proceedings in the cause: "Nicholl, Her Majesty's Procurator-General, in pursuance of the discretions of the Lords Commissioners of Her Majesty's Treasury, alleged that he should proceed no further under the attachment decreed against the said Thomas Jennings, and consented to the same being superseded." Therefore, on this minute, it is clear that the Crown has consented to the warrant being superseded—are we to interfere, and say there is no power in the Crown to grant a supersedeas? We apprehend that there is no discretion vested in us to advise the Crown either to supersede the warrant, or to allow it to remain in full force; that is a matter between Captain Jennings and the Crown. Even if the Crown had acted improperly, towards the Captors, the parties before us are only Captain Jennings and the Crown, and we cannot interpose to prevent Captain Jennings having the benefit the Crown intends him to have. It has been said in argument, that Lieutenant Hill and the Captors have a vested interest in the proceeds; and so they have, but it is in the net proceeds, after deducting the charges of the prosecution: and it is not until those charges have been deducted, that the net proceeds are ascertained.

Their Lordships must not be understood to say that there is no remedy against the Crown. Dr. Nicholl referred to a proceeding by petition of right on behalf of the Captors; but their Lordships, looking to this section of the Act of Parliament, and finding the words are, "after deducting the charges of prosecution." that the net proceeds are to be the net proceeds after deducting the charges of prosecution—finding this enactment, their Lordships apprehend that Lieutenant Hill has no cause of complaint—that the Crown has a discretion to do what is proper. It is the Crown who issued the Monition, and had Captain Jennings arrested; and if the Crown thinks proper to consent to Captain Jennings being discharged, we conceive that it is not exceeding the just power belonging to the Crown.

Therefore, Captain Jennings ought to be discharged. We think the Captors have no reason to complain, if they have one half of the net proceeds after these charges are paid.

[5 Geo. IV, c. 113, s. 40, was repealed by the Slave Trade Consolidation Act, 1873 (36 and 37 Vict. c. 88). See ss. 11–16 of the Act of 1873, and note to *Muter v. Chipchase* (1836) 1 Moo.P.C. 3]

MAGNUS SMITH APPELLANT
AND
THE JUSTICES OF SIERRA LEONE RESPONDENTS

[ON APPEAL FROM SIERRA LEONE]

(1848) 13 E.R. 846

1848 Feb. 24 and 25 Lords Langdale, Campbell, Rt. Hon. Dr. Lushington,
Rt. Hon. T. Pemberton Leigh

Appeal allowed from Orders made by the Judges at Sierra Leone, striking a practitioner of the Courts in that Colony, off the rolls of Proctors of the Vice-Admiralty Court, and also off the rolls as Attorney of the Courts at Freetown; upon terms that the Petitioner gave notice of the allowance of such appeal to the Judges, with liberty to the Petitioner to set down his case to be heard *ex parte*, at the expiration of six months after notice served (7 Moo.P.C. 175, 176).

Two Orders made by the Judges at Sierra Leone, striking a practitioner of the Courts off the rolls, for alleged misrepresentation, contempt, and misconduct:

Held, on appeal by the Judicial Committee, to have been improperly made, and ordered to be discharged, and the Appellant restored to the rolls. But under the circumstances of the case, the Judicial Committee directed the Appellant to apply to the Court, in the Colony, for such re-admission (7 Moo.P.C. 180, 185, 186).

This was a petition and appeal brought by the Appellant, an Advocate and Attorney, practising in the Courts in the Colony of Sierra Leone, complaining of three Orders made by the Judges of the Colony. First, an Order or proceeding, dated the 29th of January, 1844, whereby the Respondent, Chief Justice Carr, in his capacity of Chief Justice, in charging the Grand Judge at the General Quarter Sessions of the peace, held for the Colony of Sierra Leone, animadverted upon the practice of allowing legal practitioners to officiate professionally at the Police Office, and directed that such practice should not be permitted in future. Secondly, an Order of the Court, dated the 21st day of February, 1844, whereby the Appellant was struck off the roll of Proctors of the Vice-Admiralty Court; and thirdly, another Order of the Court, dated the 4th September, in the same year, whereby the Appellant was struck off the rolls of the Court of the Recorder, at Freetown, for alleged contempt, misrepresentation, and misconduct.

The circumstances of the case, and the nature of the proceedings which led to the making of these Orders, are fully stated in the Judgment.

The Appellant presented a petition to Her Majesty in Council, praying, that she would be pleased to admit an appeal from the several Orders, the effect of which precluded and disabled him from practising in the Colony, and that the same might be rescinded, and notice of the petition might be given to the Judge who made the Orders, and that an early day might be appointed for the hearing.

Mr. Edmund F. Moore, for the Petitioner (Dec. 16, 1846), relied upon the cases of *Smith v. the Justices of Sierra Leone* (3 Moo.P.C. 361). *In re Downie and Arrindell* (ibid. 414). The Charter of Justice of Sierra Leone, dated 22nd of April, 1834 (Clark's Col. Law, p. 502).

[LORD BROUGHAM. As this application is *ex parte*, notice ought to be given to the Judges. In the case of *Monckton* (1 Moo.P.C. 455), which was heard *ex parte*, the Judges in the Colony complained that they had not been served.]

Leave to appeal was granted upon giving security for costs, and upon service of the Judges of the Court at Sierra Leone, with a copy of the Order admitting the appeal; with notice to them to enter an appearance to the appeal; the petitioner being at liberty to set down the appeal *ex parte*, at the expiration of six months from the service of such Order upon the Judges in the Colony.

The Judges having been served with notice, in conformity with the above directions, appeared and lodged cases. Chief Justice Carr and Mr. Justice Hornell denied that the first-mentioned Order or direction was ever made by the Chief Justice; and further contended that the other Orders removing the appellant from the rolls of Proctors and Attornies, were justified by his conduct towards the Court. The other Judge, Mr. Hook, put in a separate case, stating that there had been nothing in the conduct of the Appellant towards the Court, which could justify his removal. Affidavits were filed on both sides.

The appeal now came on for hearing.

Mr. M. D. Hill, Q.C., and Mr. Edmund F. Moore, for the appellant, contended, that such Orders were irregular; having been made without any just and proper grounds, or any evidence to warrant the striking the appellant off the rolls; and ought to be reversed and rescinded.

Sir Frederick Thesiger, Q.C. and Mr. Lush, for the Chief Justice Carr, and Mr. Justice Hornell, in support of the Orders.

April 13, 1848, LORD LANGDALE. This is the petition of Magnus Smith, praying that three Orders, stated to have been made in the Courts of the Colony of Sierra Leone, may be rescinded, namely:—

First, An Order stated to have been made on the 29th of January, 1844, whereby the Chief Justice Carr is alleged to have directed, that legal practitioners in the Colony should not be permitted to practise in the Police Office.

Second. An Order of the Vice-Admiralty Court of Sierra Leone, dated the 21st February, 1844, whereby Mr. Smith was ordered to be struck off the roll of Proctors of that Court.

Thirdly. An Order of the Court of the Recorder at Freetown, dated the 4th day of September, 1844, whereby Mr. Smith was ordered to be struck off the roll of Attornies of that Court.

As no such Order as that which is alleged to bear date the 29th of January, 1844, was in fact made, we have no occasion to consider the circumstances under which Mr. Smith, in mistake, supposed it to have been made.

The second Order complained of, viz. the Order of the 21st of February, was made under the following circumstances:—

In the month of January, 1844, in the case of the Ship *Ocean* (being a case of salvage), the Salvage Proctor delivered the Act on Petition, to Mr. Smith, the Defendant's Proctor, who was ordered to deliver in his reply within fourteen days. The time was enlarged, but no reply having been delivered at the expiration of the enlarged time, application was made for the appointment of a day for hearing the case *ex parte*, and ultimately the Judge made an Order for hearing the case *ex parte* on Wednesday the 21st of February.

It was of course open to the Defendants to move to discharge that order for sufficient cause. And Mr. Smith, being desirous to make an application for that purpose on affidavit, attended at the Chambers of the Judge, on the 13th of February, with the parties whom he wished to be sworn. The Judge objected to administer the oaths, on the ground, that no previous appointment had been made with the Registrar. Mr. Smith thereupon procured from the Registrar an appointment for two o'clock, on the same day, at which time the witnesses attended, and were sworn to their affidavits and so the business for which Mr. Smith attended was done.

But something which the Judge considered to be offensive was done or said, by Mr. Smith, during his attendance, and on the same day the Registrar, by the direction of the Judge, desired the attendance of Mr. Smith, at the Court Hall, next court day, the 21st instant, to receive the Judgment of the Court for his conduct in the Judge's Chambers on that day, as well as for the language used by him to the Judge at the same time. To this letter Mr. Smith returned an answer on the 20th of February, in which he stated, that although he should have to attend the Court in the usual course of his professional duties, he would not attend for such a purpose, as that of receiving Judgment for a thing he knew nothing of, and with respect to which he was at a loss to conceive what it might turn out to be

On the day before the date of this letter, namely, on the 19th February, Mr. Smith made an affidavit in the case of the *Ocean*, in support of the application to set aside the Order to hear the case *ex parte*.

The Respondent states, that on the sitting of the Court, on the 21st of February, he addressed Mr. Smith in open Court, on the impropriety of his conduct, and observed on the offensive tenor of his letter to the Registrar, and of his affidavit of the 19th February, in both of which he had not only imputed improper motives, but had misrepresented the facts.

The result was, that the Order of the 21st of February, 1844, which is complained of, was made. It is as follows: "Magnus Smith appeared on this day, and after having been addressed by the Court, his name was ordered to be struck off the Rolls of Proctors of the Court, for gross contempt, misrepresentation, and misconduct." Mr. Smith's conduct, during the Judge's address to him was one series of interruptions, repeatedly contradicting the Court, and making use several times of the expression, "I solemnly deny that," "that is not true;" with many other expressions equally impertinent to the statements from the Bench.

It would be wrong to say anything which can in any way justify or excuse the language used by Mr. Smith, in his affidavit of the 19th or in his letter of the 20th February. We must observe with respect to this order for striking him off the Rolls—

1st. It does not appear that there was, or, under the circumstances of the case, could be, any evidence of the conduct and language of Mr. Smith, on the 19th February, for which he was desired to attend on the 21st. 2nd. That the particular grounds of complaint on which the Judge relied, and which were known only to himself, were not specified to Mr. Smith; he was not called upon to answer any specific charge, but to receive judgment for conduct and language not stated. 3rd. That Mr. Smith had no previous notice of any charge founded on his letter to the Registrar, or on the Affidavit of the 19th of February, 4th. That Mr. Smith had no notice that the establishment of such charges as were meant to be alleged against him might lead to his being struck off the Rolls of Proctors. 5th. That whatever may have been the conduct and demeanour of Mr. Smith, on the 21st of February, and however much it may have deserved censure, and even punishment, a punishment so severe as striking him off the roll in a summary manner, and without affording any time for the offender to answer, or to consider the position in which he was, does not appear to have been required for the vindication of the dignity and authority of the Court.

We think that, under these circumstances, the Order of the 21st of February 1844, to strike Mr. Smith off the roll of Proctors, is not supported by sufficient reasons.

The third Order complained of, viz. the Order of the 4th of September, 1844, was made under the following circumstances:

The Appellant was employed as the Attorney for the Plaintiff, in an action of *Lemon v. Scoble*. Judgment was signed on the 2nd of April, 1844, and a writ of inquiry was executed on the 16th of April, and the Plaintiff obtained a verdict for £29 6s.

On the following morning, the 17th of April, a letter from the Defendant was delivered to the Chief Justice (Carr) in Court, alleging, in substance, that he had paid the debt to Mr. Smith, the Plaintiff's Attorney, before the writ of inquiry was executed—and when Mr. Smith had moved for the return to the inquisition, the Chief Justice called upon the Defendant, and told him that he could not interfere in the action, or call on Mr. Smith to answer a mere written statement, and that he ought to have appeared before

the Sheriffs' Court the day before. The letter was, at Mr. Smith's request, handed to him, and he read it, but he was at that time refused a copy of the letter, on the ground, that the Chief Justice had refused to entertain the complaint. We regret this refusal; but on the 20th of April the Chief Justice (Carr), of his own accord, sent a copy of the letter to Mr. Smith, desiring him to transmit any observations he might wish to offer in the matter. Mr. Smith took offence at the letter which accompanied the copy, and he made no observations on the matter, in compliance with the desire of the Chief Justice. But on the 13th of May, an affidavit was made by Scale, and his witness, Emperor, stating that a payment on account of the debit due from Scale to Lemon, had been made to Smith, as Lemon's Attorney, and thereupon it was ordered, by the Court of the Recorder of Freetown, that a copy of the affidavit be transmitted to Mr. Smith, and that he is desired to appear in Court next Court day, the 19th June, to answer the matters contained in the affidavit. In consequence, of this, and on the 18th of June, and in answer to the affidavit of Scale and Emperor, an affidavit was filed by Lemon and Macauley, and another by Mr. Smith. The affidavit of Mr. Smith is very long and special; he went minutely into the circumstances of the case of *Lemon v. Scale*, and so far as it related to the facts, showing that there was no foundation whatever for the charges which were brought against him by Scale, it appears to us to be perfectly proper and satisfactory; it unfortunately went into other matters, many of them by no means necessary for his defence, and his statements in respect thereof became the subject of complaint against him. On the 19th of June, when the case was heard, the three Judges, taking the opposite statements in the affidavits into consideration, refrained from expressing any opinion upon the subject. Here ended the accusation which was made in Court against Mr. Smith by Scale, and it is very much to be regretted that there was any further proceedings in relation to these matters. But the Chief Justice, observing the account which Mr. Smith had given of his demeanour on the preceding 17th of April, called upon the petitioners of the Court, on the 29th of June, to prepare a statement of what actually transpired on the 17th of April, between the Court and Mr. Smith, and in consequence of this call, on the 3rd of July two affidavits, were filed, one by Dongan and Abbott, and the other by Oldfield. Besides these, another affidavit was, on the same day, filed by Oldfield and Macrae, for the purpose of showing, that an affidavit, sworn by Henry Price, in the matter of the Ocean, on the 25th of March, was in the handwriting of Mr. Smith. The Court ordered these affidavits to be read, and then ordered, that copies be transmitted to Mr. Smith, and that he should appear on the 17th of July, to answer for his conduct in reflecting in contemptuous and disrespectful language on the Court, and misrepresenting its proceedings in an affidavit sworn to by him, and purporting to be an affidavit in answer to the complaint of one Bernard Scale, against the said Magnus Smith, as also for preparing and making out a false and scandalous affidavit for one Henry Price, an ignorant merchant captain, reflecting on the Chief Justice of the Colony, while sitting as Judge of the Vice-Admiralty Court. In consequence of this Order, five several affidavits were filed on behalf of Mr. Smith, in reference to his conduct on the 17th of April. On the 17th of July Mr. Smith appeared and addressed the Court, on his own behalf, refusing to give any explanation of his conduct in preparing the affidavit of Henry Price, and conducted himself in a manner, which, if correctly stated in the minute of that day's proceedings, ought to be very much reprehended; but his conduct on that occasion is not to be the ground of any further proceedings. On the 23rd of July the

Chief Justice stated, that it was the opinion of the Court, after a full consideration of the whole circumstances of the case, and from the documents before the Court, that Mr. Smith had reflected on the Court in language contemptuous and disrespectful, that he had wilfully and maliciously, in his affidavit in the matter of Bernard Scale, misrepresented the proceedings of the Court, and that he had left unexplained his conduct in preparing and writing out the affidavit of Henry Price, intended to be used in the Vice-Admiralty Court, reflecting upon the Chief Justice of the Colony, while sitting as the Judge of that Court, and on the same day, the Court founding itself on the opinion thus expressed, ordered Mr. Smith to show cause, on the 21st of August, why he should not be struck off the roll of the Attornies of the Court, for the reasons therein stated. The time for showing cause was afterwards extended to the 4th of September, on which day, Mr. Smith attended, and addressed the Court on his own behalf, and then the Chief Justice having referred to the affidavits and documents before the Court in the matter, as also to the minute of Court, of date the 23rd of July last, and to the Judgment of the Court delivered on that day, on the 3rd of July last, calling on Mr. Smith for an explanation of his conduct, declared it to be the opinion of the Court, after a full consideration of the whole circumstance of this matter, that Mr. Magnus Smith was a very improper person to remain any longer as an Attorney of that Court, and ordered his name to be struck off the roll of the Attornies of the Court, for wilful and malicious misrepresentations, gross contempt and misconduct. Mr. Smith's name was accordingly struck off the roll of Attornies of this Court.

On consideration of this Order and the proceedings which led to it, it is plain that the whole is founded on the conduct of Mr. Smith, with reference to the affidavit of Price, sworn on the 25th of March, 1844, and the affidavit of Mr. Smith himself, sworn on the 18th of June, 1844. Whatever there may have been offensive and improper in the conduct of Mr. Smith on other occasions, or with reference to these proceedings against himself, was not made the subject of distinct charge, and is not stated to be the ground of ultimate decision. We have, therefore, thought it proper to consider this Order of the 4th of September, on its own merits, and as depending solely on the documents referred to.

With respect to Price's affidavit, Mr. Smith was required to explain his conduct in preparing and writing out the affidavit, alleged to be false and scandalous, and reflecting on the conduct of the Chief Justice.

On reading the affidavit in question (and the affidavit of Dongan Macrae and Cathcart, sworn on the 27th of March, 1844), we are by no means disposed to excuse the improprieties which it contains; but Mr. Smith does not appear to have known the facts therein stated, otherwise than from the information of Price; and although it does not appear to us, that an experienced and fair practitioner ought to have given credit to the statement, yet considering the sort of bias under which Mr. Smith has too plainly acted, it is not impossible that he may have believed it; and although he prepared and wrote out the affidavit after he had ceased to be a Proctor, and this may have been improper, yet, as this was not made the subject of a specific charge, which Mr. Smith was called upon to answer, we do not think that the conduct of Mr. Smith, in reference to this affidavit, was such as to form a sufficient ground for his being struck off the roll of Attornies, and we are confident, that it would not have been so considered by the Chief Justice himself, if Mr. Smith, when asked for explanation, had given it in a manner becoming his own station and character, which he must desire

to maintain as a respectable professional man.

With respect to Mr. Smith's own affidavit, a full statement of all the facts relating to the accusation was required from Mr. Smith, and he did right to give it. There are other statements in his affidavits from which he would have done much better to abstain; but thinking, as we do, that some considerable forbearance might have been not improperly shown to a man who found himself unjustly subject to an infamous charge, we are of opinion, that several matters in this affidavit, though very improper for Mr. Smith to have used, are not, under the circumstances, properly characterized as false and malicious, and do not afford sufficient ground for striking Mr. Smith off the rolls.

Having come to the conclusion, that neither of the Orders complained of, is to be supported on the grounds stated in them, we should be an ordinary case have only to state our intention humbly to report to Her Majesty that the Order complained of ought to be discharged: but Mr. Smith having, as it appears to us, on various occasions, during the proceedings which led to the Orders in question, and during the prosecution of this appeal, conducted and expressed himself with great impropriety and disrespect to the Chief Justice of the Colony, we do not recommend that the Orders of the 21st of February, and 4th of September, 1844, be now discharged; but we recommend, that Mr. Smith be now at liberty to apply to the Vice-Admiralty Court, and the Court of the Recorder, at Freetown to have the Orders discharged; and in case Mr. Smith should make such application, we think that the Orders respectively should be rescinded and discharged by the Court respectively, unless some sufficient reason to the contrary (other than the reasons referred to in the Orders themselves respectively) should be alleged and established against Mr. Smith. We should hope, however, that no further proceedings will be necessary; that these proceedings will have their due weight with all parties and that if Mr. Smith will make such apology for his past and disrespectful demeanour to the Chief Justice, as would well become his professional character and station, there will be no difficulty in restoring him to the rolls without delay.

[Mews' Dig. tit. COLONY; II PARTICULAR COLONIES; 20. Sierra Leone; III Appeals to Privy Council; 3 Leave to Appeal—Granted on Terms. As to special leave to appeal in criminal cases, see note to *Pe Ames* (1841) 3 Moo.P.C. at p. 413. See also note to *Re Justices of Antigua* (1829–30) 1 Knapp 269.]

GEORGE OSMOND PATNELLI APPELLANT
AND

CHARLES HEDDLE RESPONDENT

[ON PETITION FROM THE COURT OF THE GOVERNOR AND COUNCIL AT SIERRA
LEONE]

(1852) 14 E.R. 17

1852 Feb 7 Lord Cranworth, Knight Bruce L.J., Rt. Hon. Dr. Lushington,
Rt. Hon. Sir Edward Ryan

Leave to appeal granted from an Order of the Governor and Council at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under £400, the appealable value limited by the Charter of Justice; that Court having refused to hear counsel in support of the rule on the merits of the case or the questions of law raised.

This was a petition for leave to appeal from an order of the Court against Heddle. The action was upon a special contract, for recovery of £120, the amount of wages due to the Petitioner as factor of Heddle for one year. The declaration also contained *indebitatus* counts for £300 for the service of the Plaintiff, for work and labour done for the Defendant as clerk, and for work done by the Plaintiff and for commission due and payable from the Defendant to the Plaintiff; and for work done by the Plaintiff as the factor and agent of the Defendant, in settling and disposing of goods and chattels of the Defendant, and for money found due from the Defendant to the Plaintiff on an account stated. The Defendant pleaded to the declaration, *non assumpsit* to the whole; misconduct, and that the Plaintiff did not account, to the first count; payment to the whole, and a set off to the whole.

These pleas were altogether denied by the Plaintiff, and put in issue. The action was tried by a jury at the Recorder's Court, before his Honour John Carr, the Chief Justice, and the Honourable Robert Armstrong, one of the assistant Judges of the colony.

At the trial the Plaintiff's counsel, pursuant to notice, called for the production of the Defendant's books of account, which the Court refused to order. Two bills were produced in evidence by the Defendant as a set off against the Plaintiff's claim for wages, almost the whole amount of which, it was proved by one of the witnesses, was for a barter transaction between the Plaintiff and the Defendant before he entered into the Defendant's service. The Plaintiff's counsel objected to so much of this account being set off against his wages as had reference to the barter transaction; but such objection was overruled by the Court, and the account admitted in evidence. The Plaintiff's counsel produced a receipt for African produce, etc., to the amount of £312 6s. 7d., which was paid to the Defendant on account of this transaction. There was also a charge against the Plaintiff on the private account of £192 8s. 1d., for goods of the Defendant said to have been given on credit by the Plaintiff, which was also objected to, as being no answer to the Plaintiff's claim for wages. The other particulars of set off were for goods entrusted by the Defendant to the Plaintiff, for sale or otherwise, as his factor. This account being tendered in evidence was also objected to, on the ground that it could not be made the subject of a set-off against the Plaintiff's wages; but the Court overruled such objection, and admitted the account to be received in evidence.

The principal witness who was brought at the trial to impeach the Plaintiff's moral character and to prove the second plea, admitted in cross-examination that he was formerly in the employment of the Plaintiff, and (witness) had left Plaintiff's service; it also appeared from the evidence of this witness, that the Defendant had kept the Plaintiff in his employment some months after this. The Plaintiff's counsel objected to and impeached such evidence as irrelevant and inadmissible; but the Chief Justice admitted the same, and declared himself perfectly satisfied of the Plaintiff's misconduct, and he finally directed the jury to find a verdict for the Defendant, which they accordingly did.

The Plaintiff then moved in the Recorder's Court for a rule to show cause why the verdict should not be set aside and a new trial had between the parties, as being contrary to law and evidence, upon various grounds, the principal in substance being—that the first count of the declaration in the cause being upon a special contract, did not create any condition precedent on the part of the Plaintiff to his right of recovering his wages in that count mentioned: that the several sums which were given in evidence at the trial,

on the part of the Defendant, under the plea of set-off to the first and second counts, ought not to have been admitted in evidence, but should have been made the subject of a cross-action by the Defendant against the Plaintiff; and that even if the amount of goods given on credit was admissible in evidence, yet as the Plaintiff had fully accounted for all the goods entrusted to him for sale or otherwise, of which the amount said to have been given on credit formed a part, the Chief Justice ought not to have told the jury what he did, namely, that the amount of goods given in credit by the Plaintiff must be deducted out of his wages. That in his charge to the jury the Chief Justice misdirected them, by telling them that before the Plaintiff could have brought this action it was incumbent on him to have rendered a full account of the goods entrusted to him by the Defendant, and that no evidence had been given of that fact; whereas he should have left the evidence before the jury, and directed them to say, whether any accounts as had been asked for by the Defendant had been delivered to him before the action was brought. That the Judge also misdirected the jury by directing them to find a verdict for the Defendant, when he ought to have told the jury that upon the first issue a contract was clearly proved, and that their verdict ought to have been for the Plaintiff on that issue; that with regard to the second issue, they ought also to have found for the Plaintiff; and that with regard to the third and fourth issues, a verdict ought also to have passed for the Plaintiff.

The Court, without taking time to look into the matter and the questions of law raised, immediately refused to grant the rule.

The Petitioner appealed to the Court of the Governor and Council in the Colony against this decision refusing a new trial, and by his petition set forth in substance, the grounds argued upon the motion for a new trial, and prayed that the verdict should be set aside, and a *venire de novo* be issued for a new trial.

On the 9th of October, 1851, this petition was taken into consideration by the Court of the Governor and Council, when, without hearing the Petitioner's counsel in support of the appeal, they ordered that the same should be rejected, there not being sufficient grounds set forth to warrant the interference of the Court.

From this order, refusing to grant a new trial and set aside the verdict of the Recorder's Court, the Petitioner now presented a petition for leave to appeal. The Petitioner submitted, that the mode of proceeding adopted by the Court of the Governor and Council in rejecting his petition of appeal without hearing counsel in his behalf upon the merits of the case, was extremely irregular and informal, and prevented him from regularly and judicially contesting the principles of law laid down by his Honour the Chief Justice in his directions to the jury, and that such refusal amounted to a denial of justice.

Mr. Edmund F. Moore, in support of the petition. Although the subject-matter of the suit is under the amount prescribed by the Charter of Justice of Sierra Leone (by the charter, dated the 17th October, 1821, when the matter in dispute exceeds £400 an appeal lies to the Queen in Council), yet, as the ruling of the Judge of the Recorder's Court, that the set-off could be admitted, was erroneous in law, *Le Loir v. Bristow* (4 Camp. 134), *Howlet v. Strickland* (1 Cowp. 56), *Turner v. Mason* (14 Mee. and Wel. 112), and the Governor and Council made the order complained of, without hearing counsel upon the point, such refusal amounts to a denial of justice, and is

sufficient cause to entitle the Petitioner to the indulgence of the Committee to admit this appeal.

THE LORD JUSTICE KNIGHT BRUCE. Their Lordships, without expressing any opinion upon the questions of law raised, are of opinion, that to appeal ought to be granted upon giving the usual security.

[Mews' Dig. tit. COLONY: III. APPEALS, 3. Leave to Appeal. As to appeals from the Supreme Court of Sierra Leone, see Order in Council of 26th Feb. 1867 (Stat. R. and O. 1899, p. 1711). As to appeals by special leave in civil cases, see note to *Retemeyer v. Obermuller* (1837) 2 Moo.P.C. at p.125.]

WILLIAM RAINY APPELLANT
 AND
 THE JUSTICE OF SIERRA LEONE RESPONDENT

[FROM SIERRA LEONE]

(1852-53) 14 E.R. 19

1852 Feb. 7 Lord Cranworth, Knight Bruce L.J., Rt. Hon. Dr. Lushington,
 Rt. Hon. Sir Edward Ryan

1853 July 1, 2 Knight Bruce and Turner L.J.J., Rt. Hon. Dr. Lushington,
 Rt. Hon. Sir Edward Ryan

The Judicial Committee have no jurisdiction to entertain an appeal from orders made by a Court of Record in the Colonies, inflicting fines upon Practitioner for contempts of Court; such Court being the sole judge of what constituted the contempts [8 Moo.P.C. 54].

Upon a reference by the Colonial Office to the Judicial Committee, referring the whole matter of complaint against the Judge concerning the contempts and the infliction of the fines, for their advice and opinion; the Committee advised the Crown to remit part of the fines, which, by an Order in Council, was directed.

The Appellant in this case, an advocate and practitioner of the courts in the colony of Sierra Leone, complained of four orders of the Recorder's Court at Sierra Leone, bearing date the 19th, 20th, and 24th days of September, 1851, imposing upon him several fines, amounting in the whole to £130, for contempts of Court, alleged to have been committed by him while engaged in his professional character of advocate in conducting the cause of *Patnelli v. Heddle* (see *ante* [8 Moo.P.C.], p. 41) in the Recorder's Court, and also of a decision of that Court, dated the 13th of October, 1851, refusing a rule to set aside a writ of *capias* and *feri facias*, under which he was arrested for non-payment of one of the fines imposed upon him by the Court. The case was specially referred by the Secretary of State for the Colonies to the Judicial Committee, for their opinion upon the merits.

In the first instance, the appellant presented a petition to the Judicial Committee for leave to appeal from such orders, which petition alleged, that he was admitted an advocate and attorney of the Courts in Sierra Leone in the year 1849; that in June, 1851, he was retained, in his character of advocate and attorney, by one Patnelli, to commence and prosecute an

action against the Hon. Charles Heddle, a merchant of the colony, a member of Her Majesty's Council, and an assistant Judge of the Courts in the colony, upon a special contract for wages due to Patnelli, as the factor of Heddle; that the Defendant having pleaded to the action, it was tried in the Recorder's Court of Freetown, on the 17th and six following days of September, 1851, before the Chief Justice Carr and the Hon. Robert Armstrong, one of the assistant Judges, and a jury empanelled in the customary manner; that in the course of the trial the Appellant, pursuant to notice given to the Defendant, called for the production of books of accounts and certain other documents having reference to the matter at issue, but which the Defendant refused to produce, upon which the Appellant respectfully appealed to the Court to call for and enforce their production, but the Chief Justice took no notice of the application, and desired that the Appellant to proceed with the case, which he did, and brought it to a close; that the advocate engaged on the other side having addressed the jury, he began to examine his witnesses, in the course of which he proceeded to put irregular and leading questions to them, whereupon the Appellant objected, but the Chief Justice told him to sit down, which he was compelled to do; that the Appellant, having cross-examined one of the Defendant's witnesses, he was re-examined of fresh matter, to which the Appellant objected, but the Chief Justice, in a manner which the Appellant felt was both uncourteous and arbitrary, desired him to sit down and be silent, which he was compelled to do, to the great injury of his client's case; that shortly after this circumstance had taken place, the books of the Plaintiff were called for, but the Appellant declined to produce them unless the Defendant's books were also produced, whereupon the Chief Justice immediately interposed, and asked the Appellant whether he would produce the books, to which he distinctly stated, that he could not give the other side such an unfair advantage; his Honour continued to put the question, and concluded by saying, "Then do I understand that you refuse to produce the books?" that a repetition of the same matter occurred over and over again in the course of the trial; that the Appellant made an effort to convince the Chief Justice that he was mistaken in his view of the law, and what the justice of the case required, but he was told by the Chief Justice "to hold his tongue, and be silent"; that the Appellant then claimed the right of advocating his client's case, and to submit such objections to the Court as he thought were tenable in law, but the Chief Justice again desired him "to hold his tongue, and be silent." That the Defendant's counsel then proceeded to examine his witnesses, and the Appellant having again interposed and objected to the questions put as being irregular and improper, he was again desired "to be silent, and keep his seat"; but claiming and insisting on his right to interrupt the opposite counsel, and prevent his putting leading questions to the witnesses, he was ordered by the Chief Justice to be fined in the sum of £20, for contempt of Court, although, in the painful and trying position in which he was placed, he had not allowed an improper word to escape him, further than to insist upon his right to be heard; that immediately after this fine was imposed, the Chief Justice, seeming to observe that a great many persons in court felt for and sympathised with the Appellant, remarked in a violent tone, that the Appellant was acting in such a manner as to induce persons to believe that justice was not likely to be done to his client (which the Appellant felt was the fact, though he himself had said nothing indicative thereof); but upon the Chief Justice so remarking, he could not but assent thereto, whereupon the Chief Justice declared him guilty of a contempt of Court, and ordered

him to be fined in the further sum of £50; that the fines having been paid, the trial of the cause proceeded; that the Appellant having, in consequence of the refusal on the part of the Defendant to produce his books, been compelled to prove by written orders and receipts some of the matters contained in them, the Defendant's counsel proposed to produce the books, so originally called for, to displace the case of the Appellant's client, to which the Appellant objected: but the Chief Justice overruled the objection, and refused to permit the Appellant to inspect the Defendant's books and the usual entries therein, having reference to the matters at issue; that the Appellant insisted he had a right to inspect those entries, but the Chief Justice became very violent, and told him he would fine him if he did not sit down, and, being thus coerced, he was under the necessity of taking his seat, to the detriment of his client's case; that the Appellant said, he should tender a bill of exceptions, and immediately after entered into conversation with the Queen's Advocate (Mr. O'Neill) relative to the question of arbitration, when the Court desired him to be silent, on which the Appellant observed that whenever he got up to speak he was interrupted, whereupon the Court fined him £10; that, owing to these circumstances, the Appellant on several occasions excepted to the Chief Justice's ruling, but objections were frequently raised by the Chief Justice that the Appellant's written statements were incorrect and did not agree with his notes; and, in consequence of the frequent observations of the Chief Justice, that the Appellant had tendered bills of exceptions which were incorrect, the Appellant, on the occasion of his excepting to the Chief Justice's refusal to allow him to inspect the entries in the Defendant's books having reference to the matter at issue, informed the Chief Justice that, as it was a very important objection, he would reduce it into writing at once, and the same was handed to the Chief Justice, who, in a menacing tone, remarked, that "the paper contained incorrect statements and that the Court would take notice of it"; that, in consequence, the Appellant on the next day, when an important objection was raised by him, and overruled by the Chief Justice, declined to tender any more bills of exceptions, upon which he was requested to explain what he meant by asserting that he was not allowed to tender any more bills of exceptions, when he drew attention to what had occurred on the previous day, and submitted, that it was tantamount to a refusal, thereupon the Chief Justice fined him £50 for contempt of Court. That the Appellant, not having paid this fine, the Chief Justice caused a writ of *capias* and *fieri facias* to be issued for the amount of the fine, upon which he was arrested, but the writ having been issued without a seal, the sheriff discharged him upon an indemnity; that he moved the Recorder's Court for a rule to show cause why the writ should not be set aside as being invalid on the ground of the want of a seal, but the Chief Justice refused the rule, and he was obliged to pay the £50. The Appellant set out to these transactions, and submitted that he felt deeply aggrieved by these arbitrary and oppressive proceedings not only in a professional and pecuniary way, but, what was far more important to him, by the imputation which had been cast upon his conduct, and the course of proceedings which had been adopted towards him; the effect of the several orders and proceedings precluding him from the fair exercise of his profession in the Recorder's Court, and made, as he submitted, without any just or proper grounds; that the orders and proceedings were wholly unwarranted, harsh, and oppressive, without proper notice given to him or opportunity afforded him to justify and defend himself, and were a violation of the just rights and privileges of the Appellant as an advocate and attorney of the Courts in the

Colony of Sierra Leone, and tended to impair and bring into disrepute the administration of justice in that colony; that, until such orders should be formally rescinded by an Order of Her Majesty in Council, the reproach which such orders tended to cast on his character, as an advocate and attorney practising in the Courts in the said Colony, remained unmoved; and he prayed for leave to appeal from these several orders and proceedings of the Judges of the Recorder's Court at Sierra Leone, bearing date respectively the 19th, 20th and 24th of September, and also from the decision of that Court in refusing the rule to set aside the writ of *capias* and *fieri facias* of the 30th of October, 1851; and that notice of his petition might be given to the Chief Justice and to the Honourable Robert Armstrong, the Assistant Judge concerned in the orders and proceedings.

The petition was verified by the affidavit of the Petitioner.

Mr. Edmund F. Moore, in support of the petition, cited *Smith v. The Justices of Sierra Leone* (3 Moo.P.C. 361), *In re Downie and Arrindell* (3 Moo.P.C. 414), *Morgan Morgan v. Leech* (3 Moo.P.C. 368), *In re Grant* (7 Moo.P.C. 141), to show that the Court had jurisdiction to entertain the petition.

Their Lordships took time for consideration, and on the 19th of February, 1852 delivered judgment by—

LORD CRANWORTH. This petition is presented by William Rainy, a practitioner at the bar of the Courts in the Colony of Sierra Leone, praying for leave to appeal, to enable him to get rid of certain fines which were imposed upon him by the Court in that Colony for contempts of Court.—[His Lordship, after stating the facts from the petition, proceeded.]—Now it is the opinion, not only of the members of the Committee who heard this petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court. The Recorder's Court is created by the Charter of Justice, dated the 17th of October, 1821, and is authorised to hear and determine all civil suits, actions, and pleas which may happen within the Colony; and the Charter directs, that in all cases where the action would, if the parties were resident in England be tried by a jury, such action shall be tried before a jury in the Court of the Recorder, according to the practice in England. That being the constitution of the Court, in regard to trial by jury we are of opinion, that it is a Court of Record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders. All we can say is, that we have no jurisdiction to entertain such a petition impugning the propriety of such orders, and praying the remission of the fines. This view is supported by the case of *Smith v. The Justices of Sierra Leone* (3 Moo.P.C. 361), to which we were referred, in which case the Judicial Committee reversed the orders disbarring a practitioner, but decided that they had no power to remit a fine imposed by a Court of Record for contempt of Court. But, in

of apology, regret, or explanation was offered by the Appellant for his conduct in Court on the previous day. That upon the cause being resumed he again rudely interrupted the Queen's Advocate and Dougan without any justifiable cause, and upon being admonished and desired to be silent, he again, in a disrespectful manner, refused to obey the orders and injunctions of the Court; whereupon, as the repeated warnings and admonitions from the bench had produced no effect, the Respondents felt it to be their duty to impose a fine of £20 on the Appellant for contempt of Court. That after the fine had been imposed, the Appellant continued to behave in a manner tending to obstruct the due course of the trial; and, perceiving the evil consequences of such conduct in a community such as Sierra Leone, the Chief Justice thought it advisable to bring distinctly to the notice of the Appellant the effect and tendency of his conduct, in order that he might alter his bearing and behaviour in the Court, if not intentionally and purposely adopted; the more so, as he had admitted him an attorney of the Court. But, to the astonishment of the Respondents, upon the Chief Justice observing that the conduct of the Appellant was calculated to lead persons to believe that justice was not likely to be done to the Plaintiff, the Appellant, in a manner insolent and disrespectful, and while seated in his chair and with a grinning countenance, immediately replied aloud to the statement from the bench, "I can very well see that." Thereupon the Court called for an explanation or an apology, which the Appellant pertinaciously refused; and the Court, considering that his conduct and bearing had been purposely adopted, and, if unchecked, was calculated to produce the most pernicious consequences in the Colony, felt it to be an imperative duty to impose a further fine of £50 for contempt of Court. They denied the statement of the Appellant that the fine of £20 was imposed on him for objecting to any leading questions put by the opposite counsel, and alleged, that the remark of the Chief Justice was not made in a violent tone, nor made immediately after the fine was imposed. That neither of the Respondents observed persons in Court feeling for or sympathising with the Appellant, and they did not believe that any person who had a proper sense of what was due to a Court of justice could have felt any sympathy for him when the fine was inflicted. That the statements in the petition, in relation to the books of accounts of the parties to the suit, were gross misrepresentations of the conduct of the Court and of the fact as they occurred. That the Court had no power to enforce the production of the defendant's private books of account, on a notice to produce during the progress of a trial (*Habershon v. Troby*, 3 Esp. 38). That at the opening of the Court on the morning of the 20th of September, the Appellant voluntarily brought into Court the amount of the fines imposed on him the previous day, and paid the same to the clerk of the Court, telling him to receipt it. That subsequently to the imposition of the last of the two fines, the Appellant declared aloud in the Court "that the Court might fine him as often as it pleased, but that he would get justice elsewhere," and continued to behave in an insolent and disrespectful manner in the Court. That in the afternoon of that day the Appellant commenced an altercation with the Queen's Advocate, alleging that he had offered to settle the action by arbitration, which had been refused, and the Chief Justice, considering it to put an end to it, there being no question of arbitration before the Court, mildly called out, "Mr. Rainy," with the view of gaining his attention, whereupon the Appellant sharply and abruptly turned round, addressing the bench, said in a rude and insolent manner and with a defiant look, "Whenever I get up to speak I am interrupted; I am

speaking to the Queen's Advocate, " on which the Court thought it to be their duty to impose a further fine of £10. That on the 24th of September the Appellant stopped in his cross-examination of a witness, and expressed himself to the Court to the effect, " that he was not allowed to tender any more bills of exceptions. " As the Court had never refused any bill of exception from him, the Chief Justice requested an explanation, and inquired whether the bill of exception he referred to was the one he tendered at the opening of the Court yesterday. The Appellant replied he would not answer the question until he was called upon by a rule to show cause. The question was repeated, and the Appellant who as an officer of the Court was bound to answer, continued pertinaciously to refuse, and then took up his hat and said, " he was ready to go to gaol and put an end to the trial "; the Respondents then felt it their duty to impose a further fine of £50. That the allegation that the Appellant was not allowed to tender bills of the exceptions was wholly gratuitous and unfounded in fact, and after the occurrence to which it had reference (of which an explanation was given) he tendered other bills of exceptions, which were received by the Court. The answer of the Judges then further alleged, that the Appellant had made misrepresentations of what had occurred in Court. That the minutes of the Courts made by the clerk of the Court, to which the Appellant referred in his petition, were distinct from the acts of the Court, and conveyed no idea of the boisterous and disorderly conduct and demeanour of the Appellant. That the issuing the writ without seal, and refusal to grant a rule to set aside the writ of *capias* and *fieri facias*, was justified in the circumstances. And they finally submitted that the orders were fully justified by the conduct of the Appellant to the Court, in support of which they referred to *The King v. Davison* (4 Bar. and Ald. 329); *Carus Wilson's Case* (7 Q.B.Rep. 984); 2 Hawkins 211, note (1), 8th Edit. by Curwood; 2 Strange 1197; 4 Stephen's Blackstone, pp. 348, 352; *Levy v. Moylen* (1 Lown. Max. and Poll. 307), and prayed that the petition and appeal might be dismissed.

Affidavits were filed on both sides in support of the respective cases of the Appellant and the Respondents, the Judges. These affidavits were made by parties present at the trial of *Patnell v. Hedde* (8 Moo.P.C.) and were contradictory: on the one hand, the conduct and bearing of the Appellant was stated by some of the witnesses to have been irritating, violent, and disrespectful to the Court; while, on the other hand, it was sworn that the behaviour of the Chief Justice at the trial towards the Appellant was very violent, harsh, and unfeeling, and that the conduct of the Appellant was becoming and proper. The Appellant also filed a further affidavit himself, in reply to the Judges' case, denying the material statements made by them with regard to his demeanour at the trial.

The case now came on for hearing.

Mr. Whateley, Q.C. and Mr. Edmund F. Moore, for the Appellant argued, that the infliction of fines amounting to £150 upon the Appellant, in a colony where a practitioner could not realise by his professional exertions more than £500 a year, was a harsh and unjust exercise of the authority of the Court; that, although every respect was due to a Judge in the administration of justice, yet it was equally important that the Judge should respect the character of the Bar, and that they should not be curtailed in the fair exercise of their duties; that there was no such offence committed as properly constituted a contempt of Court, for there was nothing either irregular, improper, or offensive in the conduct of the Appellant towards the Court, in urging his objections to the ruling of the Court upon questions of law. That it was charged by the Petitioner, and not

denied, that the Chief Justice had used certain insulting expressions to the Petitioner, such as "to hold his tongue and be silent," "to be silent and keep his seat"; and that such conduct by a Judge tended to bring Courts of justice into disrepute.

Mr. W. H. Watson, Q.C., and Mr. Lush, for the Judges submitted, that the fines were properly imposed by a competent Court for contempts committed by the Petitioner at the trial. *The King v. Davison* (4 Bar. and Ald. 329; see also *The King v. Almon*, *Wilmot's Opinions*, pp. 243, 256, 263); that what constituted a contempt was a matter which the Court at Sierra Leone were alone competent to judge. *Carus Wilson's Case* (7 Q.B.Rep. 984-986, 1013); that the orders imposing the fines were fully justified by the conduct of the Appellant towards the Court, and to alter or rescind them would impair the authority of the Court in the administration of justice; they further contended, that fines imposed by a Court of Record, like the Recorder's Court at Sierra Leone, for contempt, could not be remitted. *Smith v. The Justices of Sierra Leone* (3 Moo.P.C. 361); and insisted that if such fines were remitted, it would be impossible for the Chief Justice to remain in office.

Mr. Whateley, in reply. This is not a regular appeal impeaching the legality of orders imposing fines, but a matter specially referred by the Crown to this Committee to advise upon the whole case as to the propriety of the Judge making such orders.

THE RIGHT HON. DR. LUSHINGTON. It is not customary in cases referred to us like the present, to deliver the opinion of their Lordships until their report has been approved by Her Majesty.

No opinion was given by the Committee, but the report of the Committee on the petition, recommended the reduction of the fines to the sum of £60, which report was approved of by Her Majesty in Council. No order was made as to costs.

[Mews' Dig. tit. COLONY: III, Appeals to Privy Council; 1 When an appeal lies generally. See *M'Dermott v. British Guiana (Judges of)* (1868) L.R. 2 P.C. 362, 5 Moo.P.C. (N.S.) 466; *Pre Ramsay* (1870) L.R. 3 P.C. 434, 7 Moo.P.C. (N.S.) 263; *Surendranath Banerjea v. Bengal (Chief Justice etc., of)* (1883) L.R. 10 Ind.App. 180; and cases collected in note to *Smith v. Sierra Leone (Justice of)* (1841) 3 Moo.P.C. at p. 368.]

ROLET APPELLANT
 AND
 THE QUEEN RESPONDENT

[ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE]

(1866) L.R. 1 P.C. 198; 4 Moo.P.C. (N.S.) 41; 12 Jur.N.S. 715
 15 W.R. 233; 16 E.R. 232

1866 Aug. 4 Knight Bruce and Turner L.JJ., Sir Edward Vaughan Williams

Admiralty—Onus of proof that vessel lies outside territorial waters: on party claiming exemption

Sentence of the Vice-Admiralty Court of Sierra Leone condemning goods and boats siezed for breach of Customs Ordinances of the Colony reversed with damages and costs; it being proved that the vessel in which the goods were unshipped, though off the harbour of Freetown, was not within three miles (the

limit of jurisdiction) from the shore at the time of the unloading and consequently not liable to the harbour dues payable under the Customs Ordinances.

Held: Where goods were unshipped in the immediate precincts of the harbour, the onus of proving that the vessel was not actually within the harbour lies on the party claiming exemption from harbour dues.

JUDGMENT. This is an Appeal from a Decree of the Vice-Admiralty Court of Sierra Leone, by which the Court condemned as forfeited to Her Majesty a large quantity of goods belonging to Victor Rolet one of the Appellants, and two boats belonging to the other Appellants, on the ground, as to the goods, that they had been illegally unladen and unshipped contrary to the provisions of certain Ordinances of the Colony and of an Order of Her Majesty in Council, and, as to the boats, that they had been illegally used in the removal and conveyance of the goods. The Appellant, Victor Rolet, is a Frenchman, residing in France, and he has a mercantile establishment at Freetown in the Colony, where he carries on business through an agent, Honoré Leconte, under the title of Malfilatre and Co. The goods in question were sent by him from France to his mercantile establishment at Freetown on board a brig called the *Belus*, which was consigned to some merchants at Fouricaria, near Mellicourie, a place which lies to the southward of Sierra Leone, and about 100 miles distant from it. On the 11th April, 1864, the *Belus* in the course of her voyage to Mellicourie came to anchor off Sierra Leone, and her captain communicated to Leconte that she had goods on board for Malfilatre and Co., and that she was anchored out of the jurisdiction of the Colony. Leconte thereupon directed boats to be sent out to bring in the goods. Four boats were accordingly dispatched to the *Belus* for that purpose early in the morning of the 12th April. These boats had not returned from the *Belus* when the Custom-house was about to close on the evening of that day. Application was in consequence made in the first instance by Barlatt, a clerk of Malfilatre and Co., and subsequently by him and Leconte to Shaw, the acting collector, to allow the goods when they arrived to be placed in the Custom-house shed for the night. Shaw appears at first to have refused, but afterwards to have acceded to the application. He gave a permit for the goods to be received in the shed, and in the course of the evening they were landed and stored accordingly. On the following morning, the 13th April, Barlatt went to the Custom-house and made a report inwards of the boats and the goods. This report described the boat as a British boat of Sierra Leone, of which Daniel Coker was master for this present voyage from Mellicourie. It set forth the particulars of the goods, and purported that the entry was a just report of the name and particulars of the ship, and contained a true account of her lading; and further stated that bulk had not been broke nor any goods delivered out of the ship since her loading in Mellicourie. The Report was signed by Coker, who was master of one of the boats which had been sent out for the goods, and was declared by him in the presence of Shaw, by whom it was also signed.

Barlatt at the same time made two entries inwards of the goods, some of them being for consumption in the Colony, and others for exportation, and requiring a separate entry. Each of these entries purported to be "an account of merchandize imported by Malfilatre and Co. in a British boat from Mellicourie." These entries were also declared before Shaw. The wharfage dues were paid, and the usual bonds given for payment of the duties. Some of the goods intended for sale in the Colony were then

removed from the Custom-house shed to the store of Malfilatre and Co. On the morning of the same 13th April the boats had again been dispatched to the *Belus* for the purpose of bringing in some more of the goods; and these goods were brought in, as to some of them, in the evening, and as to the rest, in the night of the 13th April. They were landed at the Custom-house, and stored in the Government sheds. In the meantime Shaw had taken steps for ascertaining whether the *Belus* was or was not within the jurisdiction of the Colony, which appears to extend three miles seaward from the Cape of Sierra Leone. On the morning of the 13th April he sent out Hanson, the Landing Surveyor at the Custom-house, to the *Belus* and other vessels which were lying off the Cape, and Hanson went on board the *Belus*. He returned in the afternoon, and reported that he thought that the vessel was within the jurisdiction.

Pike, the Harbour-Master, was then sent out, but he did not reach the vessel that night. He went out, however, again to the vessel on the morning of the 14th April, and then took her bearings, and found her to be within the jurisdiction. On this same morning of the 14th April the goods which remained in the Custom-house sheds, and two of the boats which had been employed in bringing them in, were seized by Shaw. Two or three days after the seizure had been made the *Belus* left the Colony, and on the 9th May following a monition was issued calling upon the Appellants to show cause why the goods and boats should not be condemned. On the 23rd May, 1865, the Appellants brought in a claim for the goods and boats.

The libel in the cause was filed on the 1st June, 1865, and on the 23rd June following the Appellants filed their plea or responsive allegation. Witnesses were then examined both on the part of the seizer and of the claimants; and upon the hearing of the cause on the 17th August, 1865, a Decree was made by the Deputy Judge of the Court rejecting the claim, holding the libel to be sufficiently proved, and condemning the goods and boats. It is from this Decree the Appeal before us is brought.

Upon the opening of the Appeal a great number of points were insisted upon on the part of the Appellants having reference to the competency and regularity of the proceedings in the cause, and to the validity of the appointment of the Deputy-Judge, and his power and authority to deal with the cause; but in the view which we have taken of the case it is not necessary for us to give any opinion upon these points. In order, however, to avoid any possible question in other cases, we think it right to say that we have no doubt whatever that the Deputy Judge was duly appointed, and had full power to adjudicate upon the questions in the cause. With this exception, we lay these preliminary points out of consideration.

The real question in this case seems to us to be whether these goods and boats were liable to seizure and condemnation upon any of the following grounds: either, first, that the goods, being liable to the payment of duty, were unshipped from the *Belus*, at anchor within the Colony, before due entry had been made of the goods, and before any warrant or sufferance had been granted for the unloading thereof; or secondly, because the goods, being subject to the payment of duty, they were unladen from the *Belus*, at anchor, as aforesaid, at a place other than the Port of Freetown; or thirdly, because the goods, being liable to the payment of duties, were unshipped from the *Belus* while in the Colony, customs and other duties not being first paid or secured. These are the points which appear to us to arise upon the Ordinances and the Order in Council referred to in the libel, and which were considered by the Deputy-Judge to be the real points in the case, and they are the points which were mainly if not solely relied upon on the part of the

Respondents in the course of the argument before us.

We proceed, therefore, to consider these points. It is to be observed, in the first place, that the third ground of seizure above referred to rests upon the non-payment not only of customs' duties but of other duties also; but the seizure in this case clearly proceeded upon the non-payment of customs' duties only; and upon examining the Ordinances and Order in Council we do not find that any forfeiture could arise upon the non-payment of other duties. The case, therefore, must depend upon the goods having been unshipped, as they undoubtedly were, before the payment of the customs' duties. In considering this question, it is not in our opinion necessary to enter into the details of the Ordinances and Order in Council. It is sufficient to say that, in our opinion, if the *Belus* was within the jurisdiction of the Colony, when the goods were unshipped, the goods and boats were liable to seizure and condemnation, but that they were not so liable if the *Belus* was not within the jurisdiction of the Colony when the goods were unshipped.

The material question therefore which we have to consider is a mere question of fact whether the *Belus* was within the Colony when the goods were unshipped. We have carefully examined the evidence upon this question, and considered the collateral facts bearing upon it, and the conclusion at which we have arrived is that the *Belus* was not in fact within the jurisdiction of the Colony when the goods were unshipped. First, as to the testimony of the witnesses. Upon the witnesses on the part of the seizer being first examined, not one of them ventures to swear that on the 12th and 13th, when the goods were unshipped, this vessel was not beyond the three miles which form the limit of the jurisdiction of the Colony. The only witnesses who speak directly to this point are Hanson and Johnson, and each of them upon cross-examination declines to swear that the vessel was within the three miles on either of those days. The evidence of Pike, the harbour-master, however goes to show that the vessel was within the three miles on the 14th, and that she was then in the same position as she had been on the two previous days, but on cross-examination he admits that the fact of the vessel having been in the same position on the 14th as on the 12th and 13th was no more than supposition on his part, and it is most remarkable that Hanson, who was on board the vessel both on the 13th and the 14th, and must therefore have known whether she had changed her position or not, is upon his first examination wholly silent upon that point.

There can be no doubt, therefore, that this evidence was insufficient to support the seizer's case, but it was insisted on his part that the *onus probandi* rested upon the Appellants, and that it was upon them to show that the vessel was not within the jurisdiction of the Colony when the goods were unshipped, and this argument on his part appears to us to be well founded. We must consider, therefore, the evidence on the part of the Appellants upon this point, and we think it quite sufficient to establish their case. The testimony of the boatmen, no less than five in number, clearly shows that the vessel was beyond the three miles when the goods were unshipped, and we find nothing to displace this evidence, for the rebutting evidence on the part of the seizer is, as it seems to us, quite insufficient for the purpose. It goes no further than this: that Hanson, on his further examination, says he has every reason to believe that the vessel was in the same position on the 13th and the 14th, but he assigns no grounds for this belief. Taking the case, therefore, to rest on the testimony of the witnesses, we think that there was no sufficient case to warrant the sentence condemning these goods and boats.

Then, how does the case stand upon the collateral facts. They seem to us

to be strongly in favour of the Appellant's case. It is clear from the evidence that the goods in question might have been sent on to Mellicourie, and thence imported into Sierra Leone on payment of duties, and we cannot but think it in the highest degree improbable that Leconte should have ventured to incur the risk of seizure for the mere purpose of saving the expense of bringing back the goods from Mellicourie, which, so far as we can see, was the only benefit he could gain by unshipping the goods at Sierra Leone. Again, notwithstanding what is said by Shaw, we consider it to be sufficiently proved that it was customary to admit the importation of goods from vessels outside upon the payment of duties, and it is admitted by Shaw that he saw the vessels outside on the 12th. It is surely most improbable that he should have granted the permit on the evening of that day, should have received the report and entries on the following morning, and should even have allowed some of the goods to have been removed from the Custom-house sheds on that morning, if he had then believed the vessel to be within the jurisdiction. Such conduct on his part goes far to show that he did not then entertain any such belief whatever he may have thought afterwards.

The excuse which is made for this course of conduct on his part is that he was told that the goods came from Mellicourie; but it is clear from the evidence that it was the custom to insert Mellicourie and other places in the entries at the Custom-house when the goods came from vessels outside; and we cannot readily believe Shaw to have been ignorant of this practice, to say nothing of there being two witnesses (Barlatt and Macrae), who distinctly state that they told him that the goods were coming from the outside. There are also these further facts in favour of the Appellants' case; that the character of the boats was of itself almost, if not fully, sufficient to show that the goods had not come from Mellicourie; that no Custom-house officer was put on board the *Belus* on the 13th, which, as we apprehend, would have been the ordinary, if not the necessary course, had she been within the jurisdiction; and that the monition was not issued till so long a time after the *Belus* had left the Colony, and the Appellants had lost the benefit of testimony which they might otherwise have been able to adduce.

We think it right to add that we desire to give no encouragement to the practice of importing goods from vessels outside, and thus evading payment of duties which would otherwise be payable; and that where such a course is pursued the parties adopting it must expect to be strictly dealt with; but looking to the evidence and to the conduct of the Custom-house officers in this case, we are satisfied that this vessel was not within the jurisdiction of the Colony when the goods were unshipped; and we shall therefore humbly recommend Her Majesty to reverse this sentence, with costs in the Court below and of the Appeal, and to condemn the Respondent Shaw in damages and costs.

CASSANOVA v. R.

THE RICARDO SCHMIDT

[ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE]

(1866) L.R. 1 P.C. 115; 3 Moo.P.C.(N.S.) 484;
12 Jur.N.S. 127; 14 W.R. 617; 16 E.R. 183

s.23—Parties awaiting decision on |

Admiralty Courts Act 1863 the time for
 parts abroad was limited to six months
 the Judicial Committee to admit
 had elapsed. Circumstances showed that
 the petition of appeal in the registry
 the prescribed time and that the delay
 on a pending appeal which involv

was justified the exercise of the discretion
 admit an appeal under the section upon p
 and giving security for further costs.

In a case of a foreign vessel, an Italian r
 harbour of Sierra Leone, on the gro
 of the Statute 5 George IV, c. 11
 that this Statute authorizes the seizure
 if its provisions have been violated. T
 as the basis of the whole of the
 think themselves under the necessity of g
 whether that construction of the Statute be ri
 to bear in mind that this seizure can be ju
 are furnished by that Statute. The learned
 decided, and very rightly, that there was
 on of the vessel; but he has refused to awa
 over given to him by the 35th Section of th
 that the seizure and the prosecution were, un
 e, justifiable. Whether there was, or was n
 e must depend upon the state of the law a
 ute, and as it is embodied therein. By
 IV, which is not applicable to the seiz
 harbours, but applies to the capture of f
 particular rule of evidence is given, viz.
 and the vessel an unreasonable quantity
 be considered as furnishing such a presun
 ded to be employed in the slave trade, as
 vessel be not condemned, to refuse any
 er of the vessel as against the captor; pro
 he circumstance to which I have referred
 he ship have a certificate stating that
 s should be only used for the recep
 me other lawful trade. Now, the lear
 abling him to arrive at the conclusio
 hip, the Ricardo Schmidt, of an un
 circumstance of such grave suspicion
 Judge was not at liberty to use the
 subsequent statute as applicable to
 competent to him to refer to that s
 of having an unusual number of w
 suspicion, but the learned Judge
 per se, as a Judge applying the
 was bound to take it in conjunc
 case; for the rule that he h
 administer, provides distinctly

acquainted with the subject can doubt) that a vessel of that depth, carrying 900 tons, could not be loaded without the additional deck in question. The evidence is distinct that vessels of this size are furnished with a second deck. The evidence of one of the witnesses is even more positive, that a vessel of this size, inasmuch as if loaded she would not be safe without a second deck, could not obtain insurance if she had not that second deck. The second deck, therefore, instead of tending to create suspicion, tends to give confirmation to the conclusion that the vessel was *bona fide* intended to be engaged in trade and to be used as an ordinary ship of burden in commerce.

Mr. Dunlop further refers to the existence of a considerable quantity of cooking utensils on board the ship beyond what, in his judgment, the crew would require; but there is evidence upon that point, that in the opinion of two or three disinterested witnesses the amount of the ship's vessels for cooking was less than the ordinary wants of the captain and crew of such a vessel rendered necessary.

We have therefore no circumstances here to which any particular weight or force is to be given by law as under the 5th William IV would be the case, but we have a case to be judged of under all the circumstances, whether any person going on board a ship lying in the harbour of Sierra Leone and examining her,—going over her,—could, from the mere circumstance of the number of water-casks, be warranted in arriving at the conclusion that this ship was intended to be engaged in the slave trade.

I need not point out, what was very well commented upon by one of the Counsel for the Appellant, that there may be great necessity for laying down clear and definite rules, as they are laid down in the 5th William IV for the purpose of guiding captors at sea, for there the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature therefore defines certain things in that statute which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the captor from consequences even if the vessel be not condemned. But when you come to the case of a ship quietly lying at anchor in a British harbour, and having been there for some time; not manifesting the smallest indication of anxiety to quit the harbour, but actually and plainly engaged in *bona fide* trade within the harbour; the obligation on a seizer to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which *per se* have not an overpowering weight on the mind at the time when the seizure was made. It appears that on the very day on which this seizure was made, not only was the captain on shore bargaining for cargo for his vessel, but some of these very casks, being no longer required for the ordinary requisitions of the trade in palm oil, were being sold, and had been sent on shore for the purpose of sale by the captain of the vessel.

With regard to the casks there was another circumstance which ought to have been looked to before the seizer ventured upon such an act as the seizing of the vessel; we mean, an inquiry whether the casks upon which his suspicion lighted were or were not to be found in the manifest of the vessel, and whether that manifest was accompanied or not by any proof that the ship had sailed with the knowledge of the proper Italian authorities that part of her stores consisted of these empty casks. Now, without deciding that the documents produced would, if the case had arisen under the Statute of William IV, have amounted to a certificate of security having been given, yet it is clear, and it is a proof of the *bona fides* of the master of the ship, that he had drawn the attention of the authorities of his country to the fact of part of his lading consisting of these water-casks, and that his ship had

been cleared by the authorities with a knowledge that these empty casks were on board. These papers were produced to Lieutenant Dunlop at or immediately after the time when the seizure was made. There was the fullest desire to give him information. The history of the vessel's proceedings he might have read from the log. The nature of her ownership was manifested by the documents that he received; the character of her antecedent employment was evidenced by the palm oil she had on board; the desire of carrying on *bona fide* commerce was evidenced by the very employment in which he found her, the captain being at that time engaged in procuring cargo on shore.

Now, we would ask, how is it possible for any merchant ship to visit the coast of Africa, and a British harbour on the coast of Africa, for the purpose of legitimate commerce, if under circumstances such as these she is liable to be seized merely upon the ground of her having certain articles on board, actually required for the purposes of the trade in which she professes to be engaged, and in which it is proved that she had for some time previously been actually engaged?

Their Lordships are therefore of opinion, that as to the existence of the water-casks, that circumstance is weighed down, explained, and its force entirely taken away by the other circumstances that were manifest and apparent; and that under the statute of the 5th George IV, that simple fact, adding to it the slave deck, adding to it the cooking utensils, did not, under the circumstances, constitute a reasonable *prima facie* case for concluding that the vessel must be condemned unless those things were explained. There was no *probabilis causa* for seizure.

Therefore, taking all the circumstances of the case, as they appeared, or might and ought to have appeared, to the seizer at the time, there was nothing that justified the seizure, and on these grounds their Lordships will humbly advise Her Majesty to reverse so much of the sentence as holds that the seizure and prosecution were justified by the circumstances, and to declare that the vessel ought to have been restored, together with damages and costs; and they will recommend Her Majesty to make the usual reference to the Admiralty Registrar, together with merchants to be associated with him, for the purpose of ascertaining the nature and amount of damages which, under the circumstances, ought to have been awarded to the Appellant.

Their Lordships are glad to find that the officers of the Crown have been directed to attend in support of the case of the Respondent. They think, however, that the national honour requires that damages and costs in this case should be given to the owner of the ship, and to them must of course be added the costs of this appeal.

GEORGE AND ANOTHER APPELLANT
 AND
 THE QUEEN RESPONDENT

[ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE]

1866 Dec. 10

Sir William Erle, Sir James W. Colville,
 Sir Edward Vaughan Williams, Cairns L.J., Sir Richard T. Kindersley

Admiralty—Natural justice—Judgment in rem—Regulation based on repealed statute: effect

The Vice-Admiralty Court of Sierra Leone made a decree in a proceeding *in rem* in respect of the seizure of a canoe and two barrels of rum and also in a proceeding in respect of penalties alleged to have been incurred for breaches of the Revenue laws.

Held: 1. The decree was in effect two separate and distinct decrees in two separate and distinct suits: in one, the liability of the parties to penalties being the matter in dispute; in the other the liability of the goods to be seized and condemned.

2. It is contrary to the first principles of justice that a party should be liable to be condemned without having an opportunity of being heard. The appellam had a right to be heard—his right was refused; in that respect the proceeding was contrary to law and he had a good ground of appeal.

3. A proceeding *in rem* is a suit, in a manner, against all persons interested, and a judgment obtained in such a suit is, if valid in itself, a judgment against all the world.

4. (*Obiter*): It has been contended that the regulation had ceased to be operative, because, as was supposed the statute from which it emanated had been abolished. It is a regulation made by virtue of a statute and being in conformity with the powers conferred by the statute it has the same authority as the statute itself; and if the statute had been repealed, the regulation would have ceased to have any operation.

JUDGMENT. This is an Appeal from a Decree of the Vice-Admiralty Court of Sierra Leone, made in a proceeding *in rem*, in respect of the seizure of some property, viz. a canoe, and two barrels of rum, and also in a proceeding in respect of penalties alleged to have been incurred for breaches of the Revenue laws. In the proceeding *in rem*, the Judgment was that the property seized was forfeited, and in the same decree the Court adjudged that the penalties had been incurred, and condemned Mr. George in the payment of those penalties. But although both those matters are disposed of in one and the same decree, their Lordships are of opinion that it is in effect two separate and distinct decrees, in two separate and distinct suits; in one, the liability of the party to penalties being the matter in dispute; in the other, the liability of the goods to be seized and condemned.

Now, in respect of the suit for the penalties, the Judge of the Court below, proceeding upon a regulation relating to claims to goods supposed to be forfeited, (as to which the party is not allowed to have his claim admitted unless he has given security for costs,) considered that that regulation extended to a proceeding in which the question was the liability to penalties, and upon that ground condemned Mr. George. But inasmuch as it is contrary to the first principles of justice that a party should be liable to be condemned without having an opportunity of being heard (that being the effect of holding that it may be made a condition precedent that he shall not be heard until he has given security, which at times may be impossible); their Lordships at once recognize the validity of that as a ground of complaint against this decree.

If there had been an express enactment that a party should not be permitted to be heard until he had given security for costs, we should, of course, be bound to give effect to it; but no such clause in any Act of Parliament has been pointed out to us; their Lordships are therefore, of opinion that upon that ground, so much of the decree as imposes penalties on Mr. George, and condemns him in the sum of £300, should be reversed. He had a right to be heard—his right was refused; in that respect the proceeding was contrary to law, and he had a good ground of Appeal.

The other portion of the decree is the Judgment relating to the goods. It is a decree in a proceeding *in rem*, in respect of goods, which is in its nature different from a decree in a suit for penalties due under the Revenue laws.

The latter decree would be against a particular wrongdoer; but the proceeding *in rem* is a suit, in a manner, against all persons interested, and a Judgment obtained in such a suit is, if valid in itself, a Judgment against all the world.

Now, when goods are seized for a breach of the Revenue law, the party interested in disputing the validity of the seizure has, according to the regulations made in that respect, a right to come in and have the validity of that seizure tried in the proper Court. But his right to come in and have the validity of that seizure tried is limited by the rules and regulations of the Vice-Admiralty Courts abroad, by one of which it is made law, that

“ the claim and affidavit are to be prepared and given in as directed in derelict cases. But in compliance with the Act 6, Geo. IV, c.114, sec. 62, security must be given on behalf of the claimant, in a sum not exceeding £60 sterling, to answer the costs, before any claim can be received. ”

The Judge in the Court below held that the claim of the present Appellant could not be received, because he could not give security for costs; and therefore, not having received his claim, the Court proceeded to give Judgment of condemnation against the goods.

The case has been argued before us with considerable ability upon all the points.

It has been contended that this regulation had ceased to be operative, because, as was supposed, the statute from which it emanated had been abolished. It is a regulation made by virtue of a statute, and, being in conformity with the powers conferred by that statute, it has the same authority as the statute itself; and if the statute had been repealed, the regulation would have ceased to have any operation.

But their Lordships are of opinion that the Appellant has failed to establish this proposition. The statute under which this regulation was made appears to us to be in force and operation; the regulation therefore was one which still bound the learned Judge, and it was his duty to act upon it.

It appears that at the proper time the claimant in the Court below (*i.e.* Mr. George, who desired to be a claimant) came forward by his proctor, and claimed to have a place as a suitor in Court, wherein he might dispute the validity of the seizure, and stop the proceedings for a condemnation; but, under the regulations above cited, it was objected that the claim could not be admitted unless security for costs was given. The question whether such security should be given was then gone into, and in the result the claim was not admitted, because security for costs could not be given.

Now we are all of opinion that at that stage of the proceedings the Judge in the Court below was warranted by the regulation in coming to the conclusion he did. The claim, then, was not admitted; and the claim not being admitted, the interference of Mr. George, as claimant in the Court below, was from that time, so far as related to the proceeding *in rem*, at an end; and the decree passed which has been mentioned. The effect of the refusal to admit his claim was to exclude him from being a party to the suit so far as related to the proceeding *in rem*.

WILSON AND OTHERS

AND

APPELLANTS

THE QUEEN

RESPONDENT

[ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE]

(1866) L.R. 1 P.C. 405; 4 Moo.P.C. (N.S.) 307; 16 E.R. 333

1866 Dec. 11 Sir James W. Colville, Sir Edward Vaughan Williams, Cairns L.J.,
Hon. Sir R. T. Kindersley

Admiralty—Seizure of goods—Appeal on costs alone: not competent

On an appeal from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the customs laws, but without damages or costs as it was held that there was possible cause for the seizure.

Held: As regards one of the appellants who proved that he was not the owner of the goods, the appeal was for costs alone and could not be entertained.

JUDGMENT. Their Lordships in this case have heard a number of questions argued at much greater length than either their importance or difficulty would have justified; but they have done so out of tenderness to the Appellants, lest any point deserving of notice should be left without argument.

With regard to one of the Appellants, Mr. Cole, it was attempted to obtain his right to appeal, on the ground that, although he had been absolved from penalties in the Court below, he had not been awarded the costs of the proceeding against him.

Their Lordships are of opinion that, with regard to the Appellant Cole, the Appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule, that an Appeal for Costs would not be entertained.

With regard to the Wilsons, the question which they have raised is this—that although the property which they claim to belong to them was returned, no damages were awarded to them for the seizure and detention of their property.

That question, again, has given rise to a number of other questions, which we have to dispose of.

In the first place, it was contended, on behalf of the Crown, that the Wilsons were limited in their argument by the nature of the Appeal asserted on the face of the proceedings below; the proceedings below stating that the Appeal asserted was merely an Appeal on the ground of costs.

It was argued also, on behalf of the Crown, that if that were not so, at all events, the citation which proceeded from this tribunal was a citation which indicated an Appeal on the subject of costs, and of costs alone.

Their Lordships, however, think that the Appeal having been asserted in the Court below, and proper security, according to the ordinance, having been given, it would not be right to limit the Appeal to the precise matter of appeal which appears to have been stated on the minutes of the proceedings below; but that those who had asserted the Appeal, and had given security, are entitled to be heard upon every question which could properly be alleged before their Lordships, by way of appeal. And with regard to the citation, their Lordships are of opinion that the citation does nothing more than

recite the decree which had been made in the Colony, and that it in no way limits any right of appeal, which, otherwise, the Appellant would have been entitled to.

The objection was next argued on behalf of the Respondents, that the Judge of the Vice-Admiralty Court of Sierra Leone having made the statement on the record, that there had been probable cause and sufficient ground for the seizure, the statute of the 16 and 17 of the Queen, c. ciii, sect. 312, rendered that statement of the Judge a bar to any claim for damages, either in these or other proceedings.

Their Lordships, however, are of opinion that, assuming that statute to apply to the Colony of Sierra Leone (a point upon which their Lordships do not offer any opinion), the section contemplates an endorsement upon the record in some proceeding in which the verdict of a jury has been rendered, for the purpose of being used in other proceedings, and not, as in this case, in the proceeding itself.

It was then contended, on behalf of the Crown, that there could not have been in the Vice-Admiralty Court any jurisdiction to award damages to the Wilsons in this case.

Their Lordships, in the view they take of the remainder of the case, do not think it necessary to do more than to take notice that this question has been argued before them, and to say that damages appear in other cases to have been awarded by a court similarly situated to the Vice-Admiralty Court of Sierra Leone, and their Lordships therefore do not entertain any opinion that there would have been a want of jurisdiction to award damages if it had been proper to do so.

The remaining question in the case, and the one which has occupied the greatest length of time in discussion, is the question of fact whether there was or was not probable cause to warrant the collector in seizing these goods.

Now, after looking at the minutes of the proceedings, their Lordships have considerable doubt whether the right to damages on the ground of the non-existence of probable cause was contended for on behalf of the Wilsons in the Court below; but here, again, they give the Appellants the benefit of the doubt, and assume that the point was made in their favour in that Court. But their Lordships propose to adhere to the rule which was laid down at this Board in the case of *Xenos v. Aldersley* (the *Evangelismos*), in the 12th volume of Moore's Reports, 359, with reference to the criterion to be applied in considering whether there has or has not been probable cause for seizure. It is true that was the case of the seizure of a ship upon an allegation of a damage sustained by a collision; but the principle which is there laid down is, in their Lordships' opinion, applicable to the case now before them. Their Lordships there said:

“ We think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded. The real question in that case following the principles laid down with regard to actions of this description, comes to this—is there, or is there not, reason to say that the action was so unwarrantably brought or brought with so little colour or so little

foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it."

Now, applying this rule, and simply dealing with the evidence which is given by two of the witnesses of the Appellants themselves, the witness William Pappah, at page 31, and the witness Canray Fingray, at page 32, their Lordships are of opinion that the evidence given by those witnesses discloses a state of facts which not only affords probable cause for the collector seizing the goods in this case, but which would in their Lordships' opinion have made it a dereliction of duty on the part of the collector if he had refrained from seizing the goods, until explanations were offered such as have been deemed satisfactory by the Court in this case.

Their Lordships, therefore, upon this simple ground, will recommend to Her Majesty to dismiss the present appeal, and to dismiss it with costs.

WILLIAM RAINY

APPELLANT

AND

ALEXANDER BRAVO

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

(1872) L.R. 4 P.C. 287; 9 Mod. P.C. (N.S.) 35;
27 L.T. 249; 36 J.P. 788; 20 W.R. 873; 17 E.R. 427

1872 June 12

Sir James W. Colville, Sir Montague E. Smith,
Sir R. P. Collier

Defamation—Strict proof of alleged libellous imputation—Secondary evidence admissible to prove words where writing is destroyed—Affidavit evidence insufficient to prove libellous words

In an action for libel the defamatory words set out in the declaration must be proved as laid and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words as qualified are still libellous. Defendant after the publication of a libel and before the action was brought destroyed the letter containing the libellous words:

Held: (1) as the defamatory writing was not in existence secondary evidence of the contents of the letter by witnesses who heard it read was admissible but the actual words used as laid in the declaration must be proved and not the substance or impression the witnesses received of the words, as otherwise, the witnesses and not the court or jury would be made the judges of what was a libel.

Before the declaration was filed the plaintiff gave notice of his intention to move for an order for the production of the letter containing the words as set out in the declaration. An affidavit in answer by the defendant stated that the defendant had destroyed the letter but raised no objection to the terms of the alleged libel set out in the plaintiff's affidavit:

Held: (2) Plaintiff's affidavit being merely for the production of the letter, it was not admissible as evidence to prove the words of the libel.

JUDGMENT. This is an action of libel brought by the Appellant, Mr. Rainy, a barrister, practising in the colony of Sierra Leone, against the Respondent, who was the police magistrate of Freetown in the colony. The case was tried before the Chief Justice without a jury, who, after taking time to consider, gave judgment for the Defendant on the ground that the libel was not proved by the evidence. A rule for a new trial afterwards ob-

tained by the Appellant was discharged, which has led to the present Appeal.

The Appellant contends that the judgment is wrong on two grounds. He contends, first, that the libel was proved; and, secondly, that if it was not proved and there was a variance, the Judge ought to have amended the declaration, and he incidentally complains of the adjournment as having interfered with an application for an amendment.

The alleged libel is contained in a letter written by the Respondent to the clerk of his court, which it is said was read by the clerk to several persons. It is alleged in the declaration to be in the following terms:

“ Tell Gilpin [meaning the police clerk] that I have prohibited Mr. Rainy from practising in my court, and there was no necessity for him, Gilpin, to employ a lawyer; but if he required a lawyer to employ Mr. Walcott (meaning another Advocate and Attorney-at-Law of the said Supreme Court), who was a clever lawyer, and what is more he is an honest man. ”

The latter words are thus innuendoed, meaning thereby that the Plaintiff was not a clever lawyer or an honest man. The letter was destroyed by the Defendant himself shortly after it was written. Four witnesses were called to prove the contents of the letter which had been destroyed. The evidence of the clerk, Metzger, to whom it was addressed, and of two others was disregarded by the Judge, on the ground that they gave evidence of the substance only of the letter and not of the very words.

It is unquestionably true that the words charged to be a libel must be set out in the declaration. If the defamatory writing does not exist, and secondary evidence is offered of its contents, the words must be proved, and not what the witness conceives to be the substance or the effect of them; for otherwise witnesses, and not the court or a jury, would be made the judges of what was a libel.

The Chief Justice seems to have had a right apprehension of the law, but their Lordships are by no means satisfied that he has not misapplied it. In this case such secondary evidence was admissible as could be obtained from the recollection of the witnesses who heard the letter read. They were bound to give the words, as far as they could recollect them, and then the inquiry would be, whether their recollection and accuracy could be trusted, and whether the words they recollected could be relied upon as giving the material words of the libel. Although in the notes of the Chief Justice, when taken literally, it would appear that the substance and effect of the letter only was given by the witnesses, yet it seems to their Lordships that in fact the witnesses must have been giving, or intended to give, the material words of the letter as they recollected them.

The evidence of the principal witness, Joseph Metzger, as reported by the learned Chief Justice thus appears upon his notes. “ The substance of the part of the letter which I read out I recollect, it was to this effect ”; undoubtedly these words, if taken alone, would import that the witness was giving merely the effect of the letter; but their Lordships cannot think that that is what the witness was really doing; they consider that what he was really attempting to do was to give the words as far as he recollected them, and this view of the evidence is borne out by the mode in which the note of the learned Chief Justice is subsequently taken. For the note goes on: “ I was to tell Gilpin his case was not a case for a lawyer, and that he (the major) was detained at Government House and could ‘ not come down that day. ’ ” Then the note goes on “ The letter said ”; which seems to imply



the words set out in the Plaintiff's affidavit were not so admitted by the affidavit of the Defendant as to render them evidence of the contents of the destroyed writing. The affidavit was made in support of an application for the production of the original document. It states that a letter had been written, and that it was to the effect given in the affidavit or to the like effect. The object being not to verify the words of the letter, but to obtain its production, the answer given by the Defendant in his affidavit was not directed to the contents of the letter, but simply stated in reply to the application for its production, that the letter referred to was lost. Their Lordships therefore think that the affidavit, although admissible to show that some letter had been written, and, it may be, as some corroborative evidence of the contents, is by no means of that conclusive character that the learned Judge ought to have adopted the words in the Plaintiff's affidavit as the true and complete words of the libel.

Such being the opinion of their Lordships it is plain that in their view the judgment upon the pleadings and evidence as they stand is correct.

They are now brought to consider the question, which was a great deal discussed at this bar, of the amendment of the declaration, that is, whether the learned Chief Justice ought not to have allowed the Plaintiff to amend it so as to make it correspond with the evidence of the contents of the letters which was given by the witnesses at the trial.

Their Lordships certainly think that, the Respondent having himself destroyed the letter, an amendment ought to have been allowed, provided that the application for it had been made at the right time, and that, if made, proper conditions had been imposed. The Appellant according to the proper rule of practice ought, in their Lordships' opinion, to have applied for the amendment at the end of his case. At the end of his case it must have been apparent that there was a variance between the evidence of the witnesses, and the statement of the libel in the declaration, and then, before the Judge had pronounced his decision or had begun to consider his decision, was the proper time for the Appellant to have applied to him for an amendment of the declaration. That, however, the Appellant did not do, but took his chance of a decision on the materials which were then before the Judge. However, when the Judge, after having taken time to consider, was delivering his judgment and giving his reasons for it, the Appellant, then perceiving that the judgment was to be against him, applied, for the first time, to the learned Judge to make the amendment. Their Lordships do not say that it was too late for the learned Judge to have exercised the power of amendment if he had thought fit to do so; but it is a matter entirely within the discretion of the Judge at the trial whether at so late a period he will make the amendment or not, and the Chief Justice on this occasion declined to make it, but offered the Appellant the choice of a nonsuit. Their Lordships think that the Appellant was ill-advised in not accepting that nonsuit.

The question really comes to this, whether this tribunal should now interfere with the discretion so exercised by the learned Judge in refusing to make the amendment. Their Lordships would be at all times most reluctant to interfere with the discretion of the learned Judge, in cases of this kind, when he has exercised it upon a full apprehension of all the circumstances before him; but there is a circumstance in this case which induces them to think that they may properly use on this occasion the power which they undoubtedly possess of directing the allowance of an amendment to be made, at this last moment. Their Lordships are disposed to give the Appellant the opportunity of amending, on terms to be presently stated, on the ground they think the learned Judge was in error in shutting out altogether the

evidence of three witnesses who prove the contents of the destroyed letter, and in relying only upon the witness Gilpin. They think that his having shut out the evidence of those three witnesses from his consideration may have influenced his own mind in the exercise of the discretion which he possessed with regard to the amendment, and, probably, if the learned Chief Justice had taken the same view of that evidence which they have done, he might himself have exercised his power in a different way.

Their Lordships, on the whole, are disposed to give the Appellant the opportunity of again trying the case. It is one in which he complains of a serious injury, and they think, under all the circumstances, he may have the opportunity of trying it if he thinks fit to do so on the only terms on which it can be granted. Those terms are, broadly, the payment of all the costs which have been incurred.

Their Lordships, therefore, will advise Her Majesty to direct that the order of the Supreme Court be varied, and that an order be made for a new trial, which leave to the Appellant to amend his declaration as he shall think fit, on the terms of the Defendant being allowed to plead *de novo*, and of the Appellant paying the costs of the trial and all subsequent costs already incurred in the Court below.

With regard to the costs of the Appeal their Lordships think that they also must be borne by the Appellant. What they propose to advise is an indulgence to him, for he did not apply to amend the pleadings at the proper time, and he refused a nonsuit when he might have had it. The subsequent costs their Lordships think are mainly attributable to what they must deem to be errors on the part of the Appellant in these respects.

Their Lordships, as I have said, will humbly advise Her Majesty to the above effect, but they desire to intimate to the parties that the case appears to be one in which they might do well to agree to a *stet processus*. They cannot judicially advise that course, but they throw it out for the consideration of the parties. The effect of a *stet processus* would be that each party would pay his own costs, including the costs of the Appeal; and having made this suggestion their Lordships will delay their report to Her Majesty to give the parties an opportunity of considering it.

MONTAIGNAC
 SHITTA
 AND
 DEFENDANT
 PLAINTIFF

[ON APPEAL FROM THE SUPREME COURT OF LAGOS]

(1890) 15 App.Cas. 357

1890 July 15, 17

Lords Watson and Herschell, Sir Barnes Peacock,
 Sir Richard Couch

Principal and Agent—Authority of agent to borrow—Liability of principal where agent exceeds his authority

Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business:—

Held: that the lender was not bound to inquire whether in the particular case the emergency had arisen or not; but that he was entitled to recover from the principal if he lent to the agent *bona fide* and without notice that the agent was exceeding his mandate.

APPEAL from an order of the Supreme Court (May 25, 1889) affirming an order of the Divisional Court (March 26 and April 30, 1888).

The action was brought by the respondent against the appellant, as chief agent for Cyprien Fabre & Co., to recover £7,200, of which £6,000 was principal, lent by the respondent to one Del Grande as agent of that firm, and £1,200 for interest thereon.

The question in the appeal was whether Del Grande had authority to borrow money on the firm's account upon the terms and rates of interest agreed upon. Finlay, Q.C., and H. Tindal Atkinson, for the appellant, contended that the firm which he represented was not liable. The respondent did not lend the money claimed to Del Grande in the ordinary course of mercantile business. Further, he lent it under such circumstances that he ought reasonably to have known or suspected that Del Grande was not borrowing on behalf of Cyprien F. Fabre & Co. Even if authority to borrow under the circumstances were established, still it did not extend to authorise the terms alleged or the rate of interest agreed upon. (Reference was made to *Sinclair, Moorhead & Co. v. Wallace & Co.* (7th Court of Sessional, 4th Series, p. 874 and *Hawtayne v. Bourne* (7 M. & W. 595).

Jeune, Q.C., and *Patrick Evans*, for the respondent, contended that Del Grande was duly authorised to borrow, and that his contract bound the firm. No fraud or collusion was proved; and in the absence of fraud it was immaterial whether Del Grande acted honestly by his principal or what rate of interest he contracted to pay. The respondent had no notice that Del Grande was acting improperly or was exceeding his instructions. He was not bound to inquire whether circumstances had arisen to render the transaction prudent in the interests of Del Grande's principals. The agent had authority to decide as to that; and if the transaction was not justified by the circumstances, he must account to his principal for his acts.

Finlay, Q.C., replied.

The judgment of their Lordships was delivered by LORD HERSCHELL: This is an appeal from the Supreme Court of the colony of Lagos, the sole question raised being whether the respondent can enforce as against the appellants a loan which he made through an agent purporting to be acting on their behalf.

On the 6th of November, 1878, the appellants, Cyprien Fabre & Co., gave a power of attorney to Mr. Settimio Carrena, who was then residing at Lagos, to manage and administer in the name of the house of Cyprien Fabre & Co. all the business of the house in the establishments which it possessed on the West Coast of Africa between the Cape St. Paul and the mouth of the River Benin. It is not necessary to read the other terms of the power. Accordingly, on the 4th of June, 1879, Settimio Carrena transferred all the powers given by Cyprien Fabre & Co. to Giuseppe del Grande in the same manner as if the power had been originally given to him direct. Under that authority Del Grande for some years acted as agent for the house of Cyprien Fabre & Co. in the colony of Lagos. Their business consisted in the working of certain factories, and also in the import and export of produce. The entire management of the business carried on appears to have rested

with Del Grande. It is not disputed that the power to manage and administer the business conferred some authority to raise money, inasmuch as the raising of money was necessary for the proper carrying on of the business affairs which were to be administered by the agent. Their Lordships think it cannot be doubted upon the evidence that the agent had authority to raise the moneys that were necessary for the purpose of the business, and to employ for that purpose all ordinary means.

It is contended on the part of the appellants that the power to borrow was restricted to the borrowing by certain means which have been suggested. It is admitted that he could borrow or raise money by selling drafts to persons desirous of remitting to Europe. It is clear that this was not the limit of his borrowing power according to the actual practice which prevailed, inasmuch as he borrowed the money needed from time to time from another merchant or merchants, repaying it either by cash or by handing over to them produce to the requisite amount. As far as appears in those mutual borrowing transactions which seem to have taken place from time to time between the merchants, the loan was made without requiring the payment of any interest. The appellants contend that, conceding all this, the transaction which took place between the respondent and Del Grande was so far out of the ordinary course of business at Lagos that the loan made by the respondent to Del Grande cannot properly be charged against his principals. It appears that Del Grande communicated to the respondent, who is a native merchant and apparently to some extent a financier, the fact that he would be wanting some £6,000 for the purpose of his factories. The respondent does not appear to have thoroughly understood the English language, or to have been able to read it. The £6,000, according to the evidence of the respondent, was not all to be lent in the first instance; but he was told that it would be required from time to time; and accordingly on the 22nd of January, 1884, and at various dates down to the 14th of October in that year, the respondent made in all eight payments to Del Grande, in sums either of £1,000 or £500, amounting in all by the 14th October to £4,500. On the 20th of July, 1885, a further sum of £300 appears to have been advanced. On all those prior occasions, as well as on this occasion of the 20th of July, 1885, a document forming an acknowledgment of the receipt of various sums advanced was given by Del Grande to the respondent. These documents were in the terms "good" for the particular amount, £500 or £1,000, as the case might be, and bore the name of Cyprien Fabre & Co., being signed by Del Grande as agent for the firm. On the last occasion to which allusion has been made, the 20th of July, 1885, although £300 only was paid in cash, a "bon" was given for the sum of £1,500 the explanation being that down to that time, although the advances had commenced in January, 1884, no interest had been paid, and £1,200 of that sum of £1,500 was advanced for the purpose of enabling the liability for interest then accrued to be discharged, and consequently the transaction was dealt with as if there had been a loan, which it is said there practically was, of £1,500 on that date, making in all £6,000.

On the 1st of August, 1887, a document was signed by the respondent which appears to have been prepared by Del Grande. It stated that it had been agreed as follows: "Mr. Shitta gives to Mr. Del Grande, agent of C. F. Fabre & Co., the sum of six thousand pounds sterling (£6,000) with interest. Mr. Del Grande obliges himself to pay to Mr. Shitta the rent of £1,800 per annum (one thousand eight hundred pounds) sterling." Mr. Del Grande must liquidate this part, and render £6,000, followed by these words: "I, the undersigned, declare to have received of Mr. Del Grande the

rent of £1,800 per annum from the 16th of January, 1884, until this day, 31st July, 1887. Lagos, 31st July, 1887." It would at first sight appear as though £1,800 per annum had been paid year by year as from January 1884, down to July, 1887, and if an arrangement had been in fact come to that £1,800 per annum should be paid whatever the amount advanced from time to time, and however far it might fall short at any time of £6,000, the case would have worn a very different aspect. But it appears on the evidence that this document prepared by Del Grande and submitted to the respondent for his signature, if it is to be understood as representing that that sum had been paid annually during that term of years, did not represent the fact. Down apparently to the date of this agreement, Mr. Shitta, the respondent, had received no interest except the £1,200 which he received out of the £1,500 advanced in July, 1885. He had received an assurance that some payments which were about to be made by a Mr. Barth for sums approaching £2,000 were to be treated as being interest on this loan, and that he was, when he had received those payments, to treat all the interest down to the 30th of July, 1887, as wiped off, and the transaction standing between them as a loan then due of £6,000, which was to bear interest at the rate of £1,800 per annum. It should be observed that the total amount received or treated as received, in respect of interest, from January, 1884, down to the 31st of July, 1887, does not exceed, but is rather less than, interest at the rate of £1,800 a year on £6,000, if applied to the various sums from time to time received by Del Grande and paid by the respondent.

The question to be considered is whether the transaction to which allusion has been made was a borrowing so far outside the ordinary course of dealing in the colony of Lagos, by a firm who were under the necessity of raising funds, as that it ought to be treated and ought to have been understood by a lender to be out of the course of business. It may be that if fuller inquiry and investigation had been made than was the case, it would have appeared that this was so. On the other hand, fuller investigation might have shewn that the condition of the colony of Lagos, the facilities for raising money, the interest which had to be paid where money was needed and parties were not wishful to remit bills to Europe, would have rendered a resort to these means of raising money not unusual or extraordinary. But in the absence of any such investigation, beyond that which is afforded by the evidence, their Lordships do not feel that it is possible for them to reverse the conclusion of fact at which both Courts below have arrived, for in truth the only question arising upon this appeal is one of fact. If in the absence of the means of raising money needed for a business by the sale of bills, or by obtaining accommodation from some other merchant with whom the house had transactions, an agent who had to raise money for his firm must have had recourse to one of these native financiers or money-lenders, then in the opinion of their Lordships the power which this agent possessed under his mandate from his principals would authorise his borrowing from such a source under such circumstances; and if the occasion might have arisen on which his borrowing powers would have been properly interpreted as comprising the recourse to such means as these, then their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not; but if he, in good faith and without any notice of the fact that the agent was not obeying or intending to obey the mandate of his employers, advanced money to him, the loan would be one by which having regard to their authority to their agent, they would be bound, and he would be entitled to recover.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment appealed from be upheld and the appeal dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellant: *Murray, Hutchins, & Stirling*; Solicitor for respondent: *H. Foster Smith*.

CALLENDER, SYKES & CO.

v.

THE COLONIAL SECRETARY OF LAGOS

J. P. L. DAVIES AND Z. A. WILLIAMS

v.

J. P. L. DAVIES

[ON APPEAL FROM THE SUPREME COURT OF LAGOS]

[1891] A.C. 460; L.J.C.P. 33; 65 L.T. 297

1891 July 11

Lords Watson, Hobhouse and Morris,
Sir Richard Couch, Mr. Shand

Bankruptcy—Property available for distribution amongst creditors—Bankruptcy Act 1869.

1. 1869 Act applies to all Her Majesty's dominions and an adjudication under that Act operates to vest in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, subject to any requirement of the local law as to the conditions necessary to effect a transfer of real estate there situate.

2. The policy of the legislature is clearly shown by reference to other statutes. By the 1849 Act, s. 142, all the lands of a bankrupt "in England, Scotland, Ireland or in any of the Dominions, Plantations or Colonies belonging to Her Majesty are to vest in his assignees." By the 1883 Act, s. 168, the property which is passed to the trustees includes "land whether situate in England or elsewhere." Scottish 1856 Act, s. 102, vests in the trustee bankrupt's "real estate situate in England, Ireland or in any of Her Majesty's dominions." Irish 1857 Act, s. 268, vests in bankrupt's assignees all his land "wheresoever situate." No reason can be assigned why the 1869 Act should be governed by a different policy from that which was directly expressed in the Scots and Irish Acts and in the English Acts immediately preceding and immediately succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it and there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony.

LORD HOBHOUSE. These suits are governed by the same legal principles, and the person interested in resisting the claim of the Appellants is the same in both cases, viz., the Respondent J. P. L. Davies. The appeals have therefore been consolidated, and Davies has been added as a Respondent in the suit against the Colonial Secretary of Lagos, to which he was not originally a party.

The main question is, whether land belonging to Davies, and situated in the Colony of Lagos, passed to James Halliday, who, on the 8th January 1877, was appointed trustee of Davies's property in bankruptcy. Davies was adjudicated a bankrupt on the 9th August 1876. On the 12th January 1877 the County Court of Lancashire made an order under Section 74 of the

Bankruptcy Act of 1869, for the purpose of seeking the aid of the Court of Civil and Criminal Justice of the Settlement of Lagos in the administration of the bankrupt's estate. In pursuance of that order inquiries were made in the Supreme Court of the Gold Coast Colony, to which Lagos then belonged, which resulted in this discovery of property which the bankrupt had concealed. So far the facts are common to both suits.

It will now be convenient to follow the history of the property called the Broad Street property, which is subject of the suit brought by Davies against the appellant Williams. That property was purchased by Davies on the 31st of January 1871. On the 30th of October 1878, Davies and his wife made an attempt to include it among certain properties settled on his wife, himself, and their children in the year 1864, by inserting it in a schedule of trust property appended to an appointment of new trustees of the settlement. That attempt has been treated in the Court below by Mr. Justice Hutchinson, as fraudulent, and intended to cheat Davies's creditors. But it led to an assertion of title by the trustees, or by Davies in their names, and to litigation in the Supreme Court of the Gold Coast Colony. The dispute was for the time ended by an order dated the 4th of June 1880, directing the deputy registrar to make delivery of the property to Halliday.

This order was made by Mr. Justice Macleod, on the application of Halliday, and after hearing Davies and the trustees, under the impression that the Supreme Court possessed a bankruptcy jurisdiction, and was bound to act as auxiliary to the English Court. On the 22nd of April 1881, the Supreme Court decided that no such jurisdiction existed. But Halliday had been placed in possession, and no attempt was made by the trustees to disturb him.

On the 11th of November 1881, Halliday agreed to sell the property to Williams for the sum of £400 then paid by him. Immediate possession was given to Williams, who retained it up to the commencement of the action against him which was brought in the Supreme Court of the Colony of Lagos on the 26th of January 1889. Davies had procured his discharge in the year 1884. In the year 1886 Lagos was made a separate colony, with a Supreme Court of its own.

The writ of summons was headed, "J. P. L. Davies, agent; trustees of the marriage settlement of Sarah Forbes Bonella Davies, deceased." What exactly was intended by this ambiguous heading was not made clear; but the Court, finding that in point of fact the trustees were not taking any action, caused the heading to be amended by striking out all reference to them. The suit therefore remained, and is, that of Davies alone.

Mr. Justice Smalman Smith, who heard the case in the first instance, gave judgment for the defendant Williams, apparently against his own opinion, and because he did not think it right to decide against the opinion of Mr. Justice Macleod. Davies appealed to the Full Court, consisting of three judges, of whom Mr. Justice Smalman Smith was one; and that Court was unanimous in reversing the judgment below, and entered judgment for Davies. It is against that judgment that the present appeal of Williams is brought.

The reasons for the judgment are very clearly stated by the three learned judges. First they hold, in accordance with the opinion expressed by the Supreme Court of the Gold Coast Colony in 1881, and on grounds which appear to their Lordships to be quite sound, that that Court had no bankruptcy jurisdiction in Lagos. That being so, it could not be auxiliary to the English Court under the Act of 1869. That leads them to the inference that the order of Mr. Justice Macleod was a mere nullity. Their Lordships

do not stop to discuss the precise effect of an order made by a Court having jurisdiction to deal with the property in a suit properly constituted, and having before it the parties interested in the dispute, but purporting to act in the exercise of a jurisdiction which it did not possess. That discussion is unnecessary, because the Court did not treat the nullity of Mr. Justice Macleod's order as conclusive against Williams, but only as leaving open the fundamental question whether the Act of 1869, under which the bankruptcy took place, did or did not confer title on Halliday.

Section 4 of that Act defines property in very general terms, "land, and every description of property whether real or personal." This is the subject matter which by section 14 is divisible among the bankrupt's creditors; by Section 15 the divisible property is again described as "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance"; by Section 17 it is made to vest in the Registrar first, and when a trustee is appointed, in the trustee; by Section 19 the bankrupt is to aid in its realization to the utmost of his power; and by Section 48, if he makes default in giving it up, his discharge may be withheld. There are other Sections in the Act, such as 73, 74, and 76, which show that it is to have operation in the whole of the British Empire. But the sections relating to property do not in express terms specify property in the Colonies, and those which expressly extend beyond England do not in express terms specify land.

The Supreme Court lay down the principle that an Imperial Act does not apply to a Colony unless it be expressly so stated or necessarily implied; they point out that there is no case deciding that land in a Colony passes under Section 17; and they dwell on the inconvenience which would arise from conflicts of law if an English Statute were to transfer land beyond the limits of the United Kingdom. On these grounds they hold that under the word "property" land in Lagos does not pass.

Upon this reasoning their Lordships first have to remark that there is no question here of any conflict between English and foreign law. Lagos was not in the year 1869, and is not, a foreign country. How far the Imperial Parliament should pass laws framed to operate directly in the Colonies, is a question of policy, more or less delicate according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in Colonial Courts of Law. It is true that the laws of every country must prevail with respect to the land situated there. If the laws of a Colony are such as would not admit of a transfer of land by mere vesting order or mere appointment of a trustee, questions may arise which must be settled according to the circumstances of each case. Such questions are specially likely to arise in those Colonies to which the Imperial Legislature has delegated the power of making laws for themselves, and in which laws have been made with reference to bankruptcy. The contrivance of statutory transfer has grown out of the older plans of conveyance by or on behalf of the bankrupt; and probably none of the Bankruptcy Acts would be held to pass land more completely than the bankrupt himself could pass it by conveyance. But the general law of Lagos is English law, and it does not appear that in 1877 there had been, or indeed that there ever has been, any local legislation which would prevent land being transferred in Lagos as freely as it may be in England. The only question that has been argued in this case with respect to transfer of title is the question whether the Act of 1869 is calculated to transfer title to Colonial land; and with that question conflicts between British and foreign law have nothing to do. Nor do the

learned Judges take notice that, if there is any difficulty in effecting a transfer of land not in England, it must arise and be dealt with under those Bankruptcy Acts which indisputably purport to transfer land elsewhere.

If a consideration of the scope and object of a Statute leads to the conclusion that the Legislature intended to affect a Colony, and the words used are calculated to have that effect, they should be so construed. It has been pointed out above that some sections of the Statute clearly bind the Colonies in words which do not necessarily, but which may, apply to land. But the policy of the Legislature is clearly shown by reference to other Statutes. By the Bankruptcy Act of 1849 (12 & 13 Vict., c. 106, sec. 142) all lands of the bankrupt "in England, Scotland, Ireland, or in any of the Dominions, Plantations, or Colonies belonging to Her Majesty, are to vest in his assignees." By the Bankruptcy Act of 1883 (46 & 47 Vict., c. 52, sec. 168) the property which is passed to the trustee includes "land, whether situate in England or elsewhere." The Scotch Act of Bankruptcy passed in 1856 (19 & 20 Vict., c. 72, sec. 102) vests in the trustee the bankrupt's "real estate situate in England, Ireland, or in any of Her Majesty's Dominions." The Irish Act of Bankruptcy passed in 1857 (20 & 21 Vict., c. 60, sec. 268), vests in the bankrupt's assignees all his land "wheresoever situate." No reason can be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scottish and Irish Acts, and in the English Acts immediately preceding and immediately succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it; and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a Colony.

It is true that no judicial decision to this effect can be found. But it has been the prevailing opinion among lawyers. This may be illustrated by a dictum of Sir George Jessel in the case of [*Ex parte Rogers* (16 Ch.D. 666)]. It was pointed out that the law of Ceylon required registration to pass land, and the learned Judge observed, speaking of the Act of 1869, "It only passes immovable property in the Colonies according to the law of the Colonies." That is not a decision, but it shows the impression of a very learned and accurate lawyer that the Act of 1869 did affect land in the Colonies. The same opinion is given in Mr. Justice Vaughan Williams's Treatise on Bankruptcy. In the last edition (5th), p. 181, it is said, "The Act of 1869 contained no express provision as to [the locality of] real property, but did not seem to be intended to alter the law." No opinion to the contrary has been brought to their Lordships' attention except the decision under appeal.

Their Lordships therefore hold that on the appointment of Halliday in January 1877 the Broad Street property vested in him, and that Davies had no interest in it subsequent to the adjudication in August 1876. His action should have been dismissed with costs. A decree to that effect should now be made in lieu of the decrees of the Courts below which should be discharged, and Davies should also be ordered to pay the costs of the appeal to the Full Court.

The other appeal (*Callender Sykes & Co. v. The Colonial Secretary of Lagos and Davies*) relates to a property called the Oil Mills, which was one of those which Davies did not disclose to his trustee, and which he endeavoured to include in his post-nuptial settlement. The whole of the disclosed properties were purchased in the year 1877 by Messrs. Sykes and Mather, partners in the firm of Callender Sykes & Co., from the trustee

Halliday. Afterwards came the inquiry by Mr. Justice Macleod, who held that the Oil Mills property was vested in Davies at the date of his bankruptcy, and that his claim to have it included in the settlement was a fraudulent claim. On the 19th April 1880 Mr. Justice Macleod made an order for delivery of this property among others to Halliday, who was placed in possession on the 28th June 1880. The trustees of the settlement were represented throughout the whole of these proceedings. They have never made any attempt to disturb the possession given under Mr. Justice Macleod's order, notwithstanding the judgment of the Supreme Court of the Gold Coast Colony in April 1881.

On the 3rd February 1881 Messrs. Sykes and Mather agreed to purchase the Oil Mills property of Halliday, and paid the purchase money. They at once entered into possession, and their title has since been confirmed by a formal conveyance. They held possession until the year 1889, when the property was wanted by the Government of Lagos, who took it under the provisions of the Public Lands Ordinance 1876, which was passed by the Gold Coast Colony when Lagos formed part of it. The value of the property was ascertained at the sum of £1,007 17s. 4d.

Messrs. Callender Sykes & Co. then brought an action for that purchase money in the Supreme Court of Lagos against the Government, the Colonial Secretary being the formal Defendant. It does not appear that Davies was made a party to the action, but he appeared in Court and cross-examined the Plaintiffs' witnesses. Neither does it appear what lines of objection were taken by Davies or by the Colonial Secretary; only that the latter appeared by the Queen's Advocate, who cross-examined the Plaintiffs' witnesses. Their Lordships must take it, on the materials before them, that the Colonial Secretary as Defendant on the record, and Davies in some less formal way, opposed the claim of the Plaintiffs to have the purchase money paid to them.

Mr. Justice Smalman Smith, who tried the case, rejected the claim of the Plaintiffs because, he said, it was founded on the order of Mr. Justice Macleod which was a nullity. On appeal, all parties agreed that the case must be governed by the decision in *Davies v. Williams*. It must now be governed by the decision of Her Majesty in Council. Davies's interest in the Oil Mills property passed out of him on the adjudication, and vested in Halliday on his appointment. All Halliday's interest passed to the Appellants Callender Sykes & Co. If any conflicting interest could exist, it would be that of the trustees of the settlement; and the existence of such an interest is suggested by Davies. But the trustees themselves have not come forward to assert any interest. They have never disputed the possession given to Halliday under the order of the 4th June 1880, irregular though it was. The Appellants had been in undisturbed possession for nine years when the Government took the property from them. As between them and the Crown their title is clearly established. And it would be a serious hardship on them if the claims made by or on behalf of the trustees in the year 1880 were now to be considered as forming a substantial cloud upon their title so as to call for the further retention of the fund.

The decrees of the lower Courts should be discharged, and in lieu thereof of a decree should be made declaring that the Appellants Callender Sykes & Co. were entitled to the Oil Mills property when taken by the Government of Lagos, and to the purchase money thereof, and ordering payment accordingly.

A considerable time after the argument was closed, the Colonial Secretary desired leave to appear by Counsel at their Lordships' bar for the

purpose of opposing any such alteration of the decrees below as might have the effect of charging him with the costs of the litigation. He has been allowed to do so, and he has contended, with respect to the litigation in the Colony, that the Supreme Court has no jurisdiction to give such costs. It would certainly be a matter for regret if it were found that a person in quiet possession of land could be expropriated by the State, and could not get the price of his land except by taking legal proceedings and paying the costs. Such miscarriages of justice have happened here in earlier times by the oversight of the Legislature, but when notice was attracted to them the law was put on a footing which effectually prevented their recurrence. Their Lordships are glad to find that the law of Lagos is not such as to prevent justice being done in this respect. By the Public Lands Ordinance, 1876, Section VII (1), the Supreme Court has complete jurisdiction over the matters in dispute. By Section III of the Petitions of Right Ordinance, 1877, all claims against the Government, being of the same nature as claims preferred against the Crown In England by Petition of Right, may, with the consent of the Governor, be preferred in the Supreme Court by a suit instituted against the proper officer. And by Section VIII of the same Ordinance costs may be awarded in suits against the Government in the same manner as in suits between private parties. It was argued for the Colonial Secretary that the power of giving cost does not extend to proceedings which are not suits framed as required by the ordinary rules of Civil Procedure. The record is somewhat meagre as regards these proceedings, but it contains enough to enable their Lordships to dispose of this argument. The various documents are entitled as an ordinary litigation between Plaintiff and Defendant, the Colonial Secretary being the Defendant; the proceeding is called a suit, is tried as a suit, and is brought to appeal as a suit. Therefore in whatever form it may have been commenced, whether it was regular or irregular, their Lordships have no hesitation in now holding it to be a suit against the Government for the purpose of recovering money due to the Plaintiffs.

The Colonial Secretary should be charged with costs of the action and appeal in the Colony. But, considering the part played by Davies, their Lordships think that he also should be charged jointly with the Colonial Secretary.

The Respondents must pay the costs of these Appeals.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

JOHNSON APPELLANT
 AND
 VOIGHT & CO. RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF LAGOS]

1896 May 12

Lords Macnaghten, Morris and James of Hereford, Sir Richard Couch

Civil Appeal—Conditions of appeal, Order LIII Supreme Court Rules (Schedule to Ordinance No. 4 of 1876).

Assuming that the Full Court may under special circumstances, be justified in making the conditions of appeal more onerous than those prescribed where

the application is made to the Court of first instance, it is obvious that to require an appellant as a condition of admitting his appeal to give security for compliance with the order proposed to be challenged by the appeal would in many cases render an appeal impossible.

LORD JAMES OF HEREFORD. The Appellant brought an action for an account against the Respondents, who had been his agents. He was admitted to sue *in formâ pauperis*, and an account was taken. In the result the sum of £2,852 4s. 6d. was found due from the Appellant, and he was ordered to pay that sum to the Respondents.

The Appellant who is desirous of appealing complains that although he is entitled as of right to appeal to the full Court, terms have been imposed upon him which render that right nugatory.

By the Supreme Court ordinance (No. 4 of 1876) for the Colony of Lagos an appeal lies as of right from all final judgments where the amount in dispute is above £50. The conditions on which appeals are to be admitted are set forth in Order LIII. of the Orders scheduled to the ordinance. Application for leave to appeal must be made within three months to the Court of first instance or within six months to the full Court. If the application is made to the Court of first instance the appeal is to be admitted on the Appellant paying a sum sufficient to cover the costs of making up the record and giving security for payment of the costs of the appeal. At the same time the Court is to say whether execution is to be stayed in the meantime or not, and the party in whose favour the Order staying or allowing execution is made has to give security. But the Order as to appeal is not dependent on compliance with the terms of the Order as to execution. The two Orders are in substance separate and distinct.

The Court of first instance has no power to depart from or vary the conditions prescribed by Order LIII. The full Court is in a different position. It has a discretion. It may give leave to appeal on such terms as it thinks just. It may dispense with security whether execution is stayed or not.

In the present instance the full Court has made leave to appeal dependent on security being given to the satisfaction of the Court for payment of the sum awarded by the Judgment which the Appellant desires to impeach. And it would appear from "the reasons" signed by the Chief Justice that this condition has been imposed in view of the merits or supposed merits of the case, which were not properly before the full Court and ought not, in their Lordships' opinion, to have been taken into consideration.

Assuming that the full Court may, under special circumstances, be justified in making the conditions of appeal more onerous than those prescribed where the application is made to the Court of first instance, it is obvious that to require an Appellant as a condition of admitting his appeal to give security for compliance with the Order proposed to be challenged by the appeal would in many cases render an appeal impossible. It must do so in all cases where the litigant desirous of exercising his right of appeal is a pauper.

Their Lordships are therefore of opinion that the Order of which the Appellant complains was not a proper exercise of the discretion committed to the full Court by Order LIII.

In the result, therefore, their Lordships have arrived at the conclusion that justice will be done if the Appellant is allowed to prosecute his appeal before the Court of Appeal in the Colony upon the terms, not of giving security for the whole amount of the debt adjudged against him, but upon giving security only for the amount of the costs of that appeal. It is impossible for their Lordships to say what that amount should be, but the

Order of the Supreme Court, seems to be an index as to what the fair sum would be. The Order mentions £20 as the probable costs of the appeal, and £10 as the costs of making up and transmission of the record of Appeal; and it seems to their Lordships that justice will be done if security be given for those two sums, making altogether £30. The Order of the full Court will therefore be varied so that the sum of £30 only should be given as security for costs.

Their Lordships will therefore humbly recommend Her Majesty to vary the Order of the Court below to that extent, and they make no order as to the costs of this Appeal.

Re RENNER

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

Ren. 114

1896 Dec. 9

Lords Watson, Hobhouse and Morris,
Sir Richard Couch

LORD WATSON. The appellant was called to the English Bar by the Honourable Society of Lincoln's Inn in April, 1883; and thereafter, in the year 1884, he was duly admitted as a barrister and solicitor of and enrolled as a practitioner before the Supreme Court of the Gold Coast Colony. The circumstances which led to the proceedings in which this appeal is taken occurred in or about the months of September, 1886, and February, 1887, and may be shortly referred to here.

During the first of these periods, the appellant was employed by one Joseph Wilson Sackey to prepare, on his behalf as mortgagor, a mortgage of a dwelling-house and parcel of land in Elmina belonging to him, in favour of a native chief, Eccra Kwaku, as mortgagee. Special instructions were given by Sackey that the consideration to be inserted in the mortgage deed was to be the sum of £250, advanced to him by the mortgagee on or before the date of the deed and also that the deed was to be antedated, the date to be inserted being the 26th September, 1884. The appellant prepared the deed in accordance with those instructions, and sent it to his client; but he was not present at, and took no part in its execution, and its delivery to the mortgagee. There is no evidence in the proceedings before us, and forming the record in the Court below, as to the precise date upon which the mortgage deed prepared by the appellant was delivered by him to Sackey; but it is shown that its delivery and its execution must both have been subsequent to the 20th September, 1886.

It now appears that, at a time when instructions were given for the preparation of the mortgage, one John F. Brooks had obtained a judgment against Sackey, the mortgagor, for the sum of £921 3s., payable by instalments of £250 per quarter, the first instalment being payable on the 20th December, 1886. The judgment creditor became entitled to recover that debt by attachment and sale of the debtor's property, real or personal.

Mr. Brooks did not take any steps to levy his debt from the property included in the mortgage to Eccra Kwaku until January 1887. After that fact came to his knowledge Eccra Kwaku, on the 29th January, 1887, instituted an interpleader suit, with the object of having the property mortgaged to him released from the attachment; and, in that proceeding, the appellant acted as his solicitor. The case went to trial before Chief

Justice Macteed, when the mortgagee gave evidence in his own favour, being examined by the appellant as his counsel and solicitor. In answer to questions put to him by the appellant, he stated the consideration which had been given by him for the mortgage, and also stated, "I have the mortgage, and produce it, marked A., dated the 26th September, 1884." As might have been expected, after production of the document, which bore the date assigned to it, no questions were put to the witness, by counsel for Mr. Brooks, as to the actual date of its execution; but the witness, was fully cross-examined as to the consideration given for the deed. The Learned Judge, on considering the evidence, released the mortgaged property.

Ecra Kwaku, the mortgagee, died in 1890; and nothing was heard of these transactions, or of the appellant's connection with them until upwards of seven years after their occurrence. In April, 1894, Kwasi Mensah, administrator of the deceased, brought an action against F. H. Kwaku, one of the sons of the deceased, for certain sums alleged to be due by him to the estate, in which the appellant acted as counsel and solicitor for the plaintiff. On the 27th July, 1894, Mr. Roberts, who was acting as counsel and solicitor for the defendant, moved for a rule nisi calling upon the appellant to show cause why he should not be suspended for a specific period from practising within the jurisdiction of the Court, temporarily, pending a reference to and the confirmation or disallowance of such suspension by the Full Court; or why, in the alternative, the matters charged against him should not be referred to the Full Court, in order that his name may be struck off the roll of the Court. The suit was, at that time, in dependence before Mr. Justice Redwar; and the application was made in terms of Section 79 of the Supreme Court Ordinance, 1876, which gave the learned Judge the power of temporary suspension, subject to confirmation or disallowance by the Full Court, with the alternative of remitting the whole matter to the consideration and determination of the Full Bench. The motion of Mr. Roberts was supported by affidavits, which were met by counter-affidavits, and a good deal of other procedure took place, which their Lordships think it unnecessary to notice, because, on the 31st August, 1894, Mr. Justice Redwar, being of opinion that the charges preferred against the appellant were of too grave a character to be dealt with by him, discharged the rule which he had granted, and referred the whole matter to the Full Court.

On the 12th September, 1894, Mr. Roberts appeared before the Full Court of the Colony, consisting of Chief Justice Hutchinson and Mr. Justice Redwar, and at the request of the Court formulated the charges which he had preferred against the appellant. These were:—

(1) "That Renner, about October, 1886, drew a mortgage for J. W. Sackey, and, with intent to defraud, dated it 26th September, 1884; and also, with the same intent, inserted the sum of £250 instead of £150."

(2) "That at the hearing of an interpleader summons at Cape Coast, before MacLeod, C.J., Renner put the mortgage in evidence, and did not inform the Court that the date of it was false, and in the result the Court, on ground that the date 1884 was the true date, gave judgment against the judgment creditor on that summons."

On the same occasion Mr. Roberts explained these charges, and read a number of affidavits which had been produced by himself and by the appellant.

The matter came again before the Full Bench on the 20th September, 1894, when the appellant examined several witnesses and addressed the Court in his own behalf. On the same day, the learned Judges, having considered the affidavits and other evidence, oral and documentary, which had been submitted to them, delivered their judgment in the matter. They held that the first charge was not, and that the second charge was proved; and in respect of the latter finding they ordered the name of the appellant to be struck off the Roll of the Court. With reference to the second charge, the learned Judges, after quoting the evidence given by Eccra Kwaku in the interpleader suit, observed,—

“ The judge believed the statement of Eccra Kwaku and gave judgment in his favour. Mr. Renner at the time this statement was made knew that it was false, because he had himself drawn the deed some time after September, 1886, and it is impossible that he should have forgotten it; and he knew that the statement must of necessity influence the result. If Mr. Renner had informed the Court that the statement made by his client was false, the judge would, as a matter of course, have disbelieved the whole of the man's evidence; and unless the rest of his evidence was corroborated by other testimony, would not have believed that he had lent any money at all to the judgment creditor, and would therefore have disallowed the claim. We are satisfied that Mr. Renner was a party to the deception practised upon the Court.”

Their Lordships cannot avoid noticing the intimate connection which exists between the two charges which were before the Court. The first accuses the appellant of having antedated the mortgage with intent to defraud some one, it is not said who. But it is impossible to peruse the affidavits and other documents laid before the Court by Mr. Roberts, without seeing that the object of the fraud imputed to the appellant was to enable Sackey to defeat the just claims of Brooks, just judgment creditor by creating a fictitious encumbrance upon his real estate, which might otherwise have been taken in execution, and made available for payment of his debt. The judgment debt did not, of itself constitute a charge upon the debtor's real estate; and the mortgage in question, if it represented a real transaction, would have been equally effective to exclude the judgment creditor if it had been dated in October, 1886, seeing that no attachment followed upon the judgment debt until January, 1887. There is no proof that either at the time when the mortgage deed was prepared, or during the dependence of the subsequent interpleader suit, the appellant knew, or had any reason to believe, that the mortgagee had not (as he stated in the evidence given by him before MacLeod, C.J., in February, 1887) advanced the consideration which the deed bears, at or before the date which he was instructed by Mr. Sackey to insert.

Sackey was examined as a witness in the interpleader suit of 1887, when he swore distinctly that the mortgagee had advanced the £250 in September, 1884. It is true, that in the action of 1894, in which these accusations have been made against the appellant, Sackey denied that he had instructed the appellant to insert the sum of £250 in the mortgage, but their Lordships can attach no credit to that statement, which is inconsistent with the terms of his letter to the appellant, dated the 29th September, 1886, as well as with the fact that he accepted the mortgage deed as drawn in conformity with his instructions, and then proceeded to execute and deliver it to Eccra Kwaku, the mortgagee.

Their Lordships also think it necessary to observe that, in the suit of 1894, the evidence taken before Mr. Justice Redwar establishes that, in the year 1884, sums amounting to £150, and bearing interest at fifty per cent., were advanced to Sackey by Eccra Kwaku, the only dispute being whether the moneys so advanced belonged to the deceased chief, or came from his son, the plaintiff in the suit. There must therefore have been ample consideration to support the mortgage; and Brook's claim in the interpleader could not have been legally sustained, whatever might have been the amount recoverable by the mortgagee in redemption suit by the mortgagor or his creditors.

The sting of the second charge, when it is read in connection with first, appears to their Lordships to consist in this, that the appellant, having previously aided Mr. Sackey's scheme to defeat his creditor by the preparation of a fraudulent mortgage, then proceeded to accomplish that scheme by misleading the Court as to the true character of the mortgage, in the interpleader suit. The finding of the Court with respect to the first charge, of which their Lordships entirely approved, in their opinion, completely alters the aspect of the second. In the view which according to that finding the appellant took, and was entitled to take, of the character of the mortgage, the actual date of the deed became of comparatively little importance. The material question was whether it represented a genuine transaction; and, from that point, so far as appears, the appellant had no reason to entertain any doubt. His client Eccra Kwaku was fully examined by the counsel for the judgment creditor as to the consideration given by him for the mortgage; and it does not appear to their Lordships that MacLeod, C.J., would have been justified in refusing to believe his evidence, and that of Sackey, if he had been made aware the mortgage was antedated. If the learned Chief Justice had, upon that ground, decided that no money was advanced by Eccra, his decision would have been contrary to the truth of the case. If he had thought further inquiry necessary, their Lordships are satisfied that it must have resulted in sustaining the mortgage, and rejecting the claim of the judgment creditor. There does not appear to them to be any room for the suggestion that the judgment of MacLeod, C.J., proceeded upon the ground that the date 1884 was the true date of the mortgage, which is a very material part of the second charge.

It is much to be regretted that Mr. Roberts should have thought fit to prefer these serious accusations of fraud which constitute the first, and which if true, would have given an ugly complexion to the second charge without any sufficient ground, and after the lapse of more than seven years from the date of the transactions to which they relate—a circumstance which, in itself, exposed the appellant to great disadvantage in meeting them. Upon the whole matter they are of opinion that both charges have completely failed. They have not been informed what, if any, rule prevails in the Colony in regard to the institution and conduct of such proceedings; but it appears to them that, if the conduct of this case had been with a responsible public officer, such as the Attorney-General for the Colony, the necessity for the present appeal might never have arisen.

Their Lordships in the preceding observations are not to be understood as expressing approval of the system of antedating documents. The practice, which is too common, involves a false assertion, and whilst it is in no case commendable, it is, in many circumstances, highly reprehensible. In the present case they are satisfied that whatever may have been the original intention of Sackey, in directing the mortgage to be antedated, it was not used by him for the purpose of defrauding the judgment creditor.

Their Lordships, in allowing this appeal to be brought, followed the usual course of directing that a copy of the Order should be referred to the learned Judges of the Court below for their observation, each of whom has made a communication on the subject to this Board. The observations of Chief Justice Hutchinson add nothing to the views which were expressed by the Full Court in giving judgment. Mr. Justice Redwar, who, in the absence of his papers, adopted the somewhat singular course of refreshing his memory by a personal interview with Mr. Roberts, the instigator of these proceedings, adds nothing of consequence except a statement affecting the appellant's professional conduct in the year 1893, which it might have been necessary to take into account had the second charge been made out, but which, in the view which their Lordships take of that charge, is immaterial.

Their Lordships will humbly advise Her Majesty to reverse the judgment and sentence appealed from, and to remit the case to the Supreme Court of the Gold Coast Colony, with directions to restore the name of the appellant to the roll of barristers and solicitors entitled to practise before that Court.

HER MAJESTY, having taken the said report into consideration, was pleased by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the recommendations therein contained be punctually observed, obeyed and carried into execution. Whereof the Commander-in-Chief of the Gold Coast Colony for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

WILLIAM KING PLAINTIFF-APPELLANT
 AND
 MANTE FRERES AND ANOTHER . . . DEFENDANTS-RESPONDENTS
 [ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[F.C. 1926-1929] 1

1898 Dec. 9 Lords Hobhouse, Morris and Davey,
 Sir Richard Couch

Master and Servant—Loan obtained by servant from third party by fraud—Liability—Findings of fact.

By fraudulently representing that he was authorised by the agent of his employers' firm, a clerk obtained a loan of £1,000.
Held that the loan having been made to the clerk, the lender could not recover from the firm.

LORD MORRIS. Their Lordships in this case have no difficulty in advising Her Majesty to affirm the judgment of the Supreme Court of the Gold Coast Colony.

The case is really one of fact. It has been ascertained by the Original Court, and by the Court of Appeal, that the fact, or at all events the obvious inference from the facts, was, that there was no loan made to the defendants in this suit, the firm of Mante Brothers. They appear to have several factories; it is not necessary to mention more than two, namely, the one at Kitta, and the one at Lome. There was a clerk at Lome of the name of Lannoy, who appears to have planned to get hold of these thousand

sovereigns, and who carried out his plan in a way which must cause everybody to sympathise with the plaintiff, Mr. King. But sympathy cannot justify making other parties liable if they are not legally liable. Lannoy saw King on the day in question, in September, 1892. He made an untrue representation to King that he had been sent by the man in charge at Popo to borrow this sum of a thousand sovereigns. King at first very prudently objected to lending it to a man of whom he did not know anything, and referred to a man named Jacobson, a native, in whom he appeared to have had every confidence, and who was a clerk at Kitta. King gave the money to his sons; they brought it to Kitta, and the money was given over to Lannoy, the man who had come there to borrow it from King, alleging that he wanted it for the factories at Popo. It happened, apparently by accident, that the agent at Kitta, Bartoli, was present. The money having been handed over to Lannoy, and counted by him, it was given over to Bartoli for the moment, who put it in an iron safe. Bartoli suggested to Lannoy, that he, Lannoy, should give a receipt for it; not that he, Bartoli, who was the agent at Kitta, was to give a receipt for it, which would have been the obvious course if Bartoli imagined that Lannoy was borrowing the money on the part of the firm. Bartoli gave the money over subsequently to Lannoy; the receipt was given by Lannoy to King's sons; Lannoy departed with the money, and was never heard of afterwards.

Even on the assumption (though it is unnecessary to decide the matter) that Bartoli had made himself responsible by holding himself forward as agent of the defendants, entitled as such to pledge their credit, even on the assumption that that was so, the question of fact remains; did Bartoli borrow any money himself at all as representing the defendants, or did he take any further part in the transaction than merely to put the money into the iron safe? It is admitted on the part of the plaintiff that if the loan was to Lannoy, he fraudulently representing that he was authorised by the agent Pomian at Lome, or by the agent, whoever he was, at Popo, if the loan was to him, and not to Bartoli as representing the defendants, there is no case. Their Lordships are clearly of opinion that the loan was to Lannoy, and not to Bartoli, and that Bartoli in no way held out that he was borrowing money. He never intended to borrow any money; he had no occasion to borrow any money. The loan being to Lannoy, there is nothing in the case.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the Supreme Court of the Gold Coast Colony. The defendants not having appeared nothing need be said as to costs.

LA COMPAGNIE DE LA GUINÉE
PORTUGAISE

APPELLANT

AND

J. STADLEMAN AND COMPANY

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

1903 Nov. 10

Lords Macnaghten and Robertson,
Sir Andrew Scoble, Sir Arthur Wilson

Carriage of goods—Liability of carrier for damage to goods caused by faulty storage during transit.

The plaintiffs complained that damage to kolanuts consigned in the

Appellants ship *Alfred Roose*. They charged that the mischief was due to the mode in which the appellants stored the nuts on board the ship. The nuts were stowed in a hold of the vessel between decks, which was unusual and improper, and in this case, a violation of the terms on which the consignment was received.

Held: It is common knowledge that fruit will not keep without some ventilation, and there was overwhelming evidence that kolanuts, old as well as new, will spoil with extraordinary rapidity in a hot place unless they are exposed to a current of air.

LORD MACNAGHTEN. The Appellants are a Belgian Shipping Company. They have a line of steam vessels plying between Freetown in Sierra Leone and other ports on the west coast of Africa. They were Defendants in the action. The Plaintiffs, who are now Respondents, are described as general merchants in Freetown.

In November 1899 the Plaintiffs shipped on one of the Defendants' vessels, called the *Alfred Roose*, 150 baskets of cola nuts, to be carried to Bissao in Portuguese Guinea and there delivered to a firm trading as B. Soller, Successor. That firm was to have the option of either buying the nuts on its own account or selling them on commission on account of the Plaintiffs.

When the cola nuts were landed in Bissao, after a voyage of about nine days, it was found that the bulk of the consignment was blackened and damaged by being heated or burnt, as it is called. Out of the shipment of 150 baskets the consignees made up 55½ baskets of merchantable nuts. The rest they rejected and returned to the Plaintiffs as unsound and good for nothing.

The Plaintiffs then brought this action against the shipowners. Their case was that the mischief was due to the mode in which the Defendants had handled and stored the nuts on board the *Alfred Roose*. The nuts were stowed in a hold of the vessel between decks, a proceeding, as the Plaintiffs alleged, unusual and improper, and, in the present case, in violation of the terms on which the consignment was received.

The action was tried by Chief Justice Stallard. The trial lasted 15 days. At its conclusion the Chief Justice reserved judgment. Shortly afterwards he directed judgment to be entered for the Plaintiffs on their claim for the sum of £933 15s. with costs. No reasons were given by the Chief Justice for his judgment, and their Lordships have not been furnished with any note showing the grounds of the decision or the view which his Honour took of the credibility of the several witnesses examined on behalf of the contending parties.

The evidence is very contradictory. On some of the points at issue, and those the most material, the witnesses on the one side and on the other are in direct conflict. The main points of difference are (1) the terms of the arrangement under which the consignment was shipped; (2) the condition of the nuts when placed on board, and (3) the origin of the damage which occurred.

Mr. Eschborn, the Plaintiff's agent, stated on oath that he arranged with Mr. Dutscher, the agent of the Defendants, that the cola nuts should be carried on deck. That was the usual and proper mode of carrying such a cargo, but he was, he said, particular in making or insisting on this condition, because it was the first time the *Alfred Roose* was to carry a cargo of cola nuts. Mr. Dutscher, on the other hand, absolutely denied that any such arrangement was made, though he admitted that there was some conversation between Mr. Eschborn and himself as to the consignment of the 150 baskets of cola nuts. Mr. Eschborn's statement, however, seems to

receive some confirmation from Mr. Dutscher's own conduct. It appears that Mr. Dutscher had provided himself with a book of printed receipts, each receipt containing these words, "*Les colas sont mis sur le pont et sont aux risques de l'expéditeur.*" On the service immediately preceding that on which the *Alfred Roose* was advertised to sail the Defendants had employed a vessel called the *Corrina*. She was unable to carry any cargo on deck, and for that reason Mr. Dutscher on the unused receipts in his book struck out with a pen the words "*sont mis sur le pont et.*" The 150 baskets of cola nuts were sent in lighters to the *Alfred Roose* in two parcels. The first, consisting of 113 baskets, was sent on board on 13th November 1899. On that occasion Mr. Dutscher gave the clerk in attendance a receipt out of his book in which the words that had been struck out were re-inserted in ink in his own handwriting. On the following day, 14th November, the balance of the consignment, consisting of 37 baskets, was sent on board, and then a receipt was given in which the words struck out were not reinserted. Both receipts were at once posted to B. Soller, Successor, at Bissao. Mr. Eschborn saw the first receipt, but not the second. He stated that his attention was not called by any one to the difference in wording between the two receipts, and that he had no reason to suppose that there was any intention on the part of Mr. Dutscher to depart from the arrangement he had made. Mr. Dutscher swears that the difference between the two receipts was intentional, that in the first receipt he restored the words that had been struck out, because the captain gave him to understand that owing to some repairs or alterations the hold would not be ready for the reception of cargo on that voyage which was advertised for the 16th November, but that on the following day, before the second receipt was given, he learned that the alterations were completed, and that it would not be necessary to stow the cargo on deck. He does not say that he informed Mr. Eschborn of the change intended to be made in the mode of stowing the cargo. With this evidence before him their Lordships think that the learned Chief Justice may well have preferred Mr. Eschborn's account of what took place to that of Mr. Dutscher.

As regards the condition of the nuts, it seems that they were all or almost all new—not nuts of the last season which had become very scarce. There can be no doubt that new nuts are more delicate than old ones. But the evidence is that the nuts shipped on board the *Alfred Roose* were carefully picked and selected before they were tied up in baskets, and that they were ripe, full and strong.

In their statement of defence the Defendants alleged that the nuts shipped by the Plaintiffs in the *Alfred Roose* were not in good condition when they were shipped by the Plaintiffs. But they made no attempt to establish that allegation by direct evidence, or to prove that young colas, if that from Freetown to Bissao. Their case was that the hold of the *Alfred Roose* was just the place to stow cola nuts in, and that therefore it must be inferred that the unsoundness which caused B. Soller, Successor, to reject the bulk of the consignment was produced by some inherent quality or vice in the nuts themselves. Now the *Alfred Roose* had been Her Majesty's gunboat *Alecto*. She lay very low in the water. The hold in which the cola nuts were stowed was in the fore part of the vessel. It was 12 feet from the iron bulkhead of the engine room and about 7 feet 6 inches high. There were portholes, but at sea they were always kept shut. According to the ship's carpenter, who was a witness for the Plaintiffs, the hatchway was kept shut too (though this is denied by the captain), and "the temperature of the

hold " he says " was very high." Even if the hatchway had been kept open there could have been no ventilation. The baskets, which are nothing more than bundles of nuts covered with leaves and tied up in canvas with cane ropes, weighing each about a cwt., were piled one on the top of another, and mixed up, as the carpenter says, with ginger starch in barrel, cases and barrels of flour. It is common knowledge that fruit will not keep without some ventilation, and the evidence in this case is overwhelming that cola nuts, old as well as new, will spoil with extraordinary rapidity in a hot place unless they are exposed to a current of air. But on this point again the strongest evidence in favour of the Plaintiffs' case is furnished by Mr. Dutscher's own conduct. After the disastrous voyage of the *Alfred Roose*, and in consequence of the complaints of the Plaintiffs and other shippers whose cola nuts were damaged on the same voyage, Mr. Dutscher gave the captain strict orders that in future " whatever happened " he was to carry the colas on deck.

In this conflict of evidence their Lordships, upon the materials before them, see no reason to differ from the conclusion at which the learned Chief Justice arrived, nor are they satisfied that the damages awarded are excessive.

They will therefore humbly advise His Majesty that the Appeal ought to be dismissed.

The Appellants will pay the costs of the Appeal.

JOHNSON APPELLANT

AND

THE KING RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

[1904] A.C. 817; 73 L.J.P.C. 113; 91 L.T. 234; 53 W.R. 207; 2 T.L.R. 697

1904 June 22 Lords Macnaghten, Davey, Robertson and Lindley

Fraud—Pleading—Evidence—Costs

1. If the Crown intended to rely on fraud as giving a right to interest, the cause ought to have been stated plainly and proved clearly.
2. There is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest whether the proceedings be taken in a court of equity or in a court of law or in a court which has jurisdiction both in equity and in law.
3. The Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule.

LORD MACNAGHTEN. Isaac Babington Johnson, a Government contractor in Sierra Leone, who was the Defendant in the action, appeals against a Judgment of the Acting Chief Justice of the Colony ordering him to pay to His Majesty £428 13s. 3d.

The money in question represents interest on two sums which Johnson received from the Army Paymaster in excess of what was due, and which he retained in his own hands for over a year.

Under his contract with the Government Johnson was required to remove a quantity of granite stones from the Signal Hill to the Naval Coal Shed in

Water Street, Freetown. For this service he was to be paid so much a ton. Between the 29th of November 1900 and the 9th of January 1901 he removed 298 tons and a fraction. His charge at the agreed rate ought to have been £448 1s 7d. He presented a voucher for £2,474 18s. 6d., and received that sum from the Army Paymaster, thus obtaining £2,026 16s 11d, beyond his due. Between the 31st December 1900 and the 24th January 1901 he removed in addition 138 tons and a fraction. His remuneration for that work ought to have been £207 8s 5d. His claim was for the removal of 4,140 tons. He presented a voucher for £6,210., and actually received that sum from the Army Paymaster. The total amount overpaid was thus £8,029 8s. 6d.

On the 2nd of January 1902 a writ was issued in the name of His Majesty against Johnson claiming return of the money over-paid. The claim was put in two ways: (1) return of money obtained by fraud: (2) in the alternative, return of money paid by mistake.

The Statement of Claim in the action was delivered on the 5th of February 1902. It followed the lines on which the writ was framed. It dealt with two cases of over-payment separately. In paragraphs 6, 8 and 9 it charged fraud, while in paragraphs 7 and 10 it presented the case as one of over-payment by mistake without alleging fraud. Then in paragraph 11 it was alleged that on the 5th of February 1902 (that is, the day on which the Statement of Claim purported to be delivered) the Defendant was convicted of having obtained by means of false pretences from the Army Paymaster two several sums equal in the aggregate to the two sums actually over-paid. In paragraph 12 it was alleged that the Plaintiff had

“incurred great expense in prosecuting and obtaining the conviction of the said Defendant for his said frauds,” and had “suffered damage by the unlawful obtaining and detention of the said sums.”

The Statement of Claim concluded by claiming under paragraphs 6 and 7 and paragraphs 9 and 10 return of the two sums which amounted together to £8,029 8s. 6d. Under paragraph 11 it claimed £1,200 as damages.

By his Statement of Defence which was delivered on the 14th of February 1902 Johnson admitted over-payment of two sums amounting to the sum of £8,029 8s. 6d. and tendered repayment. He denied fraud, and accepting apparently the suggestion of the Crown indicated in paragraphs 7 and 10 of the Statement of Claim, he said the over-payments were due to mistakes which he attributed to certain officials or servants of the Crown. The said sum of £8,029 8s. 6d. was forthwith paid into Court.

On the 18th February 1902 Johnson was sentenced to nine months' imprisonment.

By his reply delivered on the 19th of February 1902 the Plaintiff said that he accepted the sum of £8,029 8s. 6d. paid into Court by the Defendant “in satisfaction of the Plaintiff's claim under paragraphs 7 and 10 of his said Statement of Claim”—the two paragraphs which treated the over-payments as due to mistake and not to fraud. At the same time he denied that the sum was sufficient to satisfy his claim arising under paragraphs 11 and 12 of his Statement of Claim.

The case went to trial. The Crown adduced no evidence except the Statement of Defence and Johnson's answers to Interrogatories which came to nothing more than an admission of his conviction and the sentence thereon.

At the trial the claim put forward on behalf of the Crown to recover the expenses of the prosecution and conviction was rejected or abandoned. As

regards the claim for interest, it does not appear that the learned Counsel for the Crown attempted to rest it on fraud. The learned Counsel for the Defendant pointed out that fraud had not been proved in the action. But the learned Judge held that it was unnecessary to go into that point as the Defendant admitted "receiving the money by mistake or as over-payment." Consequently he thought the law would "imply a promise from Defendant to pay back to the Plaintiff the money paid in excess." He thought the allegation of special damage in the Statement of Claim sufficient, and gave "Judgment for the Plaintiff for £428 13s. 3d. damages by way of interest without costs."

Having regard to the law as settled by the Judgment of the House of Lords in the case of *The London, Chatham, and Dover Railway Company v. The South-Eastern Railway Company* ([1893], A.C. 429), it is impossible to support the decision of the Acting Chief Justice on the ground upon which it was rested. Mr. Sutton, who argued on behalf of the Crown, admitted that the case was presented to this Board in a very unsatisfactory manner. He pointed out, however, that the over-payments were so gross and indeed so monstrous in amount that it was impossible to believe in the absence of fraud. It would not be easy to resist that conclusion if their Lordships had to draw inferences of fact from the materials placed before them. But the difficulty is that the Crown seems intentionally and deliberately to have put aside all question of fraud. In the reply on behalf of the Crown the money paid into Court was accepted in terms as money paid by mistake, and no attempt was made to give any evidence of the fraudulent pretences which had been proved to the satisfaction of the Criminal Court. Possibly, as was suggested, no evidence of fraud was given in the civil action because everybody concerned must have known all the facts of the case. This Board however has nothing before it but the evidence presented in the Record. Having regard to the dates of the conviction, the payment into Court and the sentence, in connection with the reply delivered on behalf of the Crown, and considering that the punishment awarded does not seem to have erred on the score of severity, it is at least conceivable that there may have been some understanding or some expectation or hope held out that the question of fraud would not be further pressed. However that may be, the miscarriage, if miscarriage there be, is due entirely to the action of the Crown and the way in which the Crown intended to rely on fraud as giving a right to interest, the case ought to have been stated plainly and proved clearly.

In order to guard against any possible misapprehension of their Lordships' views they desire to say that, in their opinion, there is not doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest whether the proceedings to be taken in a Court of Equity or in a Court of Law or in a Court which has a jurisdiction both equitable and legal, as the Supreme Court of Sierra Leone possesses under the Ordinance of the 10th of November 1881.

In order to support the Decree it was suggested that Johnson, who was a trader, must have made a profit by the use of the money which was in his hands for a year. That is very probable, but there is no proof of it.

It was also suggested that Johnson as a "casual accountant" to the Crown was bound to account for the money with interest. But no authority was given in support of this proposition, and it appears that the Records of the old Court of Exchequer which might have thrown some light upon this point are not readily accessible.

In the result therefore their Lordships are of opinion that the Order

appealed from ought to be reversed, and they will humbly advise His Majesty accordingly:

[Their Lordships having reserved the question of costs for further consideration, the following Addendum to their Lordships' Judgment was delivered by LORD MACNAGHTEN on the 19th July 1904]:—

As regards costs, their Lordships have heard a separate argument, and they desire to say that they are much obliged to the learned Counsel on both sides for the industry and care which they have bestowed upon the question.

It will be enough to state the conclusions at which their Lordships have arrived.

It cannot be disputed that over and over again before this tribunal, the Crown has been treated in the matter of costs just like a private litigant.

It appears, however, that no case can be found in which the point was argued.

All the cases seem to fall under one or other of the following three heads:—

1. Cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in the self-governing Colonies.
2. Cases where the question arose under a Petition of Right or some proceeding analogous to a Petition of Right.
3. Exceptional cases where justice seemed to require that the Crown should pay costs or where the Crown was not unwilling to be treated as an ordinary litigant.

The present case cannot be brought under any of these heads. There is no Ordinance in Sierra Leone authorising the Court to treat the Crown as an ordinary litigant, and the Appellant has succeeded in spite of demerits.

Mr. Muir Mackenzie relied on Section 19 of the Ordinance of the 10th November 1881, which declares that statutes of general application which were in force in England on the 1st of January 1880, should be in force in Sierra Leone from the date of the Ordinance coming into effect. He contended that that Section imported into the Colony the Act 18 & 19 Vict. c. 90. Their Lordships, however, are of opinion that that Act is not a statute of general application within the meaning of Section 19 of the Ordinance in question. It only deals with proceedings in the United Kingdom.

In the result, therefore, their Lordships are of opinion that, in dealing with costs in cases between the Crown and a subject, this Board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

In the present case their Lordships think that the Order appealed from should be reversed without costs, and that there should be no costs of the Appeal.

NEAME

APPELLANT

AND

THE ASHANTI GOLD COAST ACQUISITIONS CO.
LTD.

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD
COAST COLONY (CONCESSIONS DIVISION)]

[P.C. 1874-1928] 9

1905 Mar. 2

Lords Davey and Robertson, Sir Arthur Wilson

Practice—Adjournment—Refusal to grant set aside

The Court below refused to allow a Concessions Enquiry to be adjourned. The Appeal Court reversed this order and granted a short adjournment. On an appeal to the Board:

Held, that the matter was eminently one to be decided by the learned judges on the spot.

LORD DAVEY. Their Lordships think that this is an idle Appeal. It relates to a mere question of practice. A Concessions Enquiry was held before Mr. Justice Pennington in the Gold Coast Colony, and when the Opposers were called on to proceed with their case, their Counsel admitted that he had not got the proper evidence, and asked for an adjournment. There was no question but that they had received proper notice, and that everything had been regular and in order. The learned Judge, in the exercise of his discretion, thought it was not a case in which further time should be given, and declined—as he had a perfect right to do—to grant an adjournment.

Thereupon, there was an Appeal to the Court of Appeal. After hearing Counsel on both sides, the Court of Appeal came to the conclusion that the application was not made for the purpose of delay, and that, although there had been great negligence and the Opposers were in default, nevertheless the interests of justice demanded that they should have an opportunity of being heard. Accordingly the Court granted a short adjournment on the terms of the Opposers, who asked for it, paying the costs which had been thrown away and the costs of the Appeal. An Appeal is now brought to this Board from that decision and is gravely argued by the learned Counsel who appear for the Appellant. It is difficult to characterize the Appeal in forensic or judicial language; but it is sufficient for their Lordships to say that, even if they had not been informed, as they have been, by Counsel on both sides, that the case has actually been fully heard and is now awaiting Judgment, their Lordships would not be disposed to entertain an Appeal of this kind, which is eminently a matter to be decided by the learned Judges on the spot. Their Lordships are, however, told that the learned Judge is only waiting to give his Judgment in order to hear what their Lordships say on this Appeal. The only thing their Lordships have to say is that the learned Judge had better give his Judgment with the utmost dispatch. In the meantime their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant must pay the costs of it.

AKUFFO v. YERENCHI

[ON APPEAL FROM THE SUPREME COURT OF THE
GOLD COAST COLONY]

Ren. 397

1907 June 20

Lords Ashbourne, Macnaghten and Collins,
Sir Arthur Wilson

*Appeal—Assault and false imprisonment—Judgment of Full Court reversed—
Judgment entered for Appellant without costs—Appeal respondent absent.*

LORD ASHBOURNE: This is an appeal by special leave from a judgment of the Supreme Court of the Gold Coast Colony in favour of the plaintiff (the present respondent), who was not represented by counsel before their Lordships.

The appellant Akuffo is the Omanhene, or Head Chief, of a considerable area in the Eastern Province of the Gold Coast Colony, and recognised under the Gold Coast Native Jurisdiction Ordinance, 1883, as exercising jurisdiction over natives within such area in his own tribunals in reference (*inter alia*) to the ownership of lands.

The respondent is a native, subject to the Omanhene's jurisdiction, the head of whose family was Ahin Kra; and he had a dispute with another native family as to certain land within the Omanhene's jurisdiction. The other claimant "swore the Omanhene's oath" upon the respondent, which put the respondent to the choice of leaving the land or of litigating as to his title in the Omanhene's Court. The Omanhene was informed that the oath had been disregarded, and directed the respondent to be brought before him by his officials, which was done, and the respondent was detained in custody for four days. The respondent does not appear to have been desirous of speedy bail, and his advisers transferred the question in dispute from the Omanhene's Court to the Supreme Court of the Gold Coast under section 22 of the Ordinance of 1883.

Under these circumstances the respondent instituted an action in the above Court against the appellants (the Omanhene and his officials) for assault and false imprisonment, claiming £500 damages. The defence was in substance that all that had been done was justified by native law and custom, and took place in the reasonable and rightful exercise of the Omanhene's jurisdiction. The case appears to have been strenuously fought, though the Omanhene did not avail himself of the assistance of counsel. Mr Justice Smith, who tried the action in the Supreme Court, gave judgment in the respondent's favour for £50 and costs.

The appellants appealed to the Full Court, and according to the petition upon which special leave to appeal to His Majesty in Council was granted,

"the principal ground of appeal was that the said judgment was entirely against the weight of evidence, and the matter most discussed was whether the message requiring the respondent to attend the Omanhene's Court for disregarding the oath was communicated (as native custom requires) to Ahin Kra the head of the respondent's family or whether no notice was given to the said Ahin Kra."

The Chief Justice was strongly in favour of allowing the appeal, but Mr. Justice Smith adhered to the decision he gave at the trial, and in this he was supported by Mr. Justice Purcell. Their Lordships, after much consideration have been compelled to yield to the criticism and arguments

of the learned Chief Justice. They cannot, however, refrain from expressing their regret that the Chief Justice in pronouncing his opinion should have used language calculated to give pain to a colleague of great experience, who was called upon to try a difficult case under embarrassing circumstances, and who certainly displayed extreme patience and an evident desire to do justice. The fact that the Omanhene dispensed with the aid of counsel, who might have formulated appropriate requisitions and objections, deprived the learned Judge of an assistance often of great value. The fact that there was also a summons for trespass in addition to the oath procedure about the same time may have led to some confusion. Their Lordships regard all the probabilities as strongly supporting the case of the appellants as they cannot see that the Omanhene had any motive, direct or indirect, for departing from the native usages, with which he was familiar and which there was abundant evidence to show were compiled with.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the judgment of the Full Court dated the 24th July, 1905, and the judgment of Mr. Justice Smith, dated the 20th February, 1905, ought to be discharged, and that instead thereof judgment ought to be entered for the defendants in the action with costs in both Courts.

There will be no order as to costs of this appeal.

THOMAS CLARKSON WILLIAMS APPELLANT
 AND
 THE SIERRA LEONE COALING CO.
 AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

1911 May 24

Lords Macnaghten, Mersey and Robson

Mortgage—Agreement for agency subsequently made between some parties—No reference to property secured under mortgage—Security applicable to agency agreement.

The mortgage was expressed to be given to secure an account with the mortgage for the supply of goods on credit ". . . upon the agreement that the balance of account in the hands of the mortgagor should not at any time exceed £500. The parties subsequently entered into an agency agreement, obviously no more than a machinery devised for the purpose of securing to the mortgagee the supervision over the mortgagor's business transactions which it was agreed they should have.

The appellant (mortgagor) contended that the mortgage security was not applicable to the goods supplied to him as agent since the mortgage contemplated the supply of goods to him as a purchaser.

Held: The subsequent agreement is a trading agreement whereby the appellant was to continue to buy and sell whatever goods he chose to order for his own personal profit as he had done previously. When that agreement was made nothing was said on either side, and there was certainly nothing in the circumstances to indicate that the security on which the previous trading between the parties had been founded was to be regarded as discharged.

LORD ROBSON. This is an Appeal from a Judgment of the Supreme Court of the Colony of Sierra Leone, dated the 21st December 1909, pronounced in two actions. In the principal action the Appellant was Plaintiff, and the Respondent Company Defendant. The Appellant's claim was for

re-conveyance of a mortgage which he said had been discharged. The Respondent Company as mortgagee acting under the powers of the mortgage had sold part of the property to the Respondent, Abu Baccary Savage, who was Plaintiff in the second action. He sought to have the Plaintiff ejected from the property which he, the Respondent Savage, had so purchased. Judgment was pronounced against the Appellant, with costs in both actions.

The facts material to the point in dispute are as follows: Early in 1902 the Appellant, who was a trader at Freetown, in the Colony of Sierra Leone, was desirous of opening a trading account with the Respondent Company for the supply to him of goods and merchandise on credit. The Respondent Company required security before acceding to his request, and accordingly on the 1st February 1902 he gave them a mortgage on two properties in Cline Town, Freetown. The mortgage was expressed to be given to secure an account with the said mortgagee for the

“ . . . upon the agreement that the balance of account in the hands of the mortgagor should not at any time exceed the sum of £500. ”

There was the usual proviso for reconveyance, and it was declared that after the 1st February 1904 either party should be entitled to give to the other three calendar months' notice in writing of his intention to “ close up business relationship ” with the other, and at the expiration of the said three calendar months the said account current should be deemed to be closed.

In 1906 the Appellant was largely indebted to the Respondent Company. He had found his business very bad in Freetown, and desired to open up business in the Protectorate. The Respondent Company had a business in the Protectorate known as the Kpye factory. They informed the Appellant that they had decided to close that factory, but if he cared to open up in the Protectorate he might take over the stock the Company held there and trade with them under certain conditions, ensuring them a certain measure of control over his operations. He agreed to this proposal, and an agreement was entered into on the 6th September 1906 arranging the terms under which the trading was thereafter to be carried on. In form this was an agency agreement for a period of three years, but, so far as the supply of goods was concerned, the provisions as to agency were obviously no more than machinery devised for the purpose of securing to the Respondent Company the supervision over the Appellant's business transactions which it was agreed they should have. Under Clause 1 the Respondent Company agreed

“ to supply and furnish the said Thomas Clarkson Williams at Kpye aforesaid with all goods and wares and merchandise and cash from time to time for the purpose of the business at Kpye aforesaid. ”

All profits made by the Appellant on the goods supplied to him by the Respondent Company were to be for his own account, and he was responsible for any losses he might make thereon.

The business between the parties was afterwards carried on according to the terms of this agreement. The balance in respect of the Freetown transactions was not completely liquidated till May 1907, and in the meantime a large indebtedness from the Appellant to the Company arose in respect of the supply of goods to him at Kpye. Not being able to get payment of that balance Respondents proceeded to realise their mortgage security and sold one of the properties to the Respondent Abu Baccary

Savage. The Appellant then raised the contention that the mortgage security was not applicable to the goods supplied to him at Kpye, because such goods were supplied to him as agent, whereas the mortgage contemplated the supply of goods to him as purchaser only. He therefore claimed a reconveyance of the mortgage properties for the purpose, as he himself alleged, of settling them on his wife and children, while leaving the Respondents wholly unsecured as to the rest of his indebtedness.

It is unnecessary to deal in detail with all the clauses of the disputed agreement. Their Lordships are of opinion that it has been rightly construed by the Supreme Court as a trading agreement whereby the Appellant was to continue to buy and sell whatever goods he chose to order for his own personal profit as he had done previously. When that agreement was made nothing was said on either side, and there was certainly nothing in the circumstances, to indicate that the security on which the previous trading between the parties had been founded was to be regarded as discharged.

Their Lordships are of opinion that the agency clauses in the agreement do not prevent the supply of goods under Clause 1 thereof from being a "supply of goods and merchandise on credit" within the meaning of the mortgage deed, and they will therefore humbly advise His Majesty that this Appeal should be dismissed with costs.

AKWESI DOBBIN * * * * * APPELLANT

AND

BIBIANI LTD. (SUBSTITUTED FOR BIBIANI GOLDFIELDS
LTD.) * * * * * RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE
GOLD COAST COLONY]

[P.C. 1874-1928] 14

1912 Nov. 14

Lords Macnaghten, Mersey and Moulton

Contract—Agreement depending on result of suit—No implied undertaking that suit would be prosecuted to the end.

The point decided is clear from the brief judgment of the Board.

LORD MACNAGHTEN. Their Lordships are of opinion that this case is perfectly clear. The Clause to be construed is this:—The parties agreed that in the event of the Court deciding in the action of *Taibill v. Tinneh*, in favour of Tinneh, the rent of £650 should be reduced. That event has not happened. There is no ground therefore for reducing the rent. It was argued that the agreement involved an undertaking on the part of Taibill that he would prosecute the suit to the end. Their Lordships are unable to find any such undertaking or any promise, or any warranty implied in the agreement.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed, and the Respondent will pay the costs.

IN THE MATTER OF MOSES AMADO TAYLOR

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

[1912] A.C. 347

1912 Dec. 1, 15

Lords Macnaghten, Mersey and Lord Robson

Practice—Removal of a Barrister's Name from the Court Rolls rescinded—Irregularities without Evidence of Fraud.

By three orders of the Supreme Court of Sierra Leone the appellant was fined for contempt of Court and forgery and his name was removed from the roll of barristers of the said Court:—

Held, that these orders must be reversed and the fines returned. Procurement of a warrant for arrest from a criminal Court, unless tainted by fraud, is not a contempt of the civil Court which had previously refused to grant it. Nor is the substitution in subpoenas without intent to defraud of names of witnesses whose evidence is *bona fide* required for names of those who are discovered to know nothing of the case sufficient to establish the offence of forgery.

APPEAL by special leave from three orders of the Supreme Court (September 3, 1908, May 7 and May 10, 1909).

These orders and the proceedings which led to them are detailed in their Lordships' judgment. The first of them, imposing a fine for contempt of Court, was founded on a judgment to the effect that certain criminal proceedings for which the appellant was responsible were not *bona fide*, but a gross abuse of the process of the Court, committed for the purpose of prejudicing the trial of a civil action then pending and part of a scheme to extract money from the defendant thereto. The second was made after information against the appellant under s. 59 of the Supreme Court Ordinance, 1904, charging him in substance with altering two copies of a subpoena with intent to defraud, serving such altered copies with the like intent, and uttering forged subpoenas with intent to defraud knowing they were forged; and under this order the appellant paid a fine. By the third order his name was under s. 56 of the said Ordinance struck off the roll of the Court.

Sir R. Finlay, K.C., Daniel Warde, and Parikh, for the appellant, contended that these three orders should be reversed.

The institution of the criminal proceedings was not a contempt of Court, if malicious or without reasonable and probable cause the party aggrieved has a civil remedy. On the evidence they did not influence improperly a pending action. Reference was made to *Onslow and Whalley's Case* (1873) L.R. 9 Q.B. 219, 230). The alterations of the names, addresses and occupations, and dates in two subpoenas were at the utmost unintentional breaches of unwritten rules of the Master's office. Subpoenas are usually taken out in blank, and if a mistake as to an inserted name has been made, it is not forgery within the meaning of s. 59 of the Supreme Court Ordinance of 1904 to correct it. Reference was made to *Short and Mellor's Practice of the Crown Office*, 2nd ed., p. 407 to the effect that names may be inserted in subpoenas after issue; Notes in *Annual Practice*, 1911, Order XXXVII., p. 582; *Taylor on Evidence*, 10th ed., vol. 2, par. 1835; *Wakefield v. Gall* ((1817) Holt N.P., p. 526). The order was irregular, being founded not exclusively upon the conduct provided in the case, but, as stated by the Chief Justice, also upon "previous conduct in other professional matters not specified or investigated."

Sir Rufus Isaacs, A.-G., and Rowlatt, for the respondents, that is

judges of the Supreme Court and the Colonial Attorney-General, contended that there was ample evidence that the offences charged against the appellant were committed with intent to defraud and were not merely unintentional breaches of practice rules. The orders appealed against were based throughout upon a finding of irregular professional conduct with intent to defraud.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by LORD ROBSON. The appellant Moses Amado Taylor is a native of Freetown, in the Colony of Sierra Leone and a barrister of the Honourable Society of Gray's Inn, where he was called to the Bar in June, 1907. He was afterwards enrolled as a barrister and solicitor of the Supreme Court of the said Colony, and he now appeals from three orders of that Court.

By the first of those orders, dated September 3, 1908, he was fined £100. and costs for an alleged contempt of Court; by the second dated May 7, 1909, he was fined £20, in respect of an alleged forgery in the case of *Rex v. Gamson*; and by the third dated May 10, 1909, his name was removed from the roll of barristers and solicitors of the said Supreme Court.

On May 6, 1908, the appellant, acting professionally for one Michael Huggins, commenced an action in the Circuit Court of the Protectorate wherein the plaintiff Huggins, who was a native railway pointsman in the service of the Sierra Leone Government, sued one George Wright, who was a foreman platelayer in the same employ, for damages for an alleged assault by shooting on January 30, 1908, at Kangahun, in the Protectorate. When the action was begun Huggins had been dismissed from his employment and on June 20 the appellant wrote to Wright saying that if his client had not been peremptorily dismissed from work he would have advised him to drop the matter, and offering at the same time to settle it if Wright would agree to pay his client's wages for the six months' employment he had (amounting to about £10) and costs. He further stated that if these terms were refused he would apply for the Governor's *fiat* to have the action in Freetown before he (Wright) left the Colony.

No notice was taken of this letter. On August 22, 1908, the appellant applied to the Acting Chief Justice under s. 2 of the Debtors' Ordinance, 1883, for a warrant for the arrest of Wright on the ground, which was true, that he was about to leave the Colony for settlement. The appellant at the same time stated that if Wright would agree to the terms before suggested his client would be satisfied. The Chief Justice refused this application, because, as he states in his judgment delivered on September 3, 1908, he "saw that all he (appellant) wanted to get money out of Wright and to use the warrant as a lever."

On August 24, 1908, an application was made on the information of Huggins to one of the police magistrates, Mr Vergette, at Freetown for the arrest of Wright upon a criminal charge of assault with intent to murder, on January 30, 1908, and a warrant was issued accordingly. As the magistrate who granted it had no jurisdiction in matters arising in the Protectorate except under the authority of the Government which was wanting in this case, this warrant was beyond his jurisdiction. Afterwards, in the proceedings for the return of the warrant, the magistrate stated that "In granting the warrant, I was informed, which did not go to shew that the offence was committed in the Protectorate; it was brought to me while I was on the Bench. The information was silent as to the place where the alle



but for the purposes of the present proceeding it has not been proved, and cannot be assumed, that the proceedings before the magistrate were tainted by any fraud on the part of the appellant.

The question is therefore narrowed down to the bare ground stated in the summons namely, whether under the circumstances procurement of the warrant and the arrest consequent thereon constituted in law a contempt of the Supreme Court. Their Lordships think they did not. Where a plaintiff who has been refused a warrant for the detention of the defendant by a civil Court straightway starts a criminal process on the same subject matter, and, by means of allegations to which the civil Court attached no credit, obtains his warrant from a different Court, almost as a matter of course he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the civil Court, whatever may be its other consequences.

The next order complained of, that of May 7, 1909, arose out of the case of *Rex v. Ganson and Others* in the Supreme Court, in which the appellant was retained to defend three of the accused. He was desirous of securing the attendance of two witnesses, Ashley and Gittens, who were prison warders, and applied to the Master of the Supreme Court for subpoenas for them. The subpoenas were accordingly issued on the deposit by the appellant of the conduct money, or allowance usual for witness of that class (there being no fees payable), and were duly served by the bailiff. It turned out that the witnesses named said they knew nothing about the case, so the appellant asked them to return the subpoenas to him, which they did. He then struck out the names of Ashley and Gittens, and substituted for them the names of two labourers, Lamina and Sorie. The subpoenas, so altered, were served by the appellant on Lamina and Sorie, and one of them, Lamina, called and gave evidence. On these facts being disclosed at the trial the Learned Chief Justice ordered Lamina's subpoena to be impounded.

Proceedings were subsequently taken against the appellant in the police court at Freetown on the charge that he had forged the subpoenas delivered to Lamina and Sorie.

The facts above stated, which were never in dispute, and which constituted the whole case against the appellant on this head, were then duly proved, with one additional circumstance worthy of note. It appeared on cross-examination of the Deputy Master and Registrar of the Supreme Court, who is also under-sheriff, that the appellant called on him on February 27, 1909, for a subpoena for one Anderson. At that time the other subpoenas, including those of Ashley and Gittens, had been issued, and the Deputy Master admitted that the appellant told him that he wanted some other witnesses substituted. He clearly referred to a proposed substitution of names in the existing subpoenas. The Deputy Master never told him that new subpoenas would have to be taken out. He made no protest or objection. It did not seem to strike him as being in any way a serious matter, though, possibly enough, if any one had paused to think about it, it would have been recognised as an irregularity.

The appellant was committed for trial, and on May 1, 1909, the Attorney-General preferred an information against the appellant charging him with (1) altering two copies of a subpoena with intent to defraud, (2) serving the copies, so altered, with intent to defraud, and (3) uttering forged subpoenas, with intent to defraud, knowing that they were forged.

The case came on for trial before the Chief Justice on May 3 and 7, 1909.

In the Matter of Moses Amado Taylor

If the appellant's colleagues at the Bar made a representation to His Honour, pointing out that the effect of his pleading to the information would be a conviction for an indictable offence, the consequence of which would be the removal of his name from the roll of the Inns of Court in the Colony. His Honour, therefore, on the application of the appellant's counsel, consented that a plea should not be taken, the prisoner admitting guilt and submitting to a fine of £20, which was paid. Their Lordships are of opinion that the facts alleged against the appellant do not suffice to establish the very serious offence with which he was charged. The evidence does not show or suggest any intent to defraud on the part of the appellant, and, indeed, there seems to have been no motive so far as he was concerned which could give rise to any such intent. At the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

A fresh proceeding was then immediately instituted against the appellant to have him struck off the roll of barristers and solicitors of the Supreme Court of the Colony, and on May 10, 1909, the Chief Justice made an order to that effect. This is the third order complained of. It is founded entirely on the two alleged offences already dealt with, and must stand or fall with them. It is true that the Chief Justice in giving his reasons for this order refers to the appellant's "conduct in other professional matters" rendering him unfit to be on the rolls of the Court, but no such matters are specified for the information of their Lordships, nor has the appellant been heard upon them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the order of September 1908, should be discharged, and the sum of £100 and the costs payable thereunder by the appellant be returned to him; that the order of May 1909, be discharged, except in so far as the same excepts the offer of the appellant to pay the sum of £20; and that the order of May 10, 1909, be discharged, and the name of the appellant restored to the roll of the Supreme Court of the Colony of Sierra Leone.

No order is made as to the costs of this appeal.

Solicitors: T. D. Metcalf for the appellant; Sutton, Ommaney & F. for the respondents.

OHAI v. NTIKORA

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST

Ren. 706

1913 Feb. 17

Earl Loreburn, Lords Atkinson

Position, right, interest or title of an occupier or licensee of land on the Gold Coast—Rider as to application or extent of judgment Privy Council—Judgment not to affect tribal title or the title of any chief.

EARL LOREBURN: This case comes before their Lordships in an unsatisfactory manner, both in respect of the evidence and the information which is supplied by the Courts below. The facts on which the judgment appealed from are not given, or are very scantily given, and are not clearly identified and their effect is not satisfactorily

The Court of first instance decided upon the evidence in favour of the appellants. There was evidence both ways, and certainly evidence which would support the decision at which the Court of first instance arrived, and it cannot here be questioned nor is it, indeed, seriously questioned. But when the case came to the Court of Appeal the decision of the Court of first instance was reversed, obviously upon the ground that fresh evidence could be looked at which had been rejected, evidence of a prior judgment as it is called. Their Lordships think that this so-called prior judgment was not, in fact, admissible, and they would not themselves describe it as a judgment at all. The occupier of lands in the Gold Coast under licence, or tenancy, or whatever term is most applicable, from a chief has some interest. It would be quite superfluous to describe the interest nor is it necessary to dwell upon the particularities of the law applicable to the Gold Coast, in which, perhaps, there may be more kinds of interest, in the nature of tenancy, than one; but, at all events, a person who is an occupier is entitled to protect himself in courts of law, and in this case the appellants were obviously in possession of whatever interest was created by the licence of the chief. Then they, as occupiers, are sued by the chief of another tribe for trespass to this land by cutting down palm trees or exercising rights of ownership. Now the previous so-called judgment was put in evidence and accepted in the Court of Appeal and Mr. Danckwerts maintains that it was rightly accepted in evidence. Their Lordships are not able to take that view. The plaintiff could not show his title by proving that Jatchi entered into an agreement with the plaintiff after his predecessor had given a title to the defendants, otherwise one man might dispose of another man's interest behind his back.

The consequence is that their Lordships will humbly advise His Majesty that this appeal ought to be allowed. They have nothing to add, except that this decision must not be understood as concluding any other proceeding upon different evidence which raises the question of title to this land, and it certainly does not conclude any question of tribal title or the title of any chief.

The respondent will pay the costs of the appeal and those in the Courts below.

ROBERT KLEINERT APPELLANT

AND

ABOSSO GOLD MINING CO. LTD. RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

(1913) 58 S.J. 45, P.C.; [P.C. 1874-1928] 17

1913 Oct 28

Lords Dunedin and Shaw, Sir Samuel Griffith

Contract—Failure of condition—Performance prevented by other party.

Plaintiff contracted with a mining company to remove waste rock then lying in the waste dump at a mine within a period of two years provided it did not exceed 50,000 tons; the company to provide a crusher and the rock so crushed to be put on rails and made available for sale. The crusher provided was only capable of crushing 3 tons per hour and as the company never did anything to put it in a condition to do more, the work, owing to the incapacity of the crusher, had to be stopped. Plaintiff claimed damages.

Einert v. Abosso Gold Mining Co. Ltd.

Defendants had failed to provide an adequate crusher and had failed to carry out their part of the contract. There is a variance between the declaration and proof, the proper amendment to amend the declaration is at the conclusion of the plaintiff's case.

IN. This is an action for damages in respect of breach of contract.

The plaintiff, a contractor, on 15th October 1909 entered into a contract with the defendants, a Gold Mining Company, with regard to the removal of rock then lying in the waste dump at the Abosso Mine. The contract was a carefully worded document in 18 heads and contains many material clauses which will be presently adverted to. The object of the contract was to arrange for the removal of rock lying in the dump within a period of two years provided it did not exceed 50,000 tons, and to provide for the crushing of that rock which was to be put on rails and made available for sale. The price was to pay 4d. a ton for all rock removed. The Company was to supply electric power and machinery for crushing the rock for which the plaintiff would receive 4d. per ton of rock dealt with—they were to take such crushed rock by weight on paying 3s. per ton. The Company were to allow the use of their line from the mine to the railway and to provide haulage all for a sum of 6d. per ton.

The plaintiff and Appellant alleged that he made preparation for the crusher and began it, but that he was unable to continue it, owing to the crusher supplied by the Company worked inadequately, and failed to turn out three tons of crushed rock per hour. He further alleged that he called on the Defendants to put the crusher into such a state as to do adequate work, but that they did not do so.

Witnesses were examined, and it was clearly proved—

1. That the crusher supplied never did in fact turn out three tons per hour.
2. That though the Respondents alleged it would be turning out ten tons per hour, then never put it into a state in which it could do so.
3. That in consequence of the inadequacy of the crusher the plaintiff had to be stopped.

The learned Judge at the trial gave judgment in favour of the plaintiff and Respondents upon the ground that there being no breach of contract as the amount of tons which the crusher should have turned out was not stipulated, and the Defendants having admittedly supplied a crusher, there being no evidence that they had failed to do their part, the contract had not been broken by them, and no damages could be claimed.

The rule to be applied in the construction of contracts where there are mutual stipulations is tersely expressed by Lord Macmillan in the case of *Mackay v. Dick* and another (6 App. Cas. 251):—

“ . . . as a general rule, . . . where in a written contract both parties have agreed that something shall be done, it can only effectually be done unless both concur in doing it. The intention of the contract is that each agrees to do all that is required of him for the carrying out of that thing, and to use the express words to that effect.”

The clause in the contract dealing with the obligation of the plaintiff was—

crusher is the 9th, which says " All electrical power lines and other fittings and the necessary rock breaker countershaft and motor in connection with such power supply shall be provided by the Company. . ." The Lordships cannot doubt that " necessary rock breaker " must mean such a rock breaker as is reasonably adequate for the work which is in the purview of the contract. The word " necessary " only makes the meaning more abundantly clear; but the same result would follow had that word been omitted. This interpretation is the direct result of the rule laid down by Lord Blackburn coupled with the equally well known rule that an obligation to supply any chattel for a purpose is an obligation to supply a chattel reasonably fit to fulfil that purpose. No doubt if an absolute standard of performance is required that must be specially stipulated for; but the thing supplied must in any case be reasonably fit for the purpose for which it is intended. Fitness or unfitness may come to be a question of degree but that must be decided as a question of fact.

What then was the work for which the crusher to be supplied was to be reasonably fit? In finding this out their Lordships do not propose to go outside the contract itself. In some cases it is possible to hold that a contracting party must have had in view a specified purpose not disclosed by the terms of the contract itself. But in such a case the proof would have to be clear that the purpose was brought home to the contracting party and accepted by him as really part of the contract. The evidence here of the knowledge of the Respondents of the amount of tons of stone which the Plaintiff was under obligation to furnish to the Harbour authorities, and that this contract was made in the view of both parties in order to fulfil the other contract, seems to their Lords to fall short of what is needful as above expressed, and they therefore disregard it entirely.

But taking the contract itself, what is to be found?

First, it is a mutual contract by which the one party is entitled to remove the rock and the other is entitled to call on him to remove the rock in the waste dump subject to the limitation of 50,000 tons. The Respondents argued that the removal was merely optional on the part of the contractor. This argument is in their Lordships' view quite inconsistent with the words " agrees to remove " in Article 1, and the phraseology as to breach in Article 13.

Second, by Clause 8 the Company is bound to supply electric power " for crushing the waste rock during the continuance of the work." Now that must mean the waste rock after removal, for it could not be crushed before it was removed; and it is clearly within the power of the contractor to crush all the waste rock which he removes. This being so it follows that the crushing machine must be adequate in conjunction with the electric power to crush all the waste rock.

It was argued by the Counsel for the Respondents that it was not necessary that all the waste rock should be crushed. Seeing that the only market so far as apparent was for crushed rock, and the right to use the railway line and obtain the haulage to get the rock away from the mine applies only to crushed rock, this does not seem a very practical suggestion. But even if it were it is enough that the Plaintiff has a right to crush all the rock he removes. The appliances provided must be adequate to allow him to exercise his right in full.

Third, Clause 13 is as follows:—" In the event of the contractor failing to complete the removal of waste rock . . . within a period of two years . . . the Company may summarily determine the agreement." Now, in order to remove 50,000 tons in two years it would be necessary to remove 480 tons a

week. Given a working week of 48 hours this would require a rate of 10 an hour. The mere statement of these figures shows conclusively the inadequacy of a machine which at its very best only turned out three ton per hour.

Their Lordships are therefore of opinion that it has been proved that the Respondents did not provide "a necessary rock-breaker," and that they thereby broke the contract.

At the conclusion of the argument the learned Counsel for the Respondents urged that inasmuch as there was evidence that a second breaker had been sent for and had arrived (though never placed in position) it was for the Appellant to show that that breaker was also inadequate. It is sufficient to say that this argument comes too late. The parties joined issue upon the adequacy of the first breaker. The Respondents contended that it was adequate upon a proper construction of the contract, whatever its shortcomings of performance as to amount might be. They further contended through their witnesses that it was good enough for the work. In both these contentions they have been held wrong. Their Lordships do not doubt that it might have been in the Defendants' power to admit the failure of the first breaker and then to have tendered a second. But that would have to have been clearly proffered, and the proffering clearly proved. As it is there is not a single word said as to it by any of the Respondents' witnesses, and the argument has to rest on a single sentence in the cross-examination of the Appellant's manager. In their Lordships' view there is therefore in the evidence no foundation for the plea.

Their Lordships will therefore humbly advise His Majesty to reverse the judgment and send the case back in order that damages may be awarded. As the parties had agreed in the Court below that the Court of Appeal should, had they reversed the judgment of the trial Judge, assess the damages, it seems right that they should still do so. The damages to which the Plaintiff is entitled will in the present case fall under two heads:—(1) expense to which he was put in making preparations for the work which has been rendered useless by the impossibility, of continuing the work; (2) loss of profit, which in the circumstances of the case he would naturally have earned. It must, of course, be understood that inasmuch as profit is only arrived at after necessary expense is provided for, the assessing tribunal will see to it that these two heads are not so stated as to really charge the same thing twice over. The contract with the Appellant and the Harbour authorities is not conclusive as against the Respondents, but is admissible as evidence of what profit the Appellant could probably have made. The Respondents will pay the costs of this Appeal and of the proceedings in the Courts below.

CHIEF YOUNG DEDE AND ANOTHER

APPELLANTS

AND

THE AFRICAN ASSOCIATION LIMITED

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF SOUTHERN NIGERIA]

1914 Mar. 27

Declaration of title to beaches—agreement between parties altered by act of Government—Effect—Words and Phrases: "Comey,"
Lords Dunedin, Mersey and Moulton

Traders agreed to pay *comey* according to the size of their vessel and goods exported to certain chiefs. Subsequently the British Consul promulgated "Regulations about payment of *comey* in the Brass District" which altered the arrangement between the parties.

Held: 1. The Regulations substituted the Government for the trader as debtor to the chiefs and secured to the trader his rights under the original agreement, *i.e.* the right of occupation so long as he (the trader) paid his dues to the Government.

2. If the true view, as the argument of the chiefs assume, is that the subsidies are judicial salaries, then their course is to sue the Government for payment of sums due under the arrangement of 1888 (*i.e.* arrangement made by the Consul in the Regulations). But the chiefs have no action against the trader already established in occupation; and no right as against him, unless he (the trader) fails to pay the Government.

3. *Comey* is a payment by masters of vessels—at first according to size of vessel and goods exported—afterwards according to goods exported alone.

LORD DUNEDIN. The claim in this action was for a declaration of title in favour of the plaintiffs suing on behalf of the tribal family entitled the House of Kulo, as regards certain beaches situate at Twon in Brass in Southern Nigeria, in the occupation of the defendants. It is admitted that the defendants and their predecessors have been in occupation for a period prior to 1879.

The original defence was based on the pleas of possession and the Statutes of Limitation. At the trial after evidence those pleas were held unavailing and a declaration was made as craved.

Upon appeal the Attorney-General intervened as *amicus curi*, and suggested that certain important official documents had been unknown to the parties, and intimated his willingness to produce them. The proceedings were then opened up, new pleas allowed, and fresh evidence ordered to be taken. The nature of the new pleas will appear from what follows. The Court of Appeal after receiving the fresh evidence resumed consideration of the cause, and then repeated the declaration of property in favour of the plaintiffs, but with this *addendum*, "that a declaration should be added to the effect that the appellants (defendants) are entitled to remain in occupation of the land without payment of rent so long as they continue to trade thereon."

The plaintiffs have appealed to His Majesty in Council against this additional declaration. The reason is obvious. Although the demand in this suit is limited to a simple declaration, it is but the prelude to a demand for ejectment and mesne profits as disclosed by the letters of the plaintiffs' attorney in 1906.

The history of the matter may be shortly stated.

In 1856 a treaty or code of commercial regulations was drawn up between certain kings and chiefs of the country of the Rio Bonto or Brass River and the British Consul for the Bight of Biafra. The material articles of this treaty are as follows:—

" Article 1

That the kings and chiefs of the countries connected in trade with the Rio Bonto duly appreciating the benefit of legitimate traffic, hereby guarantee that from this date forward they shall not engage in or sanction the exportation of slaves from the country."

" Article 3

That the *Comey* of vessels entering the river for the purposes of trade be for vessels of two masts to pay two puncheons worth of goods;

vessels of three masts to pay three puncheons worth of goods to each king (Kiya of Obullambry and Arishma of Bassambry), that boats or vessels coming here with cargo and bringing no produce away are to be excepted, and that for each ship taken part produce out of the river as tenderage to complete her cargo elsewhere, the comey to be five bars for each cask."

" Article 7

That the comey and pilotage being paid no other tax or payment is to be demanded under any pretence whatever. Water is not to be refused in the pilots' town called Twaw, nor is any demand to be made for the privilege of watering. Ground for the erection of houses and for the storing of casks and goods is to be granted free of all charges, and it is considered, whilst in the occupation of any British subject, as British property, and the occupant for the time being is authorised to expel trespassers and to maintain his right of occupancy, and to defend himself and property against any unlawful aggression."

" Article 19

That a copy of this treaty be furnished to each chief receiving comey and a copy of that part referring to the pilotage to the chief pilot; the chiefs to produce it when receiving comey, and the pilot to show it to the masters upon any vessel entering the river, and that these articles be held to be the laws existing between the British supercargoes and the natives for the regulation of trade matters to be observed so long as they continue law by those who are not present at their enactment as by those who were."

This treaty was revised in 1879, but no material alteration was made. It will be enough to quote three articles.

" Article 2

That comey should be paid to the two kings at the rate of one piece of satin stripe between them for each puncheon hove, or arrangement may be made with the traders which shall stand good.

" Article 3

That the comey being paid, no other tax or payment is to be demanded under any pretence whatever and that kings shall give beaches for trading purposes and such beaches shall be considered inviolable British property and the occupant for the time being is authorised by the parties subscribing to expel trespassers and to maintain his right of occupancy and to defend himself and property against unlawful aggression."

" Article 10

That a copy of this Treaty before furnished to the chiefs receiving comey and the chiefs to produce it when receiving comey and that these articles be held to be law existing between the British traders and the natives for the regulation of trade. Matters to be observed so long as they continue law by those who are not present at their enactment as by those who were."

Now up to this point the position seems clear. Comey is a payment by masters of vessels—at first according to size of vessel and goods exported—afterwards according to goods exported alone. If the comey be paid, no

further payment whatever is on any pretence to be exacted from traders. On the other hand the native tribes bind themselves *inter alia* to allow traders to occupy trading stations or beaches and that occupation is guaranteed by them as a public right. It is admitted that the occupation of the beaches in question was originated in the persons of the defendants' predecessors under this state of arrangement.

In 1885 the country was formed into a Protectorate, and a local council was established.

In 1888 a change was made and was embodied in a document headed "Regulations about payment of comey in the Brass District." In form this document is unilaterial, being promulgated by the British Consul. But it is not denied that it was *de facto* accepted by the chiefs as coming in place *pro tanto* of the former arrangements.

The clauses are as follows:—

"1. All persons whatsoever exporting produce from the Brass district except of that part which is administered by the Royal Niger Company Chartered and Limited, must pay comey.

2. Comey will at present take the form of an export duty to be levied on all palm oil or plain kernals exported from the Brass district, and the amount of this tax is at present fixed at 1s. 3d. per ton of palm oil, and 6d. per ton of kernals. Palm nuts are purchased, they will be liable to the same duty as kernals, but five casks of nuts will be considered as equivalent to only one cask of kernals.

3. The comey will be paid on the 1st of January, the 1st of April, the 1st of July, and the first of October in every year to His Majesty's Consul or to whomever he may delegate for that purpose. It may be paid either in cash, cheques on an English bank, or bills of a reputable firm, but under certain circumstances the Consul may insist on a cash payment.

4. The payment of comey is to be accompanied by a signed and sealed statement of accounts on the part of the payor. This statement will be addressed to His Majesty's Consul at Old Calabar, and will be opened and examined only by him. If the Consul desires signed bills, of lading, oil or produce books, or other documents necessary to verify the accounts of the comey, must be submitted to his inspection.

5. The Consul or other person or persons whom he may depute will pay the comey to the kings and chiefs, and the Consul alone will be responsible for this payment. Any payment of comey to any king or chief of Brass, except through the agency of His Majesty's Consul or his delegate, will be null and void, and will not exempt the payor from his liability to pay the full extent of the comey over again.

6. When the comey has been collected by the Consul or his delegate one-half of it will be paid to the King of Nimbi, and the other half will be paid to the Governing Council for expenditure in the interests of the country as stipulated in the Consul's order for the constitution of that council.

7. The present regulations respecting payment of comey in Brass will supersede all others previously issued."

This obviously altered the entire situation. Comey, so far as the paying trader was concerned, was now due from every trader, whether shipmaster or not, but was due not any longer to the chiefs, but in the form of an export duty to the Consul. By Article 5 a payment to a chief is distinctly declared to be null and void.

So far as the chiefs are concerned, they are to be satisfied with the handing over to them by the Consul of the half of the whole sums received. So matters remained till 1891. In that year a proclamation was issued which established an import duty at a certain rate. Since then import duty has been paid in terms of this proclamation. Since then payments to the chiefs have been made by the Government in form of subsidy.

The ground of the judgment of the Court of Appeal may be found in the following sentence:—

“ We are satisfied,” say they, “ upon the evidence, that in 1891 a new system was introduced with the consent of all necessary parties, under which the export duties which took the place of comeys were abolished and replaced by the imposition of import duties, and the payment of personal subsidies to the chiefs, which still continues.”

Certain documents have been produced which show clearly enough that this was the intended policy of the new arrangement. There is no evidence, however, that these actual documents were communicated to the chiefs, and from their nature it is quite improbable that they were. The appellants accordingly say they must as evidence be disregarded. What cannot however be disregarded is that *de facto* from 1891 up to the present time, the Government has paid subsidies, and not Comeys in the old form, and that so far as the traders are concerned there is no real claim against them for occupation being made till the matter gets into the hands of a lawyer in 1906. There is evidence, vague as to date, given by some of the chiefs that rent was demanded. But it is certain that no rent ever has been paid by a trader established under the old *régime*, the only persons who did pay being the Telegraph Company, who were not a trading company and who made a special arrangement.

Viewing the matter as a whole their Lordships see nothing which will make them disturb the finding of the local court. But even without that finding there seem to be an insuperable difficulty in the claim or the appeal as laid. The effect of the arrangement of 1888 was, in their Lordships' judgment, at least so far as existing occupants of beaches were concerned, to substitute the Government for the trader as the debtor of the chiefs, and to secure to the trader his rights under the original agreement, *i.e.*, the right of occupation so long as he, the trader, paid his dues to the Government. Now it is not averred that the trader here has failed to pay all that the Government ask.

If the true view, as the argument of the chiefs assume, is that the subsidies are judicial salaries—a most unlikely arrangement—then their course is to sue the Government for payment of sums due under the arrangement of 1888. But they have no action against the trader already established in occupation; and no right as against him unless he, the trader, fails to pay the Government—a failure which is not alleged against him.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

THE WASSAW EXPLORING SYNDICATE;
LIMITED

APPELLANTS

AND

THE AFRICAN RUBBER COMPANY, LIMITED . RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[1914] A.C. 626; 83 L.J.P.C. 316; 111 L.T. 54, P.C.; [P.C. 1874-1928] 22

1914 Apr. 29

Lords Atkinson, Moulton, Shaw and Summer

Concessions in Gold Coast Colony—Certificate of Validity—Demise of Surface—Exclusive Right—Modification of Concession by Certificate—Adjustment of Terms upon Opposition—Concessions Ordinance (No. 14 of 1900), ss. 13 and 16.

In 1906 the respondents obtained a concession over territory in the Gold Coast Colony; this concession was in the form of a demise and expressly conferred the right (*inter alia*) to mine and to cut timber for any purposes. In 1909 the appellants obtained a concession over lands which included part of the above-mentioned territory; this concession also was in the form of a demise and conferred on the appellant "exclusive liberty" to mine and to cut timber for mining purposes. The appellants in 1910 obtained a certificate of validity under the Concessions Ordinance 1900, and subsequently opposed an application made by the respondents for a certificate in respect of their concession:—

Held: That although the appellants' certificate concession was in the form of a demise, and was expressed to give them an exclusive right, it did not preclude the issue of a certificate of validity to the respondents, but that the appellants were entitled to remain parties to the application until the terms of a certificate with such modifications or conditions as would preserve their rights had been settled by the Court under ss. 13 and 16 of the Ordinance.

LORD SHAW. This is an appeal from a judgment of the Full Court of the Supreme Court of the Gold Coast, which affirmed a judgment of the Concessions Division of that Colony.

There is in operation in the Colony the Concessions Ordinance of the year 1900, as amended by subsequent ordinances of the years 1901, 1902, 1903 and 1905. The ordinance in question in the present case is No. 14 of the year 1900. Under that ordinance a Divisional Court of the Supreme Court has jurisdiction to inquire into and certify as valid or invalid any concession, and by Section 8 it is provided that "no proceedings shall, without the leave of the Court, be taken to give effect to any concession unless such concession has been certified before their Lordships arises out of a decision by this Concessions Court.

Generally speaking, one may say that the object of this legislation is for the protection of the natives and the native chiefs, for the validation at the sight of the Court of concessions granted of mining rights, rights of cutting trees, &c., and for the regularising of the rights of competing concessionaires by establishing priority among them *inter se*. On this last point Section 23 provides that "a certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto."

In 1906 the respondents, the African Rubber Company, obtained a concession by agreement between Chief Cudjoe Sah of Arkwasu, on behalf of himself his heirs and successors, and his tribe, by which the lessors granted, let, and demised to the respondents a parcel of land containing an area of five square miles "and all rubber, vines, fruits, trees, root and grass

rubber, timber of all description, and surface rights and property in the said surface land and premises." Full and exclusive powers and liberty were granted to the respondents and their assigns to collect rubber, make clearings, construct farms, and to grow rubber, make clearings, construct farms, and to grow rubber or any other produce. The letting and demise also included all mines, mineral substances, precious stones, and gave power to erect buildings, roads, and the like, and to divert watercourses, "and to do all acts matters and things so absolutely and effectively" as if the respondents and their assigns were for the term thereby "intended to be demised absolute owner of the fee simple." With regard to timber the grant was expressed thus "with liberty to cut remove and fell, and carry away all trees timber shrubs and plants either for the purpose of carrying on the works of the lessees or for the purpose of sale."

As stated, this agreement was made in 1906. An application was made in the end of 1909 for a certificate validating this concession. This was opposed by the appellants, the Wassaw Company, and on the 29th July 1912, the judgment appealed from, disallowing the Wassaw Company's opposition, was pronounced.

The *locus standi* of the Wassaw Company, the appellants, was this: In 1909 they had obtained a concession from the succeeding Chief of certain territory, part of which was the same as that contained in the concession granted to the respondents three years before. But the appellants promptly, that is to say, in the beginning of January 1910, obtained and applied for a certificate of validity. So far as the dates go, accordingly, the appellants' certificate, which was recorded on the 4th January 1910, has priority to that of the respondents.

The Wassaw Company now pleads its right, under the demise to it, altogether to exclude the African Rubber Company from the overlapping portion of the territory, to prevent it from either planting or cutting trees thereon, and in short to treat it in going upon the land for any purpose as a trespasser. This was the argument presented to their Lordships.

The Wassaw Company's lease is printed. It is true that it bears to be "A demise and grant" of a certain parcel of land, together with all the mines and minerals therein. The period of the grant is for ninety-nine years. There then follow clauses beginning: "It is hereby agreed and declared that during the continuance of this demise the Company shall have full free and exclusive liberty" to sink and make pits erect bridges use ground as timber-ground take and carry away minerals make tram-roads "and also to cut hew down and fell and take away any timber or trees on the said lands for the use of the steam engines and machinery used in the said mines and for the erection and maintenance of any buildings works and contrivances thereon." It is upon the earlier portion of this clause as a comprehensively exclusive demise, that the appellants take their stand.

Their lease further proceeds to give power to divert and turn water and water-courses "for the purpose of more effectually exercising and enjoying the liberties and privileges and easements hereby granted," and also to do all necessary acts or use all necessary devices "for the efficient working of the mines and premises hereby demised." The demise concludes by giving to the Company peaceable possession in these terms, which their Lordships think are important, *viz.*: That they shall "peaceably and quietly possess and enjoy the mines and premises hereby demised and exercise the rights and privileges hereby conferred without any interruption by the Chief," &c. The appellants in certain portions of their written grounds of opposition appear to concede the practical limits of the rights thus conferred upon

them. They confine their position to that of mining lessees, and they claim "the right to such timber as may be required for purposes ancillary to such mining, with the usual incidental powers and rights necessary for the beneficial enjoyment of such concession." Standing their priority on the concession record, this appears to their Lordships to be a correct statement of the measure of their rights. This the respondents, the African Rubber Company, have never disputed. And it ought to be further added, in fairness to the Courts below, that in these Courts this measure was never questioned or denied. Nor do their Lordships see any occasion to doubt that, suppose the proceedings had gone to the further stage of granting to the respondents a certificate of their, the respondents' title, that certificate would have been so worded as amply to protect any prior mining rights and all rights ancillary thereto which had been created in the appellants by their first validity concession.

It is now maintained, however, by the appellants and it appears also to have been so argued in the Courts below that the terms employed in their lease, are of such a character as to give them a demise of the land itself with the exclusive possession for ninety-nine years thereof and of all the timber thereon, and with a right also to prevent trespass on any part of the area in question. Their Lordships cannot so construe the rights of the appellants.

In the first place, it has to be observed that a right of exclusion of this character as arising out of the agreement of lease if treated as a demise of land does not appear to be within the definition of "concession" or to be the subject of validation by the Concessions Court, or to gain any priority thereby. By the Ordinance "concession" means "any writing whereby any right interest or property in or over land with respect to minerals precious stones timber rubber or other products of the soil" purports to be granted by a native. This definition does not extend to a demise of the surface of the land, nor does it extend to a sale or lease of the land itself. Even if the lease were construed as a demise of the land it is something which is not a concession and to which priority under the Concessions Ordinance has no application.

In so far, moreover, as the lease bears this character it cannot be pleaded in a question with the respondents, the African Rubber Company, who three years before had in fact obtained a title of a similar or rather of a much broader character and not confined to mining purposes or purposes ancillary thereto. What is being done, as their Lordships understand, is that the respondent Company, under their lease of 1906, are cutting certain rubber trees and planting others, and developing the property in an agricultural and arboricultural sense. All this—subject to the appellants' mining needs—appears to be within the respondents' just rights.

The next point, however, is the general one and is of importance. The appellants, having got first on the Concessions Record with their mining lease, propose to prevent these operations of the respondents upon the area in question because of the use of the word "exclusive" in that lease. They admit that they could not develop this territory themselves, indeed that they could not cut a tree upon it, except for their mining purposes. But they construe their rights as if the lease entitled them to prevent any development of this large tract of land by anyone else. Their plea is that it can never be known, if, say, trees were cut down, whether in the course of a century they, the Wassaw Company, or their successors might not come to require those trees. In their Lordships' opinion this plea is not well founded. Although the term "exclusive" is employed it has to be admitted that this term must be taken along with one specific and particular purpose and the strictly

limited nature of the rights of mining which are the subject of the grant. Accordingly the word cannot be comprehensively interpreted. For the result, upon such an interpretation, would produce a quite impracticable situation.

The Concessions Ordinance entirely covers such a case. It is provided under Section 13 that "it shall be lawful for the Court in its discretion to make such modifications in the terms of any concession and to impose such conditions with respect to the issue of any certificate of validity as to the Court shall seem just." It is then provided by Section 16 that the certificate of validity shall *inter alia* contain a statement "of any limitations, modifications and conditions imposed by the Court." Nothing could more clearly indicate that in the case of rival claims to, or overlapping rights in, any area which is the subject of a concession, the Court can adjust the rights of parties by exercising their discretion and having the practical regulation of these rights determined on the spot.

Their Lordships accordingly must repel the plea put forward by the appellants in this case in so far as it is a claim for exclusive possession of land, or for a right to exclude the respondents from it, or from exercising upon it all such rights of cutting and planting timber and the like as do not in point of fact invade the rights of the appellant Company as mining lessees.

It is with regret, however, that their Lordships have to observe that the actual order made in this case, in so far as it dismissed the opposition of the appellants at a stage prior to the actual terms of the certificate to be proposed being announced, was premature. The judgment referred to is that of the 24th February 1913. The Court, says that judgment, "is of opinion that the grantor retained the right to grant concessions subject to the prior rights of the opposer under their certificate of validity." This opinion, their Lordships think, was correct. But when the order proceeded, "The Court is therefore of opinion that the Court of First Instance was justified in dismissing an opposition which appears to be based entirely upon hypothetical grounds," their Lordships unfortunately cannot agree. The appellants hold a title by their prior certificate to what was to some extent a competing right in regard to the same area of ground, and in these circumstances they think that the appellants had a right to remain in Court until the terms of the certificate came to be adjusted. Their Lordships do not doubt that now that the claim of the appellants on the arguments submitted has been settled in the negative, the certificate of validity of the concession to the respondents will be dealt with by making such limitations, modifications, and conditions as will conserve the mining rights of the appellants and those rights of cutting timber which are ancillary thereto.

In the circumstances the orders for costs in the Courts below will not be disturbed, but their Lordships will humbly advise His Majesty to allow the appeal, and to remit the case to the Supreme Court, so that the proper steps may be taken for issuing to the respondents a certificate with the requisite limitations, modifications, and conditions, the respondents having leave to object thereto if so advised. Their Lordships are not inclined to think that the appellants would have been prejudiced by allowing the case to go forward to a certificate, the views of the Court in the direction of protecting their, the appellants', rights having been made plain. There will be no costs of the present appeal.

ATTA KWAMIN .

APPELLANT

AND

KOBINA KUFUOR

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 28

1914 July 21

Lords Kinneer, Shaw and Parmoor

Contract—Ignorance as to contents of agreement—Mark made by illiterate native—Principal and agent—Want of authority—Concurrent findings of two Courts.

In 1891 one Kwasi Tinney, the appellant's predecessor, acting on behalf of a chief named Ntwiegye, granted a lease of certain gold mines to one Kavanagh. By an agreement made in 1899, Ntwiegye's successor, for a consideration of £300, purported to recognise Kwasi Tinney as the actual lessor, and to surrender to him all right and title in the lessor's part of the lease. Ntwiegye's successor was represented at the making of the agreement by his linguist Kojo Badu, who signed the agreement by touching the pen with which his mark had been made. On the strength of this agreement, the appellant claimed to be the lessor. Both the Courts below found that Kojo Badu had no authority to surrender his chief's rights and that he did not know what he was doing when he touched the pen.

Held: That the concurrent judgments of two Courts on questions of fact will not be reversed unless some error is apparent in the way in which the learned judges have dealt with the facts.

Also, in contracts in which natives are concerned, the law as to mistake or ignorance is not to be governed by the same considerations as a purely English contract. The question whether an illiterate native has appreciated the meaning and effect of an English legal instrument is a pure question of fact, to be decided on the evidence.

LORD KINNEAR. Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts; and the learned Judges below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this Committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two Courts, unless "it be shown with absolute clearness," to use the language of Lord Herschell, "that some blunder or error is apparent in the way in which the learned Judges below have dealt with the facts." It is true that Lord Herschell's rule applies in terms to those cases only in which the judges have been unanimous; and one of the Judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned Judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt.

The controversy relates to certain lands called Bibianiha in the Western Frontier district of the Gold Coast Colony; and the question to be decided is whether the respondent Chief of Enkawie, who was plaintiff in the action, is bound by an agreement alleged to have been made in 1899 in the name of his predecessor Ntwiegye the younger, who was then chief, to surrender in favour of a chief styled Kwasi Tinney, of Pataboso, in the district of Sefwhi, all right and title in the lessor's part of a lease of gold mines, and in

the property of Bibianiha comprised in it. Chief Ntwiegye was not himself a party to this agreement, nor was he present when it was made, but he is said to be sufficiently described as the Chief Aichil Aigay, which is supposed to be an *alias* of Ntwiegye, and to have been represented by his linguist Kojo Badu, who signed the memorandum of agreement, by making his mark, or touching the pen with which the mark had been made. The memorandum recites that a lease for 99 years had been made in 1891 by Chief Kwasi Tinney of certain gold mines within the lands of Bibianiha in Sefwhi to Dr. Arthur Mather Kavanagh, since deceased, and purports to record an agreement whereby

“ in consideration of the sum of £300 to be paid on or before the 10th of May 1899 by the Chief Kwasi Tinney to Kojo Badu, for and on behalf of Chief Aichil Aigay, the latter chief recognises the lease and withdraws all claims, demands, rights, titles, privileges, advantages, benefits to and arising from the afore-mentioned lease and the Bibianiha property comprised therein.”

This is badly expressed, but if the agreement be valid there seems to be little room for question as to its meaning and effect in law. It assumes a right or at least the assertion of a right on the part of the Chief of Enkawie to give or withhold a lease of Bibianiha property, which he exercises by recognising a lease already granted by Tinney, and thereupon it makes him surrender absolutely and completely in Tinney's favour, not only the lessor's interest in the lease just confirmed, but all right and title whatever in the property of Bibianiha. This being the alleged agreement, the respondent has no fault to find with it in so far as it recognises this lease of 1891. On the contrary his case is that the lease was originally granted with the authority of his predecessor Ntwiegye who never disputed its validity, but consistently maintained his right as the true lessor to the rents payable by the lessee. But he maintains that in so far as it surrenders the rights of Enkawie it is invalid and ineffectual, and this on two grounds, first, that Kojo Badu had no authority to surrender his chief's rights or to dispose of property belonging to his stool of Enkawie, and secondly, that he did not understand the memorandum of agreement and did not know what he was doing when he was made to sign it. These are separate and distinct grounds in law, but they are both resolvable into questions of fact, and before considering either separately, it will be convenient to examine the circumstances out of which the transaction arose and the conditions under which the memorandum was executed.

The lands of Bibianiha are at some distance from Enkawie, and since the delimitation of the frontier in 1906, they have been placed within the Gold Coast Colony, whereas Enkawie is in Ashanti. The origin and early history of the Enkawie right are not clearly brought out in evidence. But it is proved that for a considerable, if indefinite, period before 1891, when the lease to Kavanagh was granted, the respondent's predecessors as Chiefs of Enkawie held the lands as part of the possessions of their family stool, and exercised their right of ownership by levying rents or tribute from members of other tribes whom they permitted to occupy them. Among these were natives of a tribe called Appolonians, who came upon the land to mine for gold. They explained their object to the people of Sefwhi, whose territory is immediately adjacent to Bibianiha; Eduampon, the Chief of Sefwhi, reported the matter to the Chief of Enkawie, who gave permission to the Appolonians to work the gold upon the Bibianiha lands. In return they paid a certain proportion of the gold extracted to the Sefwhi Chief, who paid

over one half as tribute to the Chief of Enkawie. But, the actual collection for this purpose seems to have generally made by a Sefwhi tribesman named Kwasi Tinney as representing his chief. Matters were in this position when, in 1890, Dr. Kavanagh appeared on the land in search of a mining concession. This was reported by Tinney to Ntwiegye of Enkawie, who consented to a lease being given to Kavanagh for mining purposes. The lease referred to in the minute of agreement above mentioned was accordingly granted for 99 years at a rent of £300 a year. It is made in favour of Kavanagh and his assigns, and before the date of the alleged agreement it had passed into the hands of an English Limited Company, the Bibiani Goldfields Company, who still hold it by a title which is not disputed by either of the parties to this litigation. On the face of it Tinney appears as lessor, but there can be no question that it did not in reality proceed upon any exclusive title in him, but was granted by him, with the authority of the Chief of Enkawie and also of his own immediate chief. Yaw Gebill, of Sefwhi, who had by that time succeeded Eduampon. Tinney's name as lessor of course implies an assertion of a right and title to grant the lease, but not necessarily of an independent right of property in the lands comprised in it. If they belonged to Enkawie, the owner was Ntwiegye; if they belonged to Sefwhi, as the appellant maintains, the owner was Yaw Gebill; and both of these chiefs authorised the lease. Yaw Gebill did so by countersigning the lease by his mark; and Ntwiegye did so orally before the lease was executed. This difference implies no admission of conflicting claims on the part of an Ashanti Chief, who knew nothing of the practice of creating or transferring rights by written documents. It must be admitted that in the absence of written title the nature and extent of the rights possessed by the Sefwhi chiefs are left in considerable obscurity. The learned Chief Justice is of opinion that neither Tinney nor the Sefwhi Chief can properly be called tenants, and there is evidence tending to show that they were caretakers for Enkawie. But however their right of occupation might be legally defined, the material point is that before the agreement of 1899 it was not an exclusive right of property. Nothing was done to relieve them of their liability to pay tribute to the Chief of Enkawie, or to derogate from his paramount right. The Court below has accordingly taken it as well established in evidence that at that date the ownership was still, as it had been for generations, in Ntwiegye of Enkawie, and that the only question for consideration was whether it had been effectually surrendered by the alleged agreement. This, indeed, is the assumed basis of the agreement itself, which must be altogether ineffectual if Ntwiegye had no good title to confirm or reject the lease. From this point of view, the first question to be decided is whether the memorandum was, in fact, authenticated by Kojo Badu touching the pen. This is not in substance or effect the signature of a written contract, but a symbol of assent which must be proved by oral testimony, and the testimony is conflicting. The Court, however, has held it to be sufficiently proved that Kojo Badu touched pen after his mark had been made by a witness named Duncan, whom Captain Way, the manager of the British Company, appears to have called in for the purpose of attesting the execution of the document. This point, therefore, must be taken as decided in the appellant's favour. But it does not go far to solve the more important questions, whether Kojo Badu was empowered to make any such contract for his chief, and whether he knew the meaning of the paper which he was supposed to sign.

As to the first of these points, there is no evidence to prove that Kojo Badu had any antecedent authority to make a new contract with Tinney. At

that time there was no dispute between Ntwiegye and Tinney. But the rents due by the English Company had been unpaid for several years, and according to the respondent's evidence, which the learned Judges have believed, the sole purpose for which Kojo Badu and certain elders of the tribe were sent to Cape Coast was to get the Enkawie share of these rents. It was argued that the respondent's own evidence shows that a contract of sale was intended, because he says that Badu was "told to go with Tinney to Cape Coast for the purchase money of the Bibiani lands"; and it is said that purchase implies sale. But the respondent was speaking in Fanti, and without questioning the general accuracy of the Court interpreter, it can hardly be assumed that the native witness was using the words of his own language with exact reference to the conceptions of English law. It is evident indeed, from another passage in his evidence, that the distinction between a sale and a lease for 99 years, if he understood it at all, was not present to his mind, because he says that "when the land was leased to the white man," Tinney did not go to Enkawie about the sale, but he sent messages, "and my ancestor permitted him to sell," no stress therefore can fairly be laid upon the mere use of such terms as purchase and sale in the mouths of the native witnesses; and whatever may have been the respondent's understanding of their legal import, it is certain that he did not intend to suggest the notion that Ntwiegye had authorised a sale to Tinney. He makes it perfectly plain that his chief's instructions to Badu and his companions were that they should go along with Tinney to Cape Coast where they and Tinney together were to collect £1,000 from the white man, and to divide the money. Tinney was not expected to purchase the land and pay the price, but to collect overdue rents from the white man who was already in possession. For much the same reasons the statement of the appellant's witness Kwesie Barku that Ntwiegye's messengers were told "to sell the lands to Tinney" may be disregarded. This witness is discredited, by the comment of the learned Judges on his testimony as to the execution of the memorandum, and on this point he is thrown over by the appellant himself. On the other hand Mr. Justice Gough who saw and heard the witnesses, states expressly that he was favourably impressed by the evidence of the respondent. But assuming Barku's evidence to be perfectly honest, it is confused and self-contradictory. He agrees with the respondent that the £1,000 for which Badu was sent was to be collected from the white man; and the notion of a sale to Tinney was probably a mere blunder. At most, this is an ambiguous phrase which cannot be set up against the great weight of evidence tending to prove that when Ntwiegye gave his instructions to Badu there was no dispute with Tinney, and that "beyond telling Badu to go and get the money, Ntwiegye gave then no other instructions." This is entirely in accordance with all the probabilities. The Chief Justice points out with great force that there was "no reason why Kojo Badu should have been deputed to give away the Enkawie rights to Tinney." They were in agreement as to the white man's lease, and they were also agreed that his rents in which they were to share were in arrear. It was perfectly natural that they should join in a demand on the white man; but it is not intelligible that Ntwiegye should desire to sell his right to Tinney, in consideration of something less than the share of rent which he would be entitled to recover if he kept his land unsold. It is said that Badu would not have touched pen if he had not been authorised to consent to the agreement. But it is proved that Ntwiegye knew nothing of the agreement either before or after it was signed; and the evidence as to its execution by Tinney, and Badu is loose and unsatisfactory to the last degree. The best evidence has been lost by the

death of both of these men. But the Courts below had to decide on the evidence actually adduced; and there is nothing in that to suggest that any negotiation took place between them, or that there was any reason for negotiation before the memorandum was put before them as a completed document, and the marks set upon it, which were to stand for their signatures. It was a document in the English language, and it was presented to them for signature by Captain Way, the manager of the English Company, in his house at Cape Coast, it was interpreted by a native clerk in his employment, and when it had been signed, neither the document itself, nor any copy of it was delivered to either of them. It was retained by Captain Way as his own document, and when the trial took place, it was still in possession of the English Company. It was obtained by Captain Way in return for payment of £900 of arrears of rent, and it is manifest that it's true purpose was to confirm his Company's right to the concession. Nevertheless, it purports to be a contract between Kojo Badu and Tinney; and that is said, not unnaturally, to be a singular form of instrument to adopt if the mutual rights of the two chiefs were not to be adjusted. But the learned Chief Justice observes, and this is a point on which his experience gives weight to his observation, that owing to the terms of the Concession Ordinance, Captain Way was anxious to retain the advantage given by the lease of 1891 rather than have a new joint lease from Ntwiegye and Tinney, dated in 1899." He considers that the rents were withheld until the agreement had been signed, and he adds, "there can be no doubt that the agreement was made by the European concessionaires for them and in their interest." It would have served that purpose if it had been no more than an explicit recognition of the lease that had been granted by Tinney; and in that case, it might have been within Badu's authority to sign it as representing his chief. But the question is whether he signed it in the full knowledge that it went beyond this purpose and made over to Tinney of Sefwhi, the Enkawie Chief's whole right, title and interest in the Bibiani lands. It is very possible that superfluous words may have been inserted by an unskillful English draftsman with the notion that they would somehow make the confirmation of the lease more explicit or more effectual. But however this may be, there is not a shadow of evidence that they were inserted because of a new bargain between Badu and Tinney, or that their meaning and legal effect was explained to either of the natives. The only evidence tending to show that they understood the agreement at all is that it was read over to them in the Fanti language by a native of the Gold Coast named Kraku in the employment of Captain Way; and this is plainly not enough to show that they assented to it with an intelligent appreciation of its contents. Kraku, who is still alive, was not examined, as he ought to have been, and even if it be assumed that the Fanti language possesses an exact equivalent for each of the English legal terms which are brought together in the Memorandum, it cannot be supposed that Badu could appreciate the legal effect of a multiplicity of words expressing unfamiliar conceptions on their being once read to him. He had no legal adviser, and no English adviser of any kind to explain the document. It is very probable that he understood that the paper he was asked by the lessee to sign related only to the lease or to the rents which he had been sent to collect. It is not, however, proved that he acted under that impression. But the possibilities of misunderstanding are so obvious as to render it imperative on the appellant who alleges his intelligent consent to a contract expressed in a language which he did not understand, to prove that it was clearly explained to him. For this purpose it was indispensable to examine Kraku, and the appellant's failure to put him

in the witness box is equivalent to an admission of his inability to prove his case by the best attainable evidence.

In these circumstances the learned Judges have rightly thought it material to consider how far the agreement has been acted upon, because a subsequent acceptance by Ntwiegye would have bound him as effectually as an antecedent mandate. The appellant relies upon a receipt appended to the agreement. But the value of the receipt depends on the same consideration as the validity of the contract. There is no other evidence that the sum of £300 was paid to Ntwiegye as "the consideration" mentioned in the agreement. It is proved that he received a larger sum, but to account of the rent to which he claimed to be entitled. All the other evidence of subsequent conduct shows that neither Ntwiegye nor Tinney knew anything of an agreement by which the former had abandoned his rights in Bibiani. No copy of the agreement was given to either; and when Badu returned from his mission he told his Chief nothing about any such contract. He brought back with him £420 as the Enkawie share of the £900 of arrears paid by Captain Way, after certain deductions which it is immaterial to examine. Ntwiegye would therefore be left under the belief that his mission had been exactly accomplished. But a more material fact is that Tinney continued to recognise the Chief of Enkawie's right in the lands by paying over to him a share of the rents received from the lessees; and a number of letters have been produced in which he distinctly admits the right of Enkawie. The Judges also attach considerable importance to an event which occurred after the respondents' accession to the chiefship. The respondent had heard that a paper lease had been granted, and also that a cane or rod had been presented to Tinney by the European lessees inscribed with the words "Bibiani Gold Fields, Limited, to King Quesi Tinney, 1902." "By the native mind," says the Chief Justice, "this would be regarded as evidence that Tinney was owner of the land." But on the respondent's demand, Tinney sent the cane to him, and agreed to send him the lease when he should obtain it from his lawyer, and the learned Judge says that "to anyone acquainted with the native mind this would indicate that Tinney knew that the respondent was the real owner of the land."

Notwithstanding these considerations, it is said to be a mere assumption that Kojo Badu did not know the terms of the contract. But this is inaccurate. The question is whether his knowledge is proved, and the respondent cannot be required to prove a negative. The learned Judges say in effect that the assertion that he signed the agreement in knowledge of its contents is so improbable that they refuse to believe it, on the evidence adduced. This is a perfectly legitimate method of reasoning; and it is impossible for their Lordships to say that they are so clearly wrong that their judgment must be reversed. But the respondent's case does not depend upon Badu's state of knowledge. It may be that this would afford no sufficient ground for setting aside a contract which Badu had been duly empowered to make, since in that case the Chief might well have been held to have taken the risk of this own agent's intelligence. But its true importance lies in the valuable light which it throws on the fundamental question of his power to bind the Chief of Enkawie. The learned Chief Justice says he is satisfied that Badu would not have signed away his chief's lands without orders to that effect; and that observation would have afforded a very strong argument to the appellant, if it had not been accompanied by a clear opinion that Badu did not understand what the agreement meant. It is material on the other hand to observe that if Badu's authority to contract is not proved by direct testimony, it is just as little to

be inferred from any assertion implied in his consent to sign.

The dissent of Mr. Justice Earnshaw is, as he explains, based entirely on the contract. But the learned Judge assumes that the contract is binding which, with great respect, is the very question in dispute. The contract itself does not prove that one of the parties was empowered to bind a third person, nor that a native of Africa understood a legal instrument in the English language. These are matters of fact which must be proved by the party who avers them. The respondent's case is not that a contract binding upon him should be set aside on the ground of fraud or misrepresentation, but that no contract was ever made which could bind him or his predecessor. So far as this rests on want of authority in the person professing to bind him, the law is perfectly clear. But in so far as it rests on mistake or ignorance it is by no means to be governed, as the learned Judge seems to assume, by the same considerations as a purely English contract. The principle of law is the same in both cases, but the presumptions of fact are widely different if a contract is subscribed, without negligence, in the honest belief that it is a document of a totally different nature, it is not binding upon the subscriber, not by reason of fraud or misrepresentation but because the mind of the signer did not accompany his signature. If he is excusably mistaken as to its actual contents he never intended to sign and in law he never did sign the paper to which his name or mark is appended. But then when a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it. But there is no presumption that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

THE ATTORNEY GENERAL v. JOHN HOLT & CO., AND OTHERS

THE ATTORNEY GENERAL v. W. B. McIVER & CO., AND OTHERS

[ON APPEAL FROM THE SUPREME COURT OF SOUTHERN NIGERIA]

(1915) 2 N.L.R. 57

1915 Feb. 9

Lords Shaw, Parker of Waddington and Sumner

Foreshore—Rights of the Crown—Land reclaimed or silted up—Distinction between reclamation and alluvion—Crown grants of land adjoining foreshore—Perpetual right of user of foreshore in grantees—Acquiescence—Presumed licence.

As an incident of the Cession of Lagos by Docemo in 1861, the foreshore of the lagoon, and all land accruing to the foreshore by reclamation or silting, became vested in the Crown.

Certain rights of user of the foreshore, and such land accruing thereto, have become vested in the grantees of adjoining land by licence from the Crown, presumed from acquiescence on the part of the Crown and other facts.

LORD SHAW. These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the Full Court of the



The form of the proceedings is by way of informations. It only requires to look at the prayer of these to observe the startling consequences which would result to all the Respondents' properties, should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute and for an injunction and peaceable possession. The result of this would be the complete exclusion of the Respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland.

Their Lordships are not surprised that the advisers of the Crown, shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that as to Dunkley's land and Johannsen's land, no appeal was presented against the portion of the judgment of the court below, which declared that the Respondents have acquired an easement for a jetty and a right-of-way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth.

This is the first time that process by way of information has been used in Southern Nigeria, and it is remarked by Osborne, C.J., that: "It has proved exceedingly difficult to adapt to the Supreme Court Ordinance, and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation."

Strict English procedure was accordingly departed from and the courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties.

"What," said the learned Chief Justice,

"we are really asked to do is, to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors in title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the Defendants' lands, and the low-water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties, and the courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of Osborne, C.J., that about 1850, Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on the 1st January, 1852, the slave trade was finally abolished. A British Consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice, that the land had originally belonged to tribal communities, but that "During the decade between 1852 and 1862, the practice of alienation sprung into vogue, and another new feature totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the white-cap chiefs, who were in no way subordinate to the early Kings."

In course of time, however, the royal power increased, and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on 6th March, 1861, entered into a Treaty of cession of the Port and Island of Lagos, to Her Majesty the Queen of Great Britain. The Treaty is printed at length: the only question which has been mooted upon it is as to whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they—

“ grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the Port and Island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever, thereunto belonging and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely and absolutely.”

Their Lordships do not refer to the Treaty further than to say that in their opinion, property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors, were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case.

On 13th March, 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On 19th February, 1866, Lagos became part of the West African Settlements. On 24th July 1874, the Gold Coast Colony, including Lagos, was formed. On 13th January, 1886, Lagos again became a separate Colony, and finally, on 1st May, 1906, it became the Colony of Southern Nigeria. This is briefly the political history of the island; but none of these changes, recorded in the judgments of the court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals, is as to the boundary seaward of those plots. On 21st January, 1864, a Crown Grant was executed in favour of Williams, who had been in possession for 12 years before, and the boundary on the South-west side of the property, was stated to be the river Lagos. In 1861, there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869, Dunkley obtained a Crown Grant. There is a peculiarity as to the southern boundary, which is stated to be the “ Marina,” but it appears to be a fact that there was no “ Marina ” or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land, and built a sea-wall thereon as early as 1868, and that at the time he acquired the Crown Grant, he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Reverend James White, in 1861, and in his Crown Grant the western boundary is stated to be the lagoon. The fourth plot, viz., George’s land, was the subject of a grant from King Docemo, and the boundary is described as “ facing the lagoon.” The fifth plot viz., Johannsen’s land, is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach.

Their Lordships do not investigate these titles in further detail. For in their opinion, they are substantially at one in this, that the properties were

each and all treated in description as being bounded, in fact by the sea. The expression may be in one case, the river Lagos, in another, the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion, was sufficiently expressed. They were riparian properties.

In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description, which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before advertent to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or cabbage sticks to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British Government, but so early as 1864 it was recognised, and indeed enforced, by an Ordinance confirmed upon the 28th March, of that year. A road had been made along a part of the river-side, and the owners of land abutting on the road were ordained among other things, to drive in stakes in the bank of the river, in such a manner, as should be required by the Government surveyor—the narrative of the Ordinance being that the road was liable to be put out of repair, and the soil carried away by *inter alia* “the action of the tide at the base thereof.” The reason of the Ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos, that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the Respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the possession of the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place, their Lordships are of opinion that when *de facto* the boundary was the sea under the different names already alluded to, there is nothing in the law or the nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown, that the foreshore upon the line of inroad had *de facto* been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained.

The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were *de facto* fronted and bounded by the sea, were to be in the situation that their frontage to the sea was to



reason as the principle in regard to river banks, *i.e.*, that it is founded upon security and general convenience.

In *Rex v. The Hull and Selby Railway* (5 M. & W. 332), Chief Baron Lord Abinger, referring to the case of *Yarborough*, says: "The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

The case of *The Hull and Selby Railway* is important, not only for the opinions of Lord Abinger and Baron Alderson, but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown.

"In all cases," said Lord Abinger, "of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and *vice versa*," and repeats in different words his main proposition: "No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property." Baron Alderson dwells specially upon the double-sided operation of the rule: "I think," he says,

"the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low-water mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case, the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In the case of *Chambers*, Lord Chelmsford refers to the double-sided operation of the rule in this way: "It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property which is thus silently transferred by the law to the proprietor of the seashore." As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress.

"Considering," said Chief Justice Abbot, "the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

This statement of the principle, *viz.*, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress goes no further than the words of Justinian already quoted.

It was strongly contended before the Board, that the facts of this case showed it to be substantially one of natural accretion. The argument was as follows. In accordance with the policy generally approved, stakes were set out between high and low-water mark, and the silting up took place within these stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive

reclaimed land (1) in the case of Williams' land for the purpose of storing
thereon coopers' stores, casks, trade goods and produce, and (2) and (3) in
the case of Johannsen's and Dunkley's lands easements for jetties, piers,
these last, the Crown has not insisted at their Lordships' Board, but in
regard to the first point it is maintained that such an easement is untenable
to the law. It is also further maintained that in any view the use to which
the foundation of any easement, as it was not a right assumed to be
asserted over the land of another, the possession founded
possession of the land as owner thereof.
Their Lordships see no reason why upon the first point
an easement should be exclusive of the storage claim. The law in
this respect of modern society and trade, and there is
no doubt that the easement is claimed inconsistent with
the purposes for which the House of Lords in *Dyce v. Hay* (1880) 13
Q.B. 513, who observed: "The
easement must alter and expand with the change
of circumstances of mankind."
It seems to be undoubtedly true that
the nature of all rights and
interests in property, and
the general interest in
the property, but that
the right of property is
not to be considered as
constituted by a right
of possession, but as a
right which is
exercised upon the
property.

faculty," and that a faculty might be presumed upon evidence of exclusive possession and repair for a long period.

A passage in the judgment from the opinion of Lord Chancellor Herschell is much relied upon; it is to the following effect:

"In the case of *Rogers v. Brook*, Willes, J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the Plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made, even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board, this passage does not support the proposition, that a transfer of the dominion of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes, the reclaimed ground was used along with and as part and portion of the Respondents' properties as a whole; and the piers, wharves, and whole land have been for the protracted period alluded to, used for the purpose of the shipping and mercantile business. Their Lordships are further of opinion, that the circumstances in which the reclamation itself was made negative all idea of intentional trespass or of surreptitious acquisition of land. As stated, the respondents and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with Osborne, C.J., who tried the case, and has submitted both facts and law to a thorough consideration, that:

"It is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the Government . . . as the Government must have been aware of the reclamation and subsequent building, it is more probable that those acts were done with permission from the Governor for the time being, than that they were acts of trespass done in defiance of the Government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation, and to obtain an injunction which would extrude the Respondents from the reclaimed land.

One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the Respondents' properties.

Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgot, was exceptionally troublesome; the erosion was going on and the current was so dangerous the in native opinion there was a devil in the water. In truth and substance, what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it should not be forgot that it is recognised by law, that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted, and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord, not only with the right of the subject, but with this duty of the Crown. This principle is in accord with the law laid down in the *Attorney-General v. Tomline* reported in 14 Chancery Division 58, and principally with the opinions of Fry, J. (12 Ch.D. 233), and Cotton, L.J. (14 Ch.D. 69).

With regard to the use and enjoyment of the made-up land by the Respondents as merchants, their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be what is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. It appears from the case of *Lyon v. The Fishmongers' Company* that the frontage owner has foreshore rights annexed to his land beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinterland."

Further, it appears from the case of *Marshall v. The Ulleswater, &c., Company* (L.R. 7 Q.B. 166) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist, even after the land has ceased to be subject to the flow and re-flow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown, of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision, that the foreshore rights originally attaching to the respondents' lands before reclamation have accordingly not been destroyed thereby.

The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in the *Duke of Buccleuch v. The Metropolitan Board of Works* (L.R. 5 H.L. 418), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands.

Their Lordships will humbly advise His Majesty, that the judgment of the Full Court should be set aside, and the judgment of the Chief Justice in the Court of first instance on the 14th March, 1910, restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals, and of the causes in the courts below.

Courts any power of inquiry into such a matter. If the plaintiff was irregularly deposed his remedy lay in opposing the confirmation before the Governor.

The plaintiff's Counsel said, in the second place, that the plaintiff was a person to whom the Ordinance did not apply. Now the Ordinance, after defining " head chief " as a ruler not subordinate in jurisdiction, after other ruler, goes on to define " chief " as a ruler subordinate to any jurisdiction to a head chief. The Court had before them the affidavits of both parties, from which it appeared that the plaintiff did not deny that he was appointed by the predecessor of one of the defendant chiefs, that he had exercised jurisdiction as a ruler, held a court and taken fees. Indeed, he is the deprivation of his office and the loss of further fees. It seems, therefore, idle to contend that he was not a ruler, and the Court which had an inherent jurisdiction so to find held a court, and the under the Statute. Whether he was subordinate, as seems that he was one chief who appointed him or not, matters not. If he was, he was a subordinate chief, if he was not, he would only then be a head chief, and equally subject to the Ordinance.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

MANCHE KOJO ABABIO IV .

AND

QUARTEY AND ANOTHER

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST RESPONDENTS
[P.C. 1874-1928] 40

1916 May 16 The Lord Chancellor, Earl Loreburn, Lord Shaw and
Trespass—Plaintiff not in possession—Suing in wrong capacity—A and

Held: Where no one is in actual possession of land, the person in whom title is deemed to be in possession sufficiently to maintain an action. If a plaintiff sues in a wrong capacity, but enabled the court to see that capacity is disclosed which would have enabled the court to see that should not be non-suited, but the Court should allow all the parties for the purpose of settling the real controversy between them.

THE LORD CHANCELLOR: Their Lordships greatly regret that they are compelled to send the parties away from the court, and they are decision on the real merits of the controversy; but they are unable to prevent their Lordships being able to deal with the substance of the dispute. In these circumstances it is their duty to state parties that this matter should be finally determined by the local courts which have received the advantage of a full statement of the facts, and also of a statement of the local customs and usages which depend, and also of a statement of the local customs and usages which matters are very material for the consideration of the court in an appeal, but in a case of this kind they are

The action is one which, in form, is nothing but an action for trespass. It is brought by the appellant, who styles himself the Manche of James Town, Accra, on behalf of himself and the people of James Town, Accra, against certain defendants, claiming damages for trespass. The land in respect of which the trespass is said to have been committed is certain land near Oblogo, and a ferry that runs across the river at that spot. The original defence to the action does not in actual terms deny the title of the plaintiff, but sets up a rival title on the part of the defendants themselves; this, however, was amended, and by the amendment a further defence was raised, stating that the plaintiff was not in possession of the land. This only raised the question of the plaintiff's title inferentially. If a wrong-doer is in actual possession, the real form of action at common law should be one of ejectment, though the difference between such an action and one of trespass is now of no practical importance if the facts are properly alleged; if, however, no one is in actual possession, the person who can prove his title is deemed to be in possession sufficiently to maintain an action of trespass, while again, as against a person having not title, actual possession alone unsupported by evidence of title is sufficient. This informality in the form of the pleadings, however, need not have embarrassed the Court which tried the case in determining the question which appears to have been the real question in controversy between the parties, namely, as to whether or not the plaintiff was what he styled himself, the Manche of James Town, in the district of Accra. Whether the Court did determine this point it is quite impossible to ascertain from the form of the judgment, and it is equally impossible to ascertain from the form of the judgment of the Court of Appeal what their conclusion was upon the matter. In form, this latter judgment amounts to nothing but a non-suit of the plaintiff, a non-suit which, upon the face of the judgment, is only given in respect of a particular matter which the Court appears to have thought was essential to the maintenance of the action. The judgment runs in these terms:

"The Court is unanimously further of opinion that inasmuch as the plaintiff was not the proper person to sue in the capacity disclosed on the writ, because his authority to do so was directly challenged by the people of the Sempes and Akumajes Quarters of James Town, but may have the right to sue in some other capacity, the plaintiff-respondent ought to be non-suited."

Their Lordships think that this is insufficient. If there was any capacity disclosed in the course of the action which would have enabled the plaintiff to have maintained his suit he ought not to have been non-suited, but the Court ought to have allowed all the necessary amendments that were required for the purpose of enabling the use of evidence that had been obtained for the purpose of settling the real controversy between the parties. It appears that this has not been done, and their Lordships, therefore, have no alternative but to remit this action once more to the Court of Appeal in order that it may be fully and properly determined. If upon the rehearing, the judgment of the Court of Appeal is fully stated, it may be that it will satisfy the parties, and prevent further dispute; but if it does not, this Board will then have the advantage of being able to examine and to criticise a judgment which will contain a statement of the views which the learned Judges have held, and the reasons which have led to their conclusions. Their Lordships therefore propose that the judgment of the Court of Appeal should be set aside. They do not mean by that that they have formed the opinion that the judgment upon the merits was wrong, but

that upon the materials before them it is impossible for them to say that this judgment should remain, and it is essential that the matter should be reheard. The case must, therefore, be remitted to the Court of Appeal in order to obtain a judgment which will state the facts and the principles of law and custom upon which such judgment is based. There must also be a direction to the Court that if the plaintiff is in possession, or has any interest, whether personal or representative, entitling him to sue in respect of the alleged cause of action, his right to succeed ought to be determined in this action, and all the necessary and formal amendments of the proceedings should be allowed to enable this to be done. The costs of this appeal, as taxed by the Registrar, will follow the event of the re-hearing.

KOBINA ANGU APPELLANT

AND

CUDJOE ATTAH RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 43

1916 June 23 The Lord Chancellor, Earl Loreburn, Lord Shaw and
Sir Arthur Channell

Land—Native customary law—Right to tribute—Res judicata—Evidence given in former proceedings.

Held: Possession of land, rightful as well as wrongful, is not inconsistent with liability to render tribute, and is a ground for that liability, if the lands are attached to a stool.

In order to establish a plea of *res judicata* two things are necessary; first that the judgment relied on should be between the same parties or their privies; secondly, that the judgment should be on the same question or some of the same questions as are raised in the action.

Except by agreement, or in accordance with the law of evidence as to the admissibility of the statements of deceased persons, the record of what a witness has sworn to in one action cannot be used in another action as evidence of the facts which he has sworn to.

Native customary law has to be proved in the first instance by calling witnesses acquainted with it until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them.

SIR ARTHUR CHANNELL. This is an appeal from a judgment of a Full Court of the Supreme Court of the Gold Coast Colony in an action in which the present appellant was plaintiff and the present respondent was defendant, reversing a judgment which the appellant had obtained in his favour on a trial before a single Judge of the Supreme Court, sitting as a Divisional Court. The claim of the appellant was made as Manche, or Chief, of Mansu, or Mansuah, for a declaration that he was entitled to tribute from the respondent as holder of certain lands at Bortogyina.

The land law in the Gold Coast Colony is based on native customs. As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them. In the Gold Coast Colony the principal customs as to the tenure of land have now reached the stage at

which the Courts recognise them, and the law has become as it were crystallised. There is little statutory law relating to land. There is no land registry. There is an Ordinance (No. 1 of 1895) as to registration, but it only provides for a registry of "instruments," giving priority to those which are duly registered. It has no real bearing on the present case, the only documents referred to, which could be registered, being registered.

It is part of the customary law so recognised that lands are (or were originally) attached to the stools or thrones of Chiefs, and that Chiefs are entitled to tribute from the occupants or users of land attached to these stools. There is some power of alienation by Chiefs which must be exercised in a customary matter with certain consents, so that lands once attached to a stool, may by the exercise of this power have become not so attached and may be free from tribute. There is also a class of lands known as family lands, as to which, however, no question appears to arise in the present case. The right to tribute arises from the ownership of the thief, and it is payable either in money or in produce, and is not defined in amount, but has to be settled somehow by agreement between the parties. It appears to be analogous to the arbitrary rents or exactions which in feudal times were levied in this country by lords upon their tenants, and which were known as "blackmail," as distinguished from "white rents," which were payable in silver. On the sale, however, of any interest in land, there seems some custom of dividing the purchase-money into three parts, the Chief taking part apparently as his tribute. Possession of land, rightful as well as wrongful, is therefore not inconsistent with liability to render tribute; on the contrary, it is a ground for the liability, if the lands are still attached to a stool. These are the customs material in the present case which are to be gathered from the record and from the statements of counsel in this case, and which appear to their Lordships to have been recognised by the Courts of the Colony as sufficiently proved. For the purposes of this case their Lordships assume them to be correct, but it must not be taken in future cases that the authority of the Judicial Committee has been given to this short statement as a full, or in every respect accurate, exposition of the customary law of the Colony as to tribute, for the record in this case is far from satisfactory, and their Lordships of course have no knowledge of their own as to what has been proved in the Courts of the Colony.

The appellant is the Manche of Mansu, and he claimed tribute in respect of the lands of Bortogyina as attached to his stool. The only plea pleaded at the trial to this claim was *res judicata*. The practice of the Supreme Court in the Gold Coast is governed by the Supreme Court Ordinance, 1876. This, as its date would indicate, is founded on the English Judicature Acts of 1873 and 1875, and substantially the then new English procedure is adopted, often in the same words, but there are variations to suit the colony. Pleadings may be ordered, but cases are commonly tried without pleadings, and where that is done the defendant's counsel is called upon at the close of the opening of the case by the plaintiff's counsel and before the evidence to state what his pleas are. That course was followed in this case. The original rule (order xxvi, rule 1) to the Supreme Court Ordinance, 1876, contained a rule (order xxvi, rule 1) as to amendment practically in the words of an English rule. The evidence called by the plaintiff consisted of his own evidence, that of the "linguist" of the paramount Chief of Lower Wassau, and of a Chieftainess called Princess Kiriwa, whose age is not stated, but who appears to have been an elderly woman, as she recollects three predecessors of the appellant in the chieftainship of Mansu—one was Oeisi, whom no other witness recollects, who was succeeded by Maidoo

Bedu, who is mentioned several times. Baidoo was succeeded by Bassain, and he by the appellant, Kobina Angu. The evidence of these three witnesses showed clearly a strong case that the appellant and his predecessors were by custom entitled to tribute out of the lands of Bortogyina. No dates are given for the matters stated in their evidence except by reference to the name of the Chief at the time; but as there appears to be in the Colony no statute of limitations applicable to tribute (if there is any, it was not at any stage of the case pleaded or referred to), it is not material at what date the matters occurred, unless alienation of the rights by any Chief can be proved. There is, however, some evidence as to the plaintiff himself receiving tribute. There is nothing in the notes of the evidence of the plaintiff's witnesses as to the defendant being in possession of any of the lands of Bortogyina, but this must have been admitted, as the defendant in support of his plea of *res judicata* relied on judgments to the effect that he was entitled to the possession. The cases relied on in support of this plea were *Cudjoe Atta* (the present respondent) v. *Kwesi Pon and others* (p. 10 of the record) and proceedings before Mr. Justice Watson on an application for a writ of possession (p. 65 of the record). The present appellant was not a party to either of these proceedings, nor was any one of his predecessors, but the "linguist" of his predecessor, Chief Bedu, was a witness in the case, and said that he attended as a witnesses by direction of Bedu. A "linguist" is stated to be a spokesman, not necessarily an interpreter, as he often speaks but one language. He represents and speaks for the Chief on ceremonial occasions, and has a somewhat extensive authority; but whatever his authority may be, it is obvious that his words and acts can have no greater effect than if the Chief had spoken or done the same himself. The "linguist" was a witness only, and if the Chief had himself given evidence it would not have made him a party or bound by the judgment. In order to establish a plea of *res judicata* two things are necessary: first, that the judgment relied on should be between the same parties or their privies; secondly, that the judgment should be on the same question or some of the same questions as are raised in the action. For the purpose of these two matters, the record must be looked at, and external evidence may be admissible and necessary. It is, of course, matter of evidence whether either of the parties to the older action were predecessors of the parties to the second action in the title under which they claim or defend, so as to make the action one between privies. Under a precise system of pleading the evidence would not be set out on the record; but whether it is set out, as it is here, or is not, it can only be looked at for the purpose of seeing what was decided. Mr. Justice Lionel Hawtayne, by whom the case was tried, gave the following judgment (p. 9 of the record):

"This is a claim by the plaintiff to establish his title to tribute against the defendant in respect of all that piece or parcel of land situate at Bortogyina and known as Bortogyina in Chamah district. Mr. Lance Miller for the defendant pleaded *res judicata*, and relief (1) on the case of *Cudjoe Attah v. Kwesi Pon* and others decided by the Full Court on appeal from the decision of Mr. Justice Gough of the 15th May, 1911; and (2) on decision of Mr. Justice Watson dated 29th October, 1912. I cannot agree with Mr. Lance Miller that the fact that Angu, or Ankura, being 'linguist' to Ohin Bassain, and giving evidence, was sufficient to make that Chief a party to the suit. As to the motion before Mr. Justice Watson referred to, it does not appear that Kobina Angu was a party to that motion. Both of the cases referred to

—eas this case is one for tribute. I hold that the Judgment for the plaintiff with costs.”

of *res judicata*, this judgment does not seem
—ned, and seems clearly right. It was, howe
—ourt, whose judgment was given as follows:

—g of opinion that the appellant (*i.e.* the defen
—ght to be at liberty to traverse all the facts a
—, doth allow the necessary amendment in th
—pellant, and which was reduced into writing
—sional Court; and this Court being of opinion
—ailed to establish his rights to any tribute in re
—record of appeal mentioned, and that the jud
—ourt is erroneous, doth allow the appeal.”

—as further ordered to pay the costs, and the
—visional Court for the purpose of the taxation c
—hich their Lordships assume were given in the ur
—re not stated on the record, and they are not ea
—ments which are set out. There are notes of the
—before the Judge of First Instance and before
—the references to authorities are difficult to
—of the argument not clear enough to throw muc
—On these notes it does not appear that any app
—it was made by counsel for the defendant, nor th
—was offered or had any opportunity of giving fur
—e plea added by amendment. The only evidence
—besides the oral evidence for the plaintiff which ha
—documentary, and consisted of the records of the
—of which the plaintiff was a party, and the vari
—nce in these actions. The exhibits may be assumed
—d, to have been treated as put in in this case. The
—tained notes of the evidence given by the witness
—this, when a witness has sworn to certain matters in
—what he has so sworn cannot be used in another a
—acts which he has sworn to. This is so even whe
—between the same parties as the first and *a fortiori* v
—evidence in a former action may of course be
—between the parties to another action to save exp
—suggestion of any such agreement in the present
—such an agreement such evidence could not b
—where the statement of a deceased person is ad
—not be the less so because it had been sworn
—would be admissible, not because it was so
—When public rights are in dispute evidence o
—judgments *inter alios*, when on the exact po
—of reputation, as may statements, inclu
—persons. The rights of a Chief to tribu
—assume are treated by the Courts of the
—public or general nature to admit evidenc
—but each statement or matter relied on
—require careful examination. So far a
—evidence in the former actions set out
—one is, Cudjoe Attah, the respondent

the height of absurdity to suppose that his evidence in the former suits could be used as evidence in his favour in this suit, when he might have been but was not called as a witness, except, of course, that the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute. The materials which their Lordships have for ascertaining the grounds of the judgment appealed from, in addition to the scanty notes of the arguments of counsel already referred to, are the grounds of the appeal from the Divisional Court to the Full Court (set out on page 68 of the record), the printed cases of the parties to the appeal, and such statements as counsel were able to make from their instructions. In this case, their Lordships have not had the advantage of the attendance before them of any colonial counsel engaged in the case. The counsel for the appellant was, no doubt, well acquainted with the law of the colony, where he was formerly a Judge, but, of course, he had not been engaged in any way in this case in the colony, and the counsel for the respondent was a member of the English Bar, from whom their Lordships had an able and clear argument, but who appeared to have been very imperfectly instructed as to what had taken place in the Full Court in the colony.

The grounds of appeal to the Full Court are on page 68 of the record. Grounds 1, 2 and 3 are based mainly on *res judicata*, but they also appear rather to suggest that the facts of the previous cases may be evidence in this, and the fourth ground says that the plaintiff was in possession and had proved his "title to the land" by putting in documents. These grounds do not deal directly with the important point that rightful possession is not inconsistent with liability to tribute, but it may be meant that a title was proved free from tribute by reason of the Chief's right having been extinguished. It was suggested to their Lordships on the argument that the judgment of the Full Court proceeded on the view that there was evidence of such extinguishment. If that were so, it might be thought that the plea, added by way of amendment, would have been a plea that the title to tribute had been extinguished. The title on which the present respondent succeeded in the previous action was derived through one Jobson, and the evidence as to his having got Jobson's title, whatever that was, was fairly satisfactory and need not be gone into. Jobson had bought under a Sheriff's sale, made in an action in which he had been plaintiff, and there is a copy of the certificate of this purchase at page 29 of the record, which is dated the 22nd October, 1903, and which is the root of the respondent's title. Kobina Baidoo, the predecessor of the present appellant, was a defendant in that action with others, but the proceedings and judgment in that action were not put in and there is no proof, and, in the absence of this record, there could be no proof, of what that action was about. Under the execution on the judgment the Sheriff sold, but the certificate states that the sale was of the "right title and interest" of six named defendants in the action, not including Kobina Baidoo. The certificate, therefore, fails to prove the only fact now important, viz., the acquirement of Baidoo's interest, and, indeed, it negatives that interest, having passed by the Sheriff's sale. It is, however, suggested that Baidoo had previously mortgaged his interest in the land to Jobson, and that Jobson had afterwards acquired the equity of redemption. The substance and merits of the present dispute seem to turn entirely on the question whether Baidoo did in fact mortgage his interest to Jobson, and thereby extinguish his right to tribute. The mortgage, if in writing, was not produced. It seems that a native mortgage may by custom be made by word of mouth, but must be accompanied by certain formalities. There is, however, no proof whatever in the action before the Board of this mortgage

of Baidoo. In a former action the story about it is told on p. 34 of the record, but it is in evidence given by Cudjoe Attah, the present respondent, when called as a witness in certain interpleader proceedings. There are, at least, two fatal objections to this being evidence in this action of the fact of the mortgage: the first, that a mortgage gives an individual private right, and not a public or general right, such as can be proved by reputation or hearsay; and, secondly, that Cudjoe Attah is alive and should have been called as a witness in this action in which he was defendant, if he could have proved anything material.

In the same proceedings Jobson himself was a witness, and said that Baidoo mortgaged the property to him (p. 42). This is a little better, perhaps, than the evidence of Cudjoe Attah, but the same objections apply to it. His evidence in a former action is only reputation and hearsay and inadmissible in support of a private right, and there is no proof or even suggestion that he is dead and could not have been called.

Thus the only point suggested to their Lordships as the ground for the decision of the Full Court which has any merits in it fails entirely of proof, and their Lordships are unable to find anything to justify the Full Court in setting aside the judgment of the Divisional Court.

Their Lordships feel that it is possible that the judgment of the Full Court really proceeded on some ground which has not been brought to their notice, but, if so, it is the fault of the respondent in not getting the true ground of the decision which he had to support put upon the record. Their Lordships presume that the Judges must have delivered their judgment orally, and that no note of it was taken, possibly because an appeal to the Privy Council was not anticipated. If applied to, no doubt the Judges would have given a short statement of their reasons to go into the record. Notes of judgments appealed from made from memory by the Judges after the delivery are occasionally found in the record of a case brought before this Board on appeal, and, although not so satisfactory as a written judgment or a contemporaneous note of an oral one, they generally answer the purpose. One the facts which are before the Board, this judgment of the Full Court cannot, in their Lordships' opinion, be justified, and they will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Divisional Court restored, and that the respondent should pay the costs of the appeal.

CHIEF NTIARO AND ANOTHER PLAINTIFFS/APPELLANTS
 AND
 IBOK ETOK AKPAM AND ANOTHER DEFENDANTS/RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1918) 3 N.L.R. 11

1918 Oct. 24

Lords Sumner, Parmoor, Wrenburg

Ownership of two regions, one on the seashore and the other swamp land—Claim for declaration of title, injunction and damages—Appeal on question of fact.

The Divisional Court dismissed with costs an action in which the Plaintiffs applied for a declaration of title in respect of two regions of land, and granted a declaration of title to the second defendant in respect of one of the areas. On

appeal to the Full Court the judgment of the Divisional Court was affirmed.

Held, that where the questions involved are purely of fact, the Full Court will not interfere with the decision of the Court below unless such decision is shown to be perverse or not the result of a proper exercise of judicial discretion.

Held also, that since the second defendant has not asked for the declaration of title which he was granted in the Divisional Court, there was no reason for granting it, and that the judgment given should be varied accordingly.

On appeal to the Judicial Committee of the Privy Council the Judgment given in the Full Court was affirmed.

LORD SUMNER. This was an appeal by two Chiefs, proceeding in right of their tribes, from a judgment of the Supreme Court of Nigeria, which dismissed their appeal, with a variation from a judgment of Mr. Justice Webber, who tried the case for many days in Calabar. There are pleadings in the case which state with precision what the issues raised were as between the plaintiffs and the original defendant. At the trial another Chief, Edoho Ekit, representing another tribe not akin to the plaintiff and defendant tribes, applied to be joined as having an interest in the subject-matter, and, the same Counsel appearing for both, the issues raised for the second defendant also appear tersely, but quite clearly.

The subject-matter was the ownership of two regions, one on the seashore from the mouth of the Qua Ibo river eastwards to Child Point, and the other the swamp land, at most seasons of the year largely under water, which lies immediately behind that coast line, and extends back to a creek known as "Stubbs Creek."

As to this the plaintiffs claim a declaration that the whole of this area was the property of their people, the people of Big Town, and they claim "an injunction restraining the defendants or their people from building houses or sheds on the said land or otherwise interfering with the plaintiffs' rights of ownerships," and damages. In answer the original defendant pleaded, along with other pleas, that this tribe enjoyed common ownership of the swamp land with the plaintiff tribe, and that the plaintiffs were not entitled to the exclusive use of the swamp land and the seashore. The second defendant, representing the Eket tribe, pleaded that the ownership of the whole land in them. Neither defendant asked for relief either by way of declaration or counterclaim for damages, or in any other way.

The conclusion arrived at by Mr. Justice Webber, on the plaintiffs' claim was that they had no exclusive ownership of either of these two descriptions of area. He went at some length into the evidence in the judgment he delivered; discussed the effect of a number of payments, so-called of tribute, which the plaintiffs said they had received from the defendants' or one of them, in respect of the land; offered an explanation of them, so far as those payments had been made, namely, that they were on account of the custom known as "inon," and concluded: "There has not been in my finding of the facts in respect of the seashore, any such exclusive occupation by plaintiffs, apart, of course from the fact that they have not established such evidence of long possession as would entitle them to claim ownership of the soil."

He then passed to the swamp land; "The plaintiffs, on the evidence, have failed absolutely to establish their title of ownership to this swamp": he said: "I think the claim for a declaration and injunction fails and the action must be dismissed," with costs. He then went on to add a couple of sentences to the effect that he was granting a declaration of title to the second defendants, the Ekets, in so far as the swamps were concerned, and expanded that by saying:

" They will be allowed to fish in the swamps known as Okoyak, which extend to the seashore, in the same manner as they have done hitherto; and as to the seashore, no exclusive ownership has been proved by anyone, and the Uben Ekang will be permitted to enjoy the use of the seashore in common with the other Ibenos for erecting temporary huts for the purpose of fishing in the sea."

No formal judgment was drawn up: his written judgment stands as the judgment of the Court.

When the matter came before the Court of Appeal the Court varied this judgment by deleting the concluding paragraph of the said judgment, and their Lordships are of opinion, not merely by inspecting the record which has been sent over, but from the structure of Mr. Justice Webber's judgment, that what the Court of Appeal calls the "concluding paragraph" in its order as drawn up, is the whole of the passage which begins by saying that by this judgment he granted a declaration of title, and so on, down to the end of the judgment. That passage was superfluous because, as the pleadings showed, no declaration of title had been asked for by the Ekets. There was no reason for giving them a declaration which they had not prayed for, and, as to the remainder of the passage, it was, in the opinion of the Court of Appeal, rather an expression of opinion than a definition of the rights of the two defendants as regards one another. Therefore, the plaintiffs' claim, as pleaded, stood dismissed.

Their Lordships think that the whole of the case made was one of fact. It rested on proof of acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners, as they claimed to be, and it would be difficult to find a case which was more essentially a question of fact only. That being so, and the judgment below having been affirmed with this variation, which need not be further referred to, the appeal here would have been concluded by the rule that, where two Courts below have concurred in one finding of fact, which disposes of the claim, their Lordships will not rehear the facts for a third time. But there is a passage in the judgment of the Court of Appeal, which, after stating with perfect truth the circumstances of the trial, its length, the care with which it had been conducted, and the fact that the witnesses were before the learned Judge, who had the best opportunity of estimating their weight, says this: "And this Court will not interfere with the verdict of the Judge below unless such verdict is shown to be perverse or not the result of a proper exercise of his judicial discretion. That has not been done in this case," and then deals with the question of the costs. It was strenuously contended that the Court of Appeal had come to no finding of fact of its own, and that there were not two concurrent findings of fact in the Courts below; but, that, inasmuch as Mr. Justice Webber had shown that he had exercised some judicial discretion, the Court of Appeal had accepted his findings. Their Lordships are by no means satisfied that this was the *ratio decidendi* or that the Court of Appeal took the view of its duty which has been contended for. It is unnecessary to say more because, in view of the doubt that was raised upon it, their Lordships have carefully examined the whole of the evidence and are unable to see that the decision of Mr. Justice Webber at the trial, as limited by the issues raised upon the pleadings and as reduced by the deletion of the concluding paragraph of the judgment, was erroneous. It was for him to select the witnesses whom he thought worthy of credit. One, a missionary at the station, of long service in one of the defendants' towns, who gave evidence

at length, was treated by him as an important witness; others he may have considered, and obviously did consider, inconclusive and, there being conflicting evidence, he came to the conclusion that the acts of ownership which were relied on, which were principally the receipt of tribute, had not been proved, or had not been proved under circumstances which resulted in establishing ownership; that they might be explained, and, in his opinion, were to be explained by reference to native customs.

Their Lordships can see no necessity for considering any questions of law in connection with what is, after all, a pure finding of fact.

They also think it unnecessary to go through this evidence, which has been carefully examined with the assistance of Counsel on both sides, or to re-state the story and the conclusions. All they think it right to say, and all their Lordships desire to say, is that they do not affirm anything but the judgment which, upon the issues raised by the pleadings, was the judgment of the Court, namely, the dismissal of the plaintiffs' claim, and, in so far as isolated passages, either in the judgment or in the paragraph which is struck out, might appear to support other claims than those which arise upon the pleadings, their Lordships express no opinion.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

PETER AWOONOR RENNER APPELLANT

AND

THE FANTI CONSOLIDATED MINES, LIMITED,
AND OTHERS RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY
(WESTERN PROVINCE)]

[P.C. 1874-1928] 53

1919 Apr. 3

Viscount Finlay, Lords Dunedin and Phillimore

Land—Conveyance—Uncertainty as to Boundaries—Possession.

Held: Where there is a state of uncertainty as to boundaries, it is legitimate to inquire into the circumstances attending the conveyance and the state of possession following on it. In such a case possession seems the only safe guide.

LORD DUNEDIN. This is a suit by one Renner, and seeks for a declaration of title of a piece of land described as situated on the Poassi Road, Secondee, and bounded by that road on one side, by the premises of the African Association on another side, by the railway yard on a third side, and by the railway fence on a fourth. If such a declaration were made it would negative the title of, first, the Fanti Consolidated Mines, Limited, and secondly, one Yaw Antoney, who respectively are in possession of strips of land extending from the Poassi Road to the depth of 230 feet, and in breadth, in the case of the Fanti Company, of 48 feet 3 inches, and in the case of Yaw Antoney of 54 feet at the road, tapering down to 33 feet at the upper end. Accordingly, these parties have defended the action and resist the declaration.

The plaintiff's title is derived from one Hendrick Vroom, and the land

described in the conveyance from Vroom of date the 22nd February, 1910, as it originally stood had as one of its boundaries "on the third side by Egbert and Mercer's premises." Now Egbert and Mercer's premises are on the upper side of the defendants' lots—that is the side remote from the Poassi Road.

The plaintiff brought an action in 1912 claiming a declaration in the same terms as in the present action. It was defended by the same defendants. The Judge of first instance entered judgment for the defendants, but on appeal the Court of Appeal, in February 1913, altered the judgment and non-suited the plaintiff, on the ground that his title gave no indication that his property came to the Poassi Road. The plaintiff then commenced a suit against Vroom for rectification of his title. To that suit the present defendants were no parties, and Vroom making no objection, the title was rectified, purporting to be in accordance with what had been conveyed to Vroom by a Chief Johnfia, on the 17th August, 1900—by which rectification one boundary is described as the Poassi Road. The plaintiff then raised the present action. It was tried before the same judge, who repeated the judgment of non-suit. On appeal this judgment was affirmed by the High Court.

The title of the defendants, the Fanti Company, flows by progress from a conveyance by the same Chief, Johnfia, of date the 13th December, 1901, to Karri, Davies and Russell. This conveyance grants a strip of land of 48 feet in width along the Poassi Road, extending upwards for 288 feet. The defendant Yaw Antoney has a conveyance from another Chief, the successor of Johnfia, who had been deposed. This conveyance is, of date the 21st December, 1910, and is of a strip extending from the Poassi Road 211 feet upwards and described as bounded by Mercer's premises. The plaintiff argues that both these conveyances are inept because the ground had already been conveyed by Johnfia to Vroom.

The conveyance by Johnfia to Vroom is, so far as is material to the present question, in these terms:

"All that piece or parcel of land situate and being on the road to Dixcove and measuring 600 feet by 200 feet and bounded on the north by the railway yard and railway fencing, on the south by the Dixcove Road, on the east by a land leased to African Association, Limited, and on the west by the railway fencing, which said piece or parcel of land is more particularly delineated and coloured in the plan drawn at foot of these presents. . . . Provided always and it is hereby agreed that the vendor shall hold and enjoy within and of the said piece or parcel of land hereby granted or expressed so to be an area of 170 feet by 50 feet for his or the purpose of his heirs and successors."

The road to Dixcove is another way of describing the Poassi Road.

The appended plan, as judged from a copy put in, shows a rectangular plot of ground. There is no scale, so that it is not possible to measure in feet. Further, the sides of the rectangle do not correspond proportionately with the supposed measurement, for the long side, instead of being three times as great as the short, is barely two and a quarter times. The rectangle is now shown as extending to the Poassi Road, there being an intervening space of considerable extent with markings of trees, which are lettered as "cocoanut trees." It is therefore evident that the boundaries do not tally with the plan, nor the extent with the boundaries. It is this interposition of the cocoanut trees which, in the opinion of the High Court, prevents the plaintiff from making out a boundary on the Poassi Road.

In the state of uncertainty that arises as to such a title it was legitimate, as was done, to inquire into the circumstances attending the conveyance and the state of possession following on it. That inquiry elicited, first, the fact that the conveyance was prepared at Cape Coast Castle by persons not familiar with the *locus in quo*; secondly, that the plan was adjected to the conveyance at a subsequent date; and thirdly, that at the time of the signing of the conveyance by Johnfia the land he understood he was conveying was pointed out by him and boundary pillars inserted. Unfortunately, the pillars have disappeared.

Turning now to the state of possession, it appears that prior to Vroom's conveyance to the plaintiff, Egbert and Mercer were in possession of houses built on a piece of land which is receded from the Poassi Road. When, therefore, Vroom gave off land to the plaintiff, which he described as bounded by Egbert and Mercer's premises, it seems likely either that he was giving off only a part of what he had got from Johnfia (upon the assumption that Johnfia's grant to Vroom did extend to the Poassi Road) or that he recognised that *de facto* his ground ended where Egbert and Mercer's began. Further, it is in evidence that Egbert junior was asked by Vroom to look after his land, that he saw the boundary pillars and a fence, which have subsequently disappeared, and that he knew Vroom's land, which as shown to him by Vroom, extended only upwards from Mercer's *i.e.*, in accordance with the original description in the conveyance from Vroom to the plaintiff, and that while he did look after the land to the upper side of Mercer's property, he never looked after the land between Mercer's and the Poassi Road.

To the same effect is the evidence of Sam, who was in Vroom's service, who acted as interpreter at the time of the signing of the conveyance by Johnfia, who put in the pillars, and who was put in charge of the land by Vroom. He declares that that land was not between Mercer's land and the Poassi Road.

There is also evidence on behalf of the Fanti Company that they exercised right of ownership on their piece by putting up a fence. Against this there is only the evidence of Vroom, who says he cut a drain down near the Poassi Road.

In this state of matters their Lordships agree with the unanimous judgments of the Courts below that the plaintiff has not made out his case. The exact boundaries or extent of any of the properties cannot be found with certainty by perusal of the titles. All the titles are more or less self-contradictory. In such a case possession seems the only safe guide, and there the defendants have, their Lordships think, made out their case.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs to each of the first two respondents.

In re THE ESTATE OF TOM JONES, Deceased

KATE SHAW AND BABATUNDE JONES . PLAINTIFFS/RESPONDENTS
AND

DAVID AUGUSTUS TAYLOR AND
FASANYA (CHIEF OBANIKORO) . DEFENDANTS APPELLANTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1920) 3 N.L.R. 82

1920 Mar. 25

Viscount Haldane, Lord Buckmaster
and Viscount Cave

Will—Construction of—Intention of Testator—Trusts declared and no express devise to trustees of the property to be affected, thereby.

By his will dated 4th October, 1913, Thomas Jones devised to his trustees certain real estate therein described, but not including the property which is the subject-matter of this action. Upon property not specifically devised to them the trustees were directed to build a hall "which shall be and remain for the absolute use of my countrymen of the Lagos community forever": the first floor of the building to be used for public meetings and the top floor to be supplied with a library for the educated portion of the community. The building when completed was to "bear and be known by the name of the 'Tom Jones Memorial' forever."

In the Divisional Court, Pennington, Acting Chief Justice, held that the testator dies intestate in respect of the property mentioned, and this decision was affirmed by the Full Court.

Held, on appeal to the Judicial Committee of the Privy Council, that notwithstanding that the will contained no express and formal devise of the property to the trustees, the property was by the terms of the will to be affected with a permanent trust, and that having regard to the expressions therein contained the will should be construed as affecting a devise of the property to the trustees.

VISCOUNT CAVE. This is an appeal from the judgment of the Supreme Court of Nigeria (Full Court) dismissing an appeal from the judgment of the Acting Chief Justice. The appellants are the executors and trustees of the Will of Thomas Jones, deceased, and the respondents are two children of the testator. The question raised on the appeal is whether certain property situate in Victoria Road, Lagos, was devised by the testator upon certain charitable trusts or whether the testator died intestate in respect of that property.

The Testator, Thomas Jones, by his Will dated the 4th October, 1913, appointed the appellants and another to be his executors and trustees and devised to his trustees certain real estate therein described (not including the property which is the subject-matter of this appeal) and bequeathed to them certain personal estate upon trust to sell such real and personal estate and pay the proceeds into the Bank of British West Africa at Lagos, and out of such proceeds pay his debts, including all testamentary expenses and legacies. And the will proceeded as follows:

"And I declare that after all the purposes mentioned in the preceding clauses of this my Will shall have been satisfied out of the funds deposited in the said Bank of British West Africa, Limited: of the cash that shall then remain carry on and accomplish the following work that is to say:

(A) On and over the spot now occupied by my property situate at Victoria Road in Lagos aforesaid and covered by an instrument dated the 23rd day of June, 1887, and registered as No. 124 on page 388 of Vol. 11 of the Register of Deeds kept in the Registry Office at Lagos, they shall cause to be erected a grand solid and substantial building two-storey high the plan of which shall be designed by an architect of recognised ability which shall be and remain for the absolute use of my countrymen of the Lagos Community for ever.

(B) The said building when completed shall bear and be known by the name of ' Tom Jones Memorial ' for ever.

“(C) The first floor of the said building shall include a hall made fit for public meetings in the interest of the whole or any section of the community of Lagos.

(D) The top floor of the said building shall be supplied with a decent library which shall be replenished from time to time with such books of approved utility as shall be decided upon by the trustees (hereinafter described) for the time being of the said building and the same shall be available for the use of the educated portion of the community of Lagos. And in order to ensure the stability of the said building I hereby appoint Mr. D. A. Taylor of the Marina, Lagos, Mr. C. A. Oni of Akani Street, Lagos, Rev. S. M. Abiodun of Broad Street, Lagos, Dr. Orisadipe Obasa of Bafunmi House, Breadfruit Street, Lagos, and J. R. Shanu of Oil Mill Street, Lagos, and Mr. Daniel Akitoye of Isale Eko, Lagos, to be the trustees of the said building who shall have the controlling board of the same and I vest them with power to make such rules and regulations for carrying out the purpose of the said trust and also power to appoint a new trustee in place of the trustee or trustees dying or from other causes becoming incapable to act . . . And I further declare that all profits or interest accruing to my estate from the retention of the said shares in the Fishery Company shall be treated and applied as income of my residuary estate which shall be applied entirely for the upkeep of the ' Tom Jones Memorial. ' ”

The Testator died on the 12th August, 1917, and probate of his will was granted to the appellants on the 13th October, 1917. On the 7th May, 1918, the respondents commenced the present suit, asking (among other things) to have it declared that the testator died intestate as regards his property in Victoria Road described in paragraph (A) of his will as above set out. On the 10th June, 1918, the Acting Chief Justice held (*inter alia*) that the testator died intestate in respect of the property above mentioned, and on the 17th October, 1918, his decision was affirmed by the Full Court of Nigeria. Thereupon this appeal was brought against that part of the decree. It is to be regretted that the respondents were not represented on the appeal, and accordingly no argument has been adduced in support of the decision of the Supreme Court; but after fully considering the terms of the will their Lordships have come to the conclusion that there was an effective disposition of the property in Victoria Road. It is plain that the general trustees of the will cannot carry out the testator's direction to build a hall upon this property; it is devised to them for at all events an estate sufficient to enable them to erect the building; and the declaration that the building when erected (including of course the site) shall “ be and remain ” for the use of the Lagos community for ever, and that the library “ shall be available ” for the use of readers shows that the property is to be affected with a permanent trust. Further, the appointment by the testator of certain

persons as "trustees of the said building" with powers of management indicates that the building when erected is to be transferred to those persons absolutely upon the trusts declared; and for this purpose the fee simple must be vested in the trustees of the will. It is true that the will contains no express and formal devise of the property to the trustees; but unless such a devise is to be collected from the terms of the will the whole of the elaborate trusts declared by the testator are upon the face of them nugatory and of no effect. In their Lordships' opinion this cannot have been the testator's intention; and having regard to the expressions above quoted, the will can and should be construed as effecting a devise of the property to the trustees.

It should be added that the decision of the Nigerian Court that the concluding clause above quoted from the will did not amount to a residuary gift, was not the subject of appeal to the Board; and also that it has not been suggested at any stage of the proceedings that, if the site is available, the trust for erecting and maintaining the building is open to any legal objection.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed and the orders of the Nigeria Court set aside (except as to costs), and that it may be declared that, according to the true construction of the testator's will, the property in Victoria Road was devised to the trustees upon the trust declared by the will. The costs of this appeal will be taxed and paid out of the testator's estate.

AMODU TIJANI

APPELLANT

AND

THE SECRETARY, SOUTHERN PROVINCES

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF SOUTHERN NIGERIA]

(1921) 3 N.L.R. 56

1921 July 11

Viscount Haldane, Lords Atkinson and Phillimore

Public Lands (Acquisition) Ordinance—Title to land—Basis for compensation payable—Usufructuary right.

Certain lands situate at Apapa, in the Colony of Lagos, were taken by the Colonial Government for public purposes. The Plaintiff, as Head Chief of the Oluwa family, claimed as owner of such lands to be entitled to compensation as provided by the Public Lands Ordinance.

In the Divisional Court Speed, C.J., held that as the Plaintiff had, since the cession of 1861, exercised by virtue of his chieftaincy a kind of seigniorial right of control and management of the land in accordance with the well-known principle of native law and custom, and had received payment of nominal rent or tribute from the occupiers, and as the exercise of such rights must have come to the notice of the Government, compensation should be paid to the Plaintiff on that basis and not on the basis of absolute ownership. On appeal to the Full Court this decision was affirmed. The Plaintiff thereupon appealed to the Judicial Committee of the Privy Council.

Held, that the terms of the Ordinance did not preclude the exercise which had been made of the prerogative of the Crown to give special leave to bring this appeal.

Paragraph 6 of the Public Lands Acquisition Ordinance, 1903, which says that where lands required for public purposes are the property of a native community, and that "The head chief of such community may sell and convey the same for an estate in fee simple," means that the chief may transfer the title of the community.

In the case of Lagos and the territory round, the radical title is now in the British Sovereign, but that title is throughout qualified by the usufructuary rights of the communities, rights which, as the outcome of deliberate policy, have been respected and recognised.

There is no evidence that this kind of usufructuary title of the community was disturbed; the general words used in the Treaty of Cession are not in themselves to be construed as extinguishing subject rights.

No distinction has been made out between "stool" and "communal" lands which affects the principle to be applied in estimating the basis on which compensation must be made.

The appellant, for the purpose of the Public Lands Acquisition Ordinance, No. 5 of 1903, is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting so far as such land is unoccupied, along with his own title to receive rent or tribute.

VISCOUNT HALDANE. In this case the question raised is as to the basis for calculation of the compensation payable to the appellant, who claims for the taking by the Government of the Colony of Southern Nigeria of certain land for public purpose. There was a preliminary point as to whether the terms of the Public Lands Ordinance of the Colony do not make the decision of its Supreme Court on such a question final. As to this it is sufficient to say that the terms of the Ordinance did not preclude the exercise which has been made of the Prerogative of the Crown to give special leave to bring this appeal.

The Public Lands Ordinance of 1903 of the Colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the Colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorised by the Ordinance to sell and convey it. Where the land required is the property of a native community, the Head Chief of the community may sell and convey it in fee simple, any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court is to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance. *Prima facie*, the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the direction of the Court, but where any consideration or compensation is paid to a Head Chief in respect of any land, the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit in such proportions and manner as the Native Council of the District in which the land is situated, determines with the sanction of the Governor.

The land in question is at Apapa, on the mainland and within the Colony. The appellant is the Head Chief of the Oluwa family or community, and is one of the Idejos or landowning white cap chiefs of Lagos and the land is occupied by persons some of whom pay rent or tribute to him. Apart from any family or private land which the Chief may possess or may have allotted to members of his own family, he has in a representative or official capacity control by custom over the tracts within his Chieftaincy, including, as Chief Justice Speed points out in his judgment in this case, power of allotment and of exacting a small tribute or rent in acknowledgment of his position as Head. But when in the present proceedings he claimed for the whole value

of the land in question, as being land which he was empowered by the Ordinance to sell, the Chief Justice of the Supreme Court held that, although he had a right which must be recognised and paid for, this right was:

"merely a seigniorial right giving the holder ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land."

It does not appear clearly from the judgment of the Chief Justice whether he thought that the members of the community had any independent right to compensation, or whether the Crown was entitled to appropriate the land without more.

The appellant, on the other hand, contended that, although his claim was, as appears from the statement of his advocate, restricted to one in a representative capacity, it extended to the full value of the family property and community land vested in him as Chief, for the latter of which he claimed to be entitled to be dealt with under the terms of the Ordinance in the capacity of representing his community and its full title of occupation.

The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place the real character of the native title to the land.

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognised as the most comprehensive estate in land which the law recognises, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply, in contemplation of Scottish law, a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession, is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is may not be that of the

individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.

In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognised. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.

In the instance of Lagos the character of the tenure of the land among the native communities is described by Chief Justice Rayner in the Report on Land Tenure in West Africa, which that learned Judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority.

“ The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or, family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land.”

Consideration of the various documents, records and decisions, which have been brought before them in the course of the argument at the Bar, has

led their Lordships to the conclusion that the view expressed by Chief Justice Rayner in the language just cited is substantially the true one. They therefore interpret paragraph 6 of the Public Lands Ordinance of 1903, which says that where lands required for public purposes are the property of a native community, "the Head Chief of such community may sell and convey the same for an estate in fee simple," as meaning that the Chief may transfer the title of the community. It follows that it is for the whole of what he so transfers that compensation has to be made. This is borne out by paragraphs 25 and 26, which provide for distribution of such compensation under the direction of the Native Council of the District, with the sanction of the Governor.

The history of the relations of the Chiefs to the British Crown in Lagos and the vicinity bears out this conclusion. About the beginning of the eighteenth century the Island of Lagos was held by a Chief called Olofin. He had parcelled out the island and part of the adjoining mainland among some sixteen subordinate Chiefs, called "Whitecap" in recognition of their domination over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative as ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements in the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period Lagos had become a centre of the slave trade, and this trade centre the British Government determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo. In 1861 he made a Treaty of Cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British Government, with the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate Colony, and finally, in 1906, it became part of the Colony of Southern Nigeria.

In 1862 a debate took place in the House of Commons which is instructive as showing the interpretation by the British Government of the footing on which it had really entered. The slave trade was to be suppressed, but Docemo was not to be maltreated. He was to have a revenue settled on and secured to him. The real possessors of the land were considered to be, not the native kings, but the whitecap chiefs. The apprehension of these Chiefs that they were to be turned out had been set at rest, so it was stated. The object was to suppress the slave trade, and to introduce orderly conditions. Such, in substance, was the announcement of policy to the House of Commons by the Under Secretary for Foreign Affairs, and the contemporary despatches and records confirm it and point to its having been carried out. The Chiefs were stated, in a despatch from the then Consul, to have been satisfied that the cession would render their private property more valuable to them. No doubt there was a cession to the British Crown, along with the Sovereignty, of the radical or ultimate title to the land, in the new Colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed

as having related primarily to sovereign rights only. What has been stated appears to have been the view taken by the Judicial Committee in *Attorney-General of Southern Nigeria v. Holt* (2 N.L.R. 1.; [1915] A.C., 599), a recent case reported in 1915, and their Lordships agree with that view. Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is, generally speaking, entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v. The Attorney-General of Southern Nigeria* (2 N.L.R. 77), decided by the Supreme Court of the Colony in 1912, Chief Justice Osborne laid down as regards the effect of the Cession of 1861, that he was of opinion that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a Cession are *prima facie* to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive title already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the Head Chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The Chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

Their Lordships now turn to the judgments of Chief Justice Speed in the two Courts below. The reasons given in these judgments were in effect adopted by the Full Court, and they are conveniently stated in what was said by the Chief Justice himself, in the Court of First Instance. He defined the question raised to be "whether the Oluwa has any rights over or title to the land in question for which compensation is payable and if so upon what basis such compensation should be fixed." His answer was that the only right or title of the Chief was a "seigneurial right giving the holder the ordinary rights of control and management of land, in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis and not on the basis of absolute ownership." The reasons given by the Chief Justice Speed for coming to this conclusion were as follows: According to the Benin law the King is the sovereign owner of the land, and as the territory was conquered by the Benins it follows that during the conquest the King of Benin was the real owner, the control exercised by the Chiefs under his "Eleko" or representative being exercised as part of the machinery of government and not in virtue of ownership. It might be that for a considerable period prior to 1850 the control of the King of Benin had been

relaxed until it became little more than a formal and nominal overlordship, and that in this period there had been a tendency on the part of the minor chiefs to arrogate to themselves powers to which constitutionally they had no claim, including independent powers of control and management. But the effect of the Cession of 1861 was that, even according to the then strict native law, all the rights over the land, including sovereign ownership, passed to the British Crown. He finds that what was recognised by the British Government was simply the title of the Chiefs to exercise a kind of control over considerable tracts of land, including the right to allot such lands to members of their family and others for the purposes of cultivation, and to receive a nominal rent or tribute as an acknowledgment of "seigneurial" right. Strict native law would not have supported this claim, but it was made and acquiesced in, although there were certain Crown grants which appear to have ignored it. There was thus no title to absolute ownership in the Chiefs, and, so far as the judgment in the *Onisiwo* case (already referred to), was inconsistent with this view, it was based on a confusion between family and Chieftaincy property. It was true that in yet another case in 1907, which came before the Full Court the Government had paid compensation on the basis of absolute ownership, but in that case the Government had not raised the question of title, and the decision consequently could not be regarded as authoritative.

Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognise the real character of the title to land occupied by a native community. That title, as they have pointed out, is *prima facie* based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the Cession to the British Crown took place in 1861. The general words used in the Treaty of Cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the Full Court.

Nor do their Lordships think that there has been made out any distinction between "stool" and communal lands, which affects the principle to be applied in estimating the basis on which compensation must be made. The Crown is under no obligation to pay anyone for unoccupied lands as defined. It will have to pay the Chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it, and if the allottees have had valid titles conferred on them, they must also be compensated. Their Lordships doubt whether any really definite distinction is connoted by the expression "stool lands." It probably means little more than lands which the Chief holds in his representative or constitutional capacity, as distinguished from land which he and his own family hold individually. But in any event the point makes little difference

for practical purposes. In the case of land belonging to the community, but as to which no rent or tribute is payable to the Chief, it does not appear that the latter is entitled to be compensated otherwise than in his representative capacity under the Ordinance of 1903. It is the members of his community who are in usufructuary occupation or in an equivalent position on whose behalf he is making the claim. The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Courts below should be reversed, and that declaration should be made: (1) That the appellant, for the purposes of the Public Lands Ordinance No. 5 of 1903 is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting in so far as such land is unoccupied, along with his own title to receive rent or tribute; (2) That the consideration or compensation awarded is to be distributed, under the direction of the Native Council of the District with the sanction of the Governor, among the members of the community represented by the appellant as its Head Chief in such proportions and in such manner as such Council, with the sanction of the Governor, may determine. The case will go back to the Supreme Court of Nigeria (Southern Provinces) to secure that effect is given to these declarations. The appellant is entitled to his costs of this appeal and of the appeal to the Full Court, and in any event to such costs of the original hearing as have been occasioned by the question raised by the respondent as to his title. The other costs will be dealt with by the Supreme Court in accordance with the provisions of the Ordinance.

EX-OMAHENE OFORI KUMA II AND OTHERS . . . APPELLANTS
AND
ACTING OMAHENE YAO BOAFO IV . . . RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 57

1922 July 18

Viscount Haldane, Lords Parmoor and Trevethin

Chief—Election—Native custom—Custody of stool paraphernalia.

In the year 1914, Ofori Kuma II, the principal appellant was elected and enstooled as Omahene of Aqwapem, and this election and enstoolment were confirmed by the Government in the following year. In a letter to the Governor dated 12th June 1919 he resigned the stool. The respondent then, on behalf of himself and the Oman of Aqwapem, claimed the delivery to him of the stool paraphernalia. The claim was resisted by the principal appellant and others on the grounds, *inter alia*, firstly that the appellant had been duly re-appointed Omahene of Aqwapem about 16th December, 1919, and secondly that the paraphernalia was the property, not of the stool of Aqwapem, but of the stool of the Asona family.

Held: That the principal appellant had not been elected in accordance with native custom, as the Adontenhene of Aburi was not present, and the approval of the Nifahene and the Benkumhene had not been obtained.

And, that the paraphernalia claimed belonged to the stool of Aqwapem.

LORD PARMOOR. This is an appeal from a judgment of the Supreme Court of the Gold Coast Colony, affirming a judgment of Mr. Justice

Porter, delivered in the Divisional Court. At a meeting held on the 2nd March, 1920, between the Commissioner for the Eastern Provinces, and the Secretary for Native Affairs, it was decided that the re-election of the principal appellant as Omahene of the Oman of Aqwapem was not complete, according to native customs, and that the Government could not recognise its validity, and that it was desirable that the attitude of the Government should be known, and that, as matters then stood, the proper course was to seek the remedy, which the law allowed, by bringing an action in the High Court. In these circumstances an action was brought by the respondent who claimed on behalf of himself, and the Oman of Aqwapem, the delivery to him of certain Aqwapem paraphernalia, as set out in the particulars annexed to the writ, and valued at £17,515. The appellant Ofori Kuma II was the principal defendant in the action. The other defendants were added at the trial as persons in actual possession of one or other item of the paraphernalia claimed. In the case of one of the defendants in the action, Kwaku Ayaben, the appeal to the Supreme Court was allowed, and no question now arises.

A large number of issues were raised, both in the Divisional Court and in the Supreme Court. In the appeal to their Lordships three questions were raised for decision. They may be summarised as follows:

- (1) Did the appellant, Ofori Kuma II, who was duly appointed Omahene of Aqwapem, on or about the 16th May, 1915, resign that office in June, 1919?
- (2) If the resignation of Ofori Kuma II in June, 1919, was effective, was he duly re-appointed Omahene of Aqwapem in accordance with native custom on or about the 16th December, 1919?
- (3) If the resignation did take effect, and there has been no re-appointment, is the respondent entitled to claim, as trustee or guardian, the Aqwapem paraphernalia set out in the particulars, until a new Omahene has been duly appointed in accordance with native custom? In connection with this issue, the question is raised whether the Stool claimed as part of the Aqwapem paraphernalia is the Stool of the Omahene of Aqwapem, or whether it is the Stool of the Asona family, of which family Ofori Kuma II is a member.

Evidence was given at the trial, both oral and documentary. The oral evidence is in many respects unsatisfactory; but, by consent, a Report by Mr. Robertson, the Secretary for Native Affairs, made on the 13th September, 1907, and a second Report made by Mr. Crowther, Secretary for Native Affairs, made in October, 1915, were admitted as evidence. It would have been difficult, part from these Reports, to form any conclusion on the issues raised as to native customs, and their Lordships have been much assisted by their admission as evidence.

To understand the contentions put forward by the parties it is first necessary to consider shortly the origin and constitution of the State of Aqwapem, and the circumstances which have given rise to the present litigation.

The Oman of Aqwapem consists of three divisions—the Adonten (centre), the Nifa (right), and the Benkum (left). The origin of this organisation, and of the formation of the State of Aqwapem, is attributed to the wars which led to the overthrow of the Akwamu dynasty about A.D. 1733. The Akwamus, a Twi tribe, who had been rulers of a part of Akim, Accra, and the tribes in the Aqwapem district, were defeated about that time by a combination of the latter with the powerful people of Akyem, and

driven across the Volta. The Cherepong and Guan tribes of Aqwapem determined to form a combined State under Akyem protection. They asked Safori, the victorious Akyem General, to be their Omahene. He accepted the offer, arranged the new State in accordance with the Twi military principles, his own people forming the van or "Adonten," the Cherepongs the right wing, and the Guans the left. At the present time the Oman of Aqwapem comprises (1) the Adonten chiefs, including the first, second and third Adontenhene, and three Odikros or lesser chiefs; (2) the Nifa chiefs, comprising the Nsfahene and six Odikros; (3) the Benkum chiefs, comprising the Benkumhene and six Odikros. The three Adontenhene, in order of authority, are first, the Adontenhene of Akropong, second, the Adontenhene of Amanakrom, and thirdly the Adontenhene of Aburi. One of the questions involved in the appeal is whether the concurrence or approval of the Adontenhene of Aburi and of the Nifahene and Benkumhene is required by native custom in the election of the Omahene of Aqwapem.

The first Omahene belonged to the Asona family, one of the families or tribes into which all Twi-speaking people are divided, and this family is regarded as the family from which normally the Omahene is selected. Amongst the Twi tribes membership of a family is reckoned through the mother, and the position of the head woman of the family is one of great importance. There is a dispute as to the person who is entitled to be regarded as the head woman. She is variously designated in the evidence as the Aberewatia, the Queen Mother, the Stool Mother, the Elder Woman and the Ohenmea; but both parties are agreed that it is an essential step towards the election of the Omahene that the nomination should be made by the Aberewatia. In 1907 the chiefs of Aqwapem met on the 29th July, and purported to de-stool the then Omahene Akuffo. The validity of the de-stoolment was disputed, and the Governor of the Gold Coast Colony appointed W. C. F. Robertson, Secretary of Native Affairs, a Commissioner, to inquire whether the de-stoolment of Akuffo had been carried out in accordance with native custom. The Commissioner reported that Akuffo had been de-stooled according to native custom, and subsequently Owusu Ansa was elected and enstooled as Omahene of Aqwapem. After Owusu Ansa's death in 1914 the principal appellant was elected and enstooled as Omahene of Aqwapem. His election and enstoolation were confirmed by the Government in February, 1915. At the same date the Government confirmed the election and enstoolation of the respondent, as Mankralo, and first Adonthene of Aqwapem. In 1915 charges were made against the principal appellant by the Benkumhene and Nifahene. The Secretary for Native Affairs, Mr. Crowther, inquired into these charges, and so far as is relevant to questions raised in this appeal, the evidence given before him, and his Report thereon, confirm the Report of Mr. Robertson, and the evidence given before Mr. Robertson. A further inquiry was held by Mr. Ross, the then acting Secretary for Native Affairs, from the 4th to 12th July, 1918. This Report was not produced in evidence, but it appears that Mr. Ross declared in his report that the principal appellant had been properly destooled according to native custom on or about the 28th November, 1918. In July, 1919, the acting Governor gave his decision in writing, which was so far in favour of the principal appellant, that he stated, holding a different opinion from Mr. Ross, that he was not satisfied that the de-stoolment of the appellant had been conducted in accordance with native custom, and that he was therefore unable to confirm it. At the same time, however, the acting Governor accepted the resignation

of the principal appellant, contained in a letter of the 12th June, 1919. In this letter the principal appellant applied to the acting Governor that his Excellency would be so gracious as to allow him to resign the Stool, and he added, "I proceed to hand my resignation to the Stool-Mother, and the senior Adonthene to-day, together with all the Stool properties attached thereto." Their Lordships cannot doubt that the resignation of the principal appellant became effective on its acceptance by the acting Governor, and that the principal appellant cannot claim to be Omahene of Aqwapem unless he can show that since the date of his resignation he has been duly reappointed in accordance with native custom.

The oral evidence adduced before the trial Judge, and the Report of Mr. Robertson, show what, according to native custom, the procedure should be in connection with the election of an Omahene of Aqwapem. The initiative rests with the representatives of the Adonten, who meet with the Elders of Akropong, the Jasifo, Ankobea Stoolbearers, etc. (usually called Elders of Akropong, the Jasifo, and inform the Royal Family of Asona, through its male official Elder, that they desire to know whom the family gives to them as their Ohene. The Elder conveys this message to the Aberewatia who, after formal consultation with the Elders of the Family, gives him the man selected, whom he in turn introduces to the assembled Chiefs and Elders. The selected person has, in the first instance, to be approved by the Household attached to the Stool, and the Elders of Akropong. In the event of their disapproval it is necessary for the family to give someone other than the man suggested. In addition, it is necessary to secure the approval of the Adonten, after which he is shown to the divisions of the Nifa and Benkum as the Omahene elect. The disapproval of the Nifa and Benkum would necessitate reconsideration, as it would mean disintegration of the State, but Mr. Robertson states that this is unlikely to occur. The Oman as such is not concerned with the instoolation, or placing on the Stool, which follows later. The allegation made on behalf of the respondent is that the appellant failed to comply with the native custom in three particulars. It is alleged that Akua Oye, by whom he was selected, was not at the time the Aberewatia; that the third Adontenhene (of Aburi) and the Benkumhene and Nifahene were not present at the meeting, and that neither the Adonthene of Aburi nor the Benkumhene and Nifahene have ever approved of the re-election of the principal appellant as Omahene.

Whether Akua Oye was the Aberewatia is a question of fact. Mr. Robertson, after a local inquiry, reported that Akua Oye did hold the office of Aberewatia. After hearing her evidence, and that of the rival claimant, Akua Aso, Mr. Robertson reports that Akua Oye was admittedly entitled to the post by birth, and that though she was a Christian, and had declined on that account to perform the funeral customs, she did in fact appoint Akuffo as Omahene in 1895, and apparently appointed Owusu Ansa to the Omahene Stool in 1907. He also found that she appointed Ofori Kuma in 1914 to the Omahene Stool, and asserted her position as Elder of the Family by taking proceedings for wrongful disposition of the Stool property, and by deposing Akuffo in 1907, and demanding the Stool from him. The trial Judge did not think it necessary to decide this issue, finding that on other grounds the election was invalid; but in the Supreme Court the Chief Justice and Mr. Justice Logan, relying on the evidence given by Ekua Oye at the inquiry before Mr. Robertson, that there is a Stool of the Mother of all the Women, and that anyone who occupies that Stool is the Elder of the Family, and that Ekua Aso is on that Stool now, have expressed the contrary view that the Aberewatia at the time of the alleged re-election was

Ekua Aso, and Ekua Oye. Their Lordships do not think it is necessary to decide this issue, finding that on other grounds the principal appellant has not been elected Omahene in accordance with native customs. It is admitted that the third Adontenhene (of Aburi) was not present, and that the approval of the Nifahene and the Benkumhene has not been obtained. The importance of obtaining this consent is explained in the Report of Mr. Robertson, who states that their disapproval would mean the disintegration of the State. Their Lordships, therefore, find that at the material date the principal appellant had not been re-elected to the office of Omahene of Aqwapem.

The last matter to be determined is whether the respondent is entitled to claim on behalf of the Oman of Aqwapem possession of the Stool and paraphernalia during the interval between the resignation of the appellant and the appointment of his successor. This issue mainly depends on the question whether the Stool and paraphernalia are the property of the Omahene of Aqwapem for the time being or of the Asona family. The counsel for the appellants supplied to their Lordships a list of the passages in the evidence and Reports on which he relied in support of the contention that the Stool and paraphernalia, of which the respondent claims possession, are the property of the Asona family. Their Lordships have carefully considered the passages to which they have been referred. It would be impossible, within the limits of this judgment, to refer to all these passages; but special weight was attached to two of them. One of these shows that in 1906 the then Aberewatia, Ekua Oye, succeeded in an action against the ex-Omahene Akuffo for the recovery of certain Stool lands, and the second gives an account of the meeting at Akropong on the 20th November, 1909, before Captain Taplin, the District Commissioner, in the presence of the Adonthene of Akropong, the respondent, and Elders. At this meeting the chief linguist to Ekua Oye states, "I know all about the Stool property. I am not responsible for it all. When the late Omahene was de-stooled the Ohemia, Yao Boafo (the respondent) and his Elders took charge of the Stool property. They still have it." In answer to the Commissioner the witness adds that the Ohemia is responsible for handing over the Stool property to a new Omahene. On the other hand no claim appears to be made that the Stool and paraphernalia were Asona property, and it is on more than one occasion referred to as being the property of the Oman of Aqwapem by the principal appellant, who is now seeking to retain possession, not as a member of the Asona family, or on behalf of the Adonten of Akropong, but as Omahene of Aqwapem, on the ground that he has not resigned or that if he has resigned he has been duly re-elected in accordance with native custom. Moreover, in October, 1907, Offei Kwasi, the acting Omahene of Aqwapem, brought an action against Akuffo, then ex-Omahene of Aqwapem, claiming a declaration that certain articles therein mentioned, being some of the articles claimed in the present action, belong to the Stool of the Omahene of Aqwapem. The application for the summons in this action was signed by the principal appellant, who took an active part against Akuffo, and during the hearing of the action made a statement that the articles in question were paraphernalia of the Aqwapem Stool. Offei Kwasi succeeded in establishing his right as the then acting Omahene of Aqwapem, holding the same office as that in respect of which the respondent is now claiming. Under these circumstances their Lordships are of opinion that the Courts below have rightly held that the Stool and paraphernalia now claimed are the Stool and paraphernalia of the Oman of Aqwapem, and that the respondent as acting Omahene of Aqwapem is

entitled to the custody of and to claim on behalf of himself and the Oman of Aqwapem delivery to him of the paraphernalia mentioned in the particulars annexed to the writ and valued at £17,515. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

ERNEST KWEKU ADISI
AND
FRANS THOMAS DOVE.

APPELLANT
RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 64

1923 Apr. 13

Viscount Haldane, Lords Dunedin and Parmoor

Contract—Sale of goods—Disclosed principal—Time for payment.

In pursuance of a contract in writing dated 23rd November, 1917, one F. W. Dove, a brother of the respondent, supplied to the appellant a quantity of cocoa, the price being fixed in the contract. The price remaining unpaid, the appellant in a letter dated 26th November, 1917, consented to F. W. Dove's having control of the cocoa, and in a reply F. W. Dove consented to the appellant's hypothecating or shipping the cocoa in order to make payment.

On the respondent's suing the appellant for payment, the claim was resisted on the grounds that the contract was with F. W. Dove and that payment was to be made only on shipment.

Both the Courts below held that the contract was made with F. W. Dove as the agent of a disclosed principal.

And, nothing having been settled in the contract about the time of payment, payment was to be on delivery.

And, F. W. Dove's consent to appellant's shipping the cocoa in order to make payment was equally consistent either with the money being due on delivery or with its being due on shipment, and therefore did not alter the terms of the contract.

The Board upheld the views taken by the Courts below.

LORD DUNEDIN. In this case Mr. Montgomery has put every point which could be put for the appellant, but their Lordships have no doubt that the view taken by both Courts below was the correct view.

The action is one for payment for cocoa delivered, and there is no question that the cocoa was delivered. A question was raised at one time as to shortage; but, inasmuch as that is a point that really depended upon the credibility of the evidence and on which there were concurrent findings in the Courts below, it would be impossible for their Lordships to go into any such matter.

The beginning of the negotiations which led up to the contract is contained in a letter from the appellant to F. W. Dove, a brother of the respondent, dated the 22nd November, 1917, which is in these terms: "Please offer 1,000 bags of cocoa delivered Accra station at the rate of 12s. 6d. per load of 60 lbs. weight. The above contract to be filled up not later than Tuesday next. Upon the cocoa being carted to Lighterage beach stores, immediate payment of the cost thereof will be made."

To that letter a reply was sent on the 23rd November, 1917, which did not constitute an acceptance, but made various suggestions as to modification, and in particular did not at all agree to the suggestion as to payment being made upon the cargo being carted to the Lighterage beach stores. That letter

was followed by a letter of the same date from the appellant to F. W. Dove in these terms:

“ Further to my letter of yesterday, I ask you to supply 2,000 bags of cocoa delivered at Accra railway station at the rate of 13s. and 13s. 6d. per load of 60 lbs. weight, including cost of bags for each 1,000 bags, respectively, and that the said quantity of 2,000 bags should reach Accra not later than Thursday next, the 29th instant. Please note that I require only good fermented cocoa, well dried and free from all foreign matter and substance.”

To that letter F. W. Dove replied on the same day as follows: “ In reply to yours of even date, I accept your offer on the terms and conditions therein stipulated.”

There is no question that those two letters taken by themselves form a firm contract, and upon the face of them, if there was nothing else, they are a contract between the appellant and F. W. Dove, who is the brother of the respondent. But then it was said that although on the letters the contract was made between the appellant and the brother of the respondent, the contract was truly made with the respondent. It does not very much matter whether the view is taken that the contract was truly made with the respondent, his brother really being put forward as a sort of nominee or *prete nom*, or whether the other view, which is probably the more strictly legal one, is preferred, that the contract was made with the agent of a disclosed principal. Both the Courts below have come to the conclusion that the latter is the true position, and certainly it would be very unusual for their Lordships to disturb such a finding unless something very clear could be shown to the opposite effect. If the learned counsel for the appellant had been able to substantiate what he said at first, that the terms of the documents were quite inconsistent with this view, then no doubt there might have been some reason for interfering, but there is nothing in the two letters to which reference has been made which is at all inconsistent with the view of its being a contract with an agent for a disclosed principal, and, accordingly, their Lordships would be slow indeed to interfere with such a finding. Nor, indeed, do they doubt that they would certainly have arrived at the same conclusion from the evidence. That disposes of the main point, but there is subsidiary point, namely, that this action was premature, because although the cocoa had admittedly been delivered, payment by the terms of the contract was only to be made upon shipment, and the cocoa had not been shipped. Their Lordships think that the letters which have already been referred to displace that view. There is nothing whatever in them about payment upon shipment. On the contrary, the ordinary idea of a contract for sale is, of course, payment on delivery, and in the initiation of the negotiations here what was proposed was not payment on delivery, but upon the cocoa being carted to the Lighterage beach stores. That proposal was objected to and upon the objection being taken there was a contract proffered and accepted in which nothing was settled at all about payment, and, therefore, the ordinary result in law will follow, that payment is to be on delivery. It is impossible, therefore, to read into the contract as constituted by those two letters anything about payment being deferred until shipment, and further than that the learned Judges in the Court below have held that there is nothing in the parol evidence which in any way varied the terms of the contract, even if it were possible to do so.

There is one further matter which ought to be referred to. It seems that the cocoa not having been at once paid for some doubts arose in the mind of

the seller, and he got his brother, who was dealing with the matter, to reply to the appellant that he should in some way have control of the cocoa. Accordingly the appellant, three days afterwards, on the 26th November, 1917, wrote to Mr. F. W. Dove the following letter: "With reference to my letter of 23rd instant, I consent to your having control of all cocoa supplied me by you until you have been paid by me for such supplies."

What precisely he meant by that it is not altogether easy to see. He may have had some rather hazy legal idea that a letter in those terms constituted a sort of floating charge upon the cocoa. Be that as it may, in answer to that letter, Mr. F. W. Dove wrote to the appellant on the same day in these terms: "On your undertaking of even date that I have control of all supplies of cocoa I make to you until I have been paid, I hereby consent to your hypothecating or ship such supplies for the purpose of making such payments thereof."

The learned counsel for the appellant strenuously contended that the inference could be drawn from that letter that payment was not to be made until shipment. In their Lordships' opinion no such inference can be drawn. The matter appears to their Lordships to be quite clear. This control, such as it was, having been given, a second letter is written by the appellant, in which he said: "I am quite willing to relax my control and to allow you to ship in spite of my control and to allow you to hypothecate," presumably by means of bills of lading and then endorsing the bills of lading "in order that you may obtain the money to pay me." That is equally consistent either with the money being due on delivery or with its being due on shipment, and therefore there is nothing in that letter which alters the clear terms of the contract.

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

TOLOMEO GANDOLFO

APPELLANT

AND

THE AFRICAN PLANTATIONS COMPANY

AND ANOTHER

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C.1874-1928] 68

1923 Apr. 17

Viscount Haldane, Lords Shaw and Parmoor

Charter Party—Breach—Want of Retainer—Procedure.

The appellant, who was not a party to the Charter Party sued on, was represented in the Court below; but the Court held that for want of a power of attorney, the representative was not entitled to appear. The suit was treated as undefended and judgment given against the appellant in his absence.

VISCOUNT HALDANE. In this case the facts are sufficiently stated in the judgment given by Mr. Justice Porter on the 21st March, 1921, concurring with the Chief Justice. Their Lordships need not go into the history of the litigation. It is sufficient to say that on the 2nd May, 1918, the Writ of Summons was issued at the instance of the African Plantations Company against the defendant Tolomeo Gandolfo, the Master, and Murialdi Giovanni, the representative of the owners of the ship *Estrella*, and a

motion was made to stop the clearance of the ship *Estrella*, the subject of the Charter Party, which was at the time in Accra Roads. There were various proceedings and adjournments. At first the respondents were advised by Mr. Renner, who later appeared for Mr. Gandolfo, the present appellant. On the 7th May an order was made by the Court that the clearance of the ship *Estrella* should be stopped and the ship detained pending security being given in the sum of £5,000 for any damages which might be given against the defendants. Under the Charter Party the ship chartered was to have sailed from Accra with a certain cargo, and, as a breach of the contract on the part of the shipowners was apprehended, security was asked and obtained to the extent of £5,000. That money was paid out to the African Plantations Company, and the ship was allowed to sail. That did not end the matter, because the case went on as a suit for damages against the owners of the ship for breach of the provisions of the Charter Party, and the Court had before it various affidavits, notably an affidavit from which it appeared that Mr. Gandolfo, the present appellant, disputed his liability, saying that he was only the servant of the owners of the ship, and it appeared when the Charter Party was put in evidence that he was no party to the Charter Party. A new feature introduced itself into the suit. A question was raised as to the propriety of Mr. Renner's appearance on behalf of the defendants, one of whom was the present appellant, having regard to the fact that he had been employed by the other side in the earlier stages of the matter, and there was much dispute and discussion as to that, on which their Lordships do not intend to express any opinion. It may be that the Court below were quite right in thinking that Mr. Renner was precluded from acting. Then there appeared another gentleman, probably brought there by Mr. Renner, and the point was taken by the plaintiffs, the African Plantations Company, that this gentleman had not a proper retainer; that he only appeared under a Power of Attorney, which covered the case of the representatives of the owners, the Italian Government, but did not extend to Gandolfo, the present appellant, and they said, therefore, that he did not and could not appeal for Mr. Gandolfo. On that the Court proceeded to give judgment on the footing that the suit was undefended. Their Lordships think that in doing this the Court below were wrong. Although it was clearly before them that Mr. Gandolfo, the present appellant, was not a party to the Charter Party, they nevertheless treated him as a person who could be made liable for damages, and gave judgment for £6,000 damages against him in his absence. On the fact of it appears to their Lordships to be impossible to support this. There may, however, be something else unknown to their Lordships, which would have been elicited had a proper trial taken place, and, therefore, they do not conceive themselves to be justified in finally disposing of the case upon this point. All they wish to say is that it does not appear to them to be right that the Court should have failed to take judicial notice of what was on the face of the documents a very serious point. Under these circumstances, their Lordships, much as they dislike protracted litigation, and glad as they would have been to have disposed of a case which turns so much upon small details, think that they have no alternative but to send it back for a new trial in the light of the observations which they have made. The £5,000 referred to having been paid out of Court, must be paid in again to abide the result of the new trial. In their Lordships' opinion the appellant is entitled to his costs here, but there should be no order at this stage as to any other costs. These should be dealt with when the case has been re-tried. Their Lordships will humbly advise His Majesty accordingly.

ANEGE AKUE

AND

APPELLANT

KOJO ABABIO

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST]

[1923] A.C. 474

1923 Apr. 19, May 8

Viscount Haldane, Lords Shaw and
Parmoor

Gold Coast—Expropriation of lands—Procedure—Appeal from judgment—Notice of appeal—Public Lands Ordinance, 1876, s. 6, sub-s. 8.

Sect. 6, sub-s. 8 of the Public Lands Ordinance, 1876 (Gold Coast,) which provides that a party who desires to appeal from judgment under the section (namely, a judgment as to questions arising out of the acquisition of land under the Ordinance), is to give notice of his "intention to appeal," is complied with if a notice to appeal in accordance with the rules under the Supreme Court Ordinance, 1876, is given to the requisite parties; a notice under s. 6, sub-s. 8, is not necessary in addition to a notice of appeal under the rules. Further, where the amount of the compensation is agreed, and the only issue with which the judgment deals is the competing rights of two claimants to the land, neither the Colonial Secretary nor the other claimants need be served with notice of the appeal as parties affected by it.

Judgment of the Supreme Court reversed.

APPEAL (No. 86 of 1922) by special leave from a judgment of the Supreme Court of the Gold Coast (March 7, 1921) affirming a judgment of the Chief Justice.

The appeal arose out of proceedings under the Public Lands Ordinance, 1876, for the acquisition of land required for the service of the Colony.

The only question arising upon the appeal was whether in the circumstances of the case the present appellant had given proper notice of his intention to appeal to the appellate court in the Colony from a judgment of the Chief Justice (Sir Phillip Smyly) delivered upon the trial of an issue whether the appellant or the respondent was entitled to the lands in question. The Full Court had held that the notices given were insufficient to comply with s. 6, sub-s. 8, of the above Ordinance, and with the order of the Court giving conditional leave to appeal.

The facts of the case and the material provisions of the Ordinance appear from the judgment of the Judicial Committee.

1923, April 19. *Montgomerie, K.C.* and *J. A. Johnston* for the appellant
Clauson, K.C. and *Sir W. B. Griffith* for the respondent.

May 8. The judgment of their Lordships was delivered by VISCOUNT HALDANE. This is an appeal brought by special leave from an order of the Full Court of the Gold Coast Colony. The leave granted extends only to the allowance of which objections to the hearing of the appeal, on the Court of first instance Smyly C.J. had decided in favour of the respondent. The question before him was whether the respondent or the appellant was entitled to certain compensation payable by the Government of the Gold Coast Colony for lands taken compulsorily for waterworks purposes under the Public Lands Ordinance, 1876, of the Colony. On appeal the Full Court refused to enter on the merits, holding that the appeal failed by reason of the appellant not having complied with conditions which under the law of the Colony must be complied with by an appellant before he could become entitled to have his appeal heard.

The amount of compensation for the land taken was agreed with the Colonial Secretary of the Colony at a certain sum. The question which emerged being who was entitled to this sum came before Smyly C.J. for decision. He tried the question as between the appellant and the respondent, subject to the possible establishment of claims by other persons with minor titles, who, along with the Colonial Secretary, did not intervene at the hearing. The decision was given on July 24, 1918. The appellant, as was required by the procedure rules, applied *ex parte* for leave to appeal on terms of paying money into Court and of giving notice to all parties affected by the appeal. The appellant duly paid the money into Court and, on January 7, 1919, gave notice of appeal to the respondent and not to any one else. On January 31, 1919, he was given final leave to appeal.

The appeal came on March 3, 1921, before Smyly C.J. and Porter and Wilkinson J.J., when the respondent took the following preliminary objections: (1) that the appellant had not complied with s. 6, sub-s. 8, of the Public Lands Ordinance, 1876, the only notice of appeal given to the respondent not being such as was required by the section; (2) that notice had not (as required by the Order of December 13, 1918) been given to the parties other than the respondent affected by the appeal.

The Full Court reserved judgment, and on March 7, 1921, dismissed the appeal. All three of the judges who heard the case agreed in holding that the appellant had not complied with s. 6, sub-s. 8, of the Public Lands Ordinance, 1876. Smyly C.J. was of opinion that the respondent's further objection to the appeal on the second ground, that there were no other persons directly affected, was invalid. But Porter and Wilkinson JJ. thought that the second objection also was valid, and held that all the parties on the record ought to have been served with notice.

In the event special leave to appeal to His Majesty in Council was given, but limited to the preliminary second question stated as to failure to give proper notice of appeal to the Full Court, and not as extending to the general merit.

The Public Lands Ordinance of 1876 enacts by s. 6, sub-s. 7, that any final judgment in any such case as the present is to be subject to the like appeal to which other final judgments of the Court making the same are subject. By sub-s. 8 of the same section the Ordinance enacts:

“ The party who may desire to appeal against such judgment shall give notice to the other party and to the Court of his intention to appeal and proceed in other respects to perfect his appeal according to the Rules of Court for the time being regulating appeals, and if such notice is not given and the appeal perfected within the period prescribed the judgment of the Court shall be final.”

By the Supreme Court Ordinance, 1876, the appellant is, in addition to other conditions which in the present case were complied with, to give notice of the appeal to all parties directly affected by the appeal, and to such others as respondents as the Court below thinks fit to direct. If the conditions prescribed have been complied with, and if application for final leave to appeal has been filed in the Court below not later than seven days after the expiration of a month, then the Court below must give leave to appeal, provided that where the conditions of appeal shall not have been perfected within such period as aforesaid or where the appeal shall for any reason have lapsed or been abandoned and the appellant shall again make application for leave to appeal, the Court may either refuse to grant leave or may impose any terms that it thinks proper in addition to the terms above

mentioned. By r. 8 it is enacted that in every final judgment the Court of Appeal may give leave to appeal on such terms as that Court thinks just.

The Full Court gave judgment on March 7, 1921, upholding both preliminary objections, and dismissed the appeal with costs without going into the merits. Smyly C.J. based his decision, as already stated, only on the first ground, that the conditions prescribed by s. 6, sub-s. 8, of the Public Lands Ordinance, 1876, had been complied with. He did not think that the Colonial Secretary, who had retired from the case, or the other claimant, who had taken no part in the proceedings, were parties "directly affected." But the other two judges were in favour of the respondent on both the preliminary objections, holding that notice of the appeal ought to have been given to the Colonial Secretary of the Colony and to the other original claimants.

On January 31, 1919, the Court of first instance had granted leave to appeal. Various motions for leave to appeal had previously been made *ex parte*, and the respondent was notified on January 7, 1919, that, conditional leave having been granted by the Court below, the appellant intended to appeal.

The substantial question before their Lordships is whether there was such a defect in the notice required as made the appeal incompetent. Smyly C.J., as has already been observed, took the view that two notices were essential, one that prescribed by s. 6, sub-s. 8 of the Public Lands Ordinance of 1876, and the other such a notice, together with the proper procedure, as was required by the rules of Court for the time being regulating appeals. The other two judges concurred with him in this view, but also held that the conditions of the procedure Order LIII, r. 7, had not been complied with. Differing from the Chief Justice, they considered that it was not sufficient that the respondent alone should have been served, but that the Colonial Secretary and the other claimants should have been notified, the former as having to pay the amount of the compensation, and the latter as being entitled to establish a right to compensation if the right to the amount were established.

Their Lordships are unable to agree with the view taken by the latter two judges. In his original judgment, on July 24, 1918, the Chief Justice who tried the case made it quite clear that the amount of the compensation to be paid was treated as having been agreed to by the claimants to the ownership of the lands in question. The Colonial Secretary was therefore not required as a party to the appeal. He went on to state that it had been decided to try the question of ownership as between the appellant and the respondent only, and that the amount awarded should be subject to the claims of the two other claimants if they should succeed in establishing their claims. He again made this clear at the end of his judgment. Their Lordships agree with what the Chief Justice said when sitting in the Court of Appeal on March 7, 1921, to the effect that neither the Colonial Secretary nor the claimant who, it had been argued, should have been served with notice of appeal, were under these circumstances parties directly affected.

But their Lordships are unable to concur in the opinion which the Chief Justice expressed, that the notice of intention to appeal must be a separate notice independent of the notice and procedure required by the rules of Court. It is, of course, true that the Public Lands Ordinance enacts by s. 6, sub-s. 8, already quoted, that the party who desires to appeal is to "give notice to the other party and to the Court of his intention to appeal and to proceed in other respect to perfect his appeal according to the rules of the Court for the time being regulating appeals." But their Lordships do not

read these words as rendering it necessary that the notice made essential by them must be given in a separate form or on a physically separate piece of paper. All that is required is that it should be clear that "the other party" has been notified of the desire to appeal and that the procedure in the appeal should be in accordance with the rules of Court. The appellant has only in any sufficient fashion to make clear his intention to appeal and then, it may be *uno flatu*, to proceed with his appeal in proper form. Taking this to be true meaning of the sub-section, their Lordships think that there was no defect in the procedure followed in the bringing of the appeal before the Full Court.

As the special leave given to appeal to the King in Council was confined to the objections raised to procedure and excluded any discussion on the merits, their Lordships will humbly advise His Majesty that the judgment of the Court below should be reversed in so far as it gave effect to the respondent's contention as to procedure, and that the appeal should go back to the Court of Appeal to be dealt with on the merits. The respondent will pay to the appellant the costs of the appeal to this Board, and in the appellate Court below. All other costs will be dealt with in the Court below.

Solicitors: *Ashurst, Morris, Crisp & Co.; Munro, Saw & Co.*

G. C. HUTCHFUL AND OTHERS APPELLANTS
 AND
 THE AFRICAN AND COLONIAL COMPANY,
 LIMITED RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C.1874-1928] 76

1924 Dec. 2

Lords Sumner, Wrenbury, Carson

No question of law arose in this case, and the Board upheld the concurrent findings of the Courts below.

LORD SUMNER. In this case their Lordships are of opinion that it was entirely for the trial Judge to form his own estimate of the credibility of the witnesses called by the family claimants to this property. As was assumed in the Courts below and admitted in argument at their Lordships' Bar, Claud Ennin had such possession of the house and such *prima facie* title to the land under the lease and the conveyance, as satisfied the burden of proof in the first instance and threw upon the claimants the burden of showing, as against the judgment creditors, that the real ownership was in the family, so that the judgment creditors could not seize the house and land in execution.

Their Lordships are unable to think that the trial Judge misdirected himself in any way with regard to the evidence, which it was material for him to consider. True, he does not mention that the second document, in making a reference to the parcel dealt with by the first document, calls it Ennin family land. True, also, that he does not refer to the fact that three witnesses, one of whom was apparently disinterested, said that Maria Hewton made a journey to Secondee in order to interview Chief Anaissie, at which interview she made some arrangement. Her account of this arrangement, however, was not in conformity with the statement made in the contemporary documents which were before him.

Their Lordships do not think that the learned Judge in any way misunderstood the gist of the evidence or the rules by which he ought to be guided. They consider that he took a fair view of the evidence before him and that his conclusion is properly expressed, when he says, in terms of the ordinance, that the plaintiffs, that is, the family, "have failed to satisfy the Court that the property in question is family property."

The Full Court of three Judges was entirely of the same opinion. They held that the question was for him, that he approached it in the proper way and that they could not interfere. Clearly they thought that they would have arrived at the same conclusion themselves. The circumstances were such as to require a clear case to be proved, in view of the circumstance that the documents, which were taken by Claud Ennin, were taken in his name at the request of Maria Hewton. Moreover, Claud Ennin, who knew the truth, was apparently in Court and was not called. It may be that his self-interest made it unlikely that he would have told the truth; but at any rate his evidence was not taken.

Their Lordships think that no question of law arises in this case, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

R. J. GHARTEY

APPELLANT

AND

NO. 2 COMPANY OF WINNEBAH, *per* KWESI

AFFAIDZI AND ANOTHER

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C.1874-1928] 78

1924 Dec. 22

Lords Sumner, Wrenbury and Carson

No question of law arose in this case, and the Board upheld the findings of the Native Tribunal, the Acting Commissioner and the Full Court.

LORD CARSON. The respondents brought an action in the Native Tribunal of Gomoah calling upon the appellant to show cause why he should not be stopped from further dealings with the land situate at Winnebah, from the Moni Lagoon to Ndamba. This proceeding was taken by the respondents in consequence of a proposal made by a lighterage company to the appellant to acquire from him a portion of the Ndamba lands by purchase at the price of £150. The respondents disputed the title of the appellant not only to the Ndamba lands but also to the Oyantsiadzi lands which were also included in the writ under the description already set forth. The Native Tribunal by a judgment dated the 6th December, 1918, gave judgment for the plaintiffs (respondents) and ordered the defendant (appellant) to withdraw himself from further use of the lands, *i.e.*, both from the Oyantsiadzi land and the Ndamba lands.

The appellant appealed to the Provincial Court at Winnebah, and the Acting Commissioner decided by a judgment (the date of which does not appear upon the record) that the appellant was entitled to certain portions of the Oyantsiadzi lands and Ndamba lands the boundaries of which were shewn on a map made in accordance with a survey directed by the Commissioner.

As regards the Ndamba lands, the Commissioner upheld the judgment of the Native Tribunal of Gomoah except as regards a house and adjoining land, the boundaries of which are set out and which were held to be the property of the appellant. The appellant appealed to the Full Court of the Gold Coast Colony who, by a judgment dated the 20th April, 1921, altered the judgment of the Acting Commissioner as to the Oyantsiadzi land by substituting more extensive boundaries contained in a certain indenture of lease dated the 14th February, 1884, of the boundaries as settled, by the Acting Commissioner. As regards the Ndamba lands, the Court, by a majority (Logan, J., dissenting), affirmed the judgment of the Acting Commissioner.

The present appeal relates only to the Ndamba lands and the appellant claims that he should be declared the owner of such lands and that the judgment of the Full Court should be varied accordingly. It is thus to be observed that the Native Tribunal, the Acting Commissioner and the Full Court of the Gold Coast have all decided against the claim of the appellant to the lands in question in this appeal, and their Lordships are unable to find any sufficient reason for coming to a different conclusion.

The lands in question form a considerable area of territory near the town of Winnebah, and were claimed by the plaintiffs as part of the Stool lands of Winnebah, and were originally held under some kind of communal tenure. Apparently the occupier of the Stool of Winnebah had the right along with his chiefs to lease or sell the lands. The case of the appellant as to the Ndamba lands, shortly stated, was that his father the late Ghartey IV, the then Ohene of Winnebah, in the year of 1878 had given him the land, but no document of any kind was produced to establish his title or to corroborate his statement. Nor indeed was there any evidence that his father Ohene Ghartey IV had ever validly acquired the land as his own property from the Oman of Winnebah. An attempt was made to show that the Ndamba lands were included in a certificate of purchase dated the 19th November, 1901, whereby one C. F. Johnson (who afterwards transferred the lands therein mentioned to the appellant), was declared the purchaser of certain lands therein mentioned by metes and bounds. The Acting Commissioner, however, who had the lands surveyed, states that he is unable to accept that view, and this Board cannot find anything in the description of the parcels in the said certificate to lead them to a different conclusion. It was also attempted to show certain dealings by the appellant with some of the Ndamba lands to prove acts of ownership. The evidence given, however, is not at all satisfactory and was not supported by any details or documents, nor does it amount to much, and apparently from time to time objection was taken to some, at all events, of such acts, and eventually, when an attempt was made by the appellant to sell some of the land to the lighterage company, the present action was brought.

The learned Chief Justice in the Court below evidently considered that such acts as were proved were "in the nature of dashes or gifts" and did not amount to proof of ownership according to native law and custom. Their Lordships are therefore of opinion that there is no ground for coming to a different conclusion from that arrived at by the majority of the Supreme Court of the Gold Coast Colony, and that this appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

COMMONWEALTH TRUST, LIMITED

AND

AKOTEY

APPELLANTS

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST]

[1926] A.C. 72

Lords Atkinson, Shaw and Marmor

1925 May 1, 4; July 21

Sale of Goods—Conversion—Title to goods—Owner precluded from setting up title—Railway consignment note—Bona fide purchaser.

The respondent, a grower of cocoa in the Gold Coast Colony, there consigned by railway, 1,050 bags of cocoa to L., to whom he had previously sold cocoa. Before a difference as to the price had been settled, L. sold the cocoa to the appellants and handed the consignment notes to their agent, who reconsigned the cocoa to the appellants. The appellants bought in good faith and for the full price. The respondent sued the appellants in the Colony for damages for conversion:

Held, that the respondent by his conduct was precluded from setting up his title against the appellants, and accordingly that the action failed.

Farquharson Bros. & Co. v. King & Co. [1902] A.C. 325 distinguished.
Judgment of the Supreme Court reversed.

APPEAL (No. 131 of 1924) from a judgment of the Full Court of the Gold Coast Colony (November 12, 1923) reversing a judgment of Beatty J.

The respondent brought an action in the Supreme Court of the Gold Coast Colony against the appellants and one Laing claiming damages for the conversion of 1,050 bags of cocoa. The cocoa had been sold and delivered by the defendant Laing to the appellants in the circumstances stated in the judgment of the Judicial Committee. By the railway consignment notes the cocoa was to be delivered to Laing. The railway receipt book was signed by Lawson, the appellants' agent, upon his reconsigning the cocoa to the appellants.

The trial judge (Beatty J.) dismissed the action; he was of opinion that the property in the cocoa had passed to Laing before the sale to the appellants.

Upon appeal to the Full Court the decision was reversed. The learned judges held that the property had remained vested in the respondent. It was not necessary, they said to decide whether the principle of the Factors Act applied in the Colony, because Laing was not a mercantile agent, and had dealt with the appellants as a principal. Judgment was given for £6,375, against both defendants.

No ordinance of the Colony was referred to in the judgments of the Courts below, or in the cases of the parties upon the appeal, dealing with the sale of goods.

1925, May 1, 4. *Clauson K.C.* and *J. Forster* for the appellants. The trial judge rightly held on the facts that the property in the cocoa had passed to Laing. But even if there was not a complete contract, and the property did not pass, the respondent is precluded from setting up his title. By his conduct he enabled Laing to deal with the cocoa as if he were the owner, or was authorised to sell it. The principle laid down in *Lickbarrow v. Mason* ((1787) 2 T. R. 63, 70), and applied in *Henderson & Co. v. Williams* ([1895] 1 Q.B. 521), applies in this case.

Hon. Geoffrey Lawrence K.C. for the respondent. There was not a complete contract between the respondent and Laing; the cocoa remained

throughout the property of the respondent. The English law applicable to the case is codified in ss. 21 and 25 of the Sale of Goods Act, 1893; neither of those sections would help the appellants. The respondent did nothing to preclude himself from setting up his title. The appellants had not agreed to buy, nor was the railway consignment note a document of title. The application of the principle laid down in *Lickbarrow v. Mason* ((1787) 2 T.R. 63, 70) was expressly limited in *Farquharson Bros. & Co. v. King & Co.* ([1902] A.C. 325, 342). There was no evidence that Laing's possession of the consignment note induced the appellants to purchase the cocoa. The respondent is supported by *Cole v. North Western Bank* ((1875) L.R. 10 C.P. 354; *Heap v. Motorists' Advisory Agency* ([1923] 1 K.B. 577) and *Moakes v. Nicolson* ((1865) 19 C.B.(N.S.) 290). If the appellants acquired under the common law a good title, there would have been no need to pass the Factors Act.

Clauson K.C. replied.

July 21. The judgment of their Lordships was delivered by LORD SHAW. This is an appeal from a judgment of the Full Court of the Gold Coast Colony, reversing the judgment of the judge of first instance.

The action was brought by the respondent against the appellants and a co-defendant, named Laing, for damages for the conversion of 1,050 bags of cocoa. This cocoa was consigned by respondent to Laing: the consignment notes were duly forwarded; Laing transferred these to the appellants, who, in entire good faith, took delivery of and paid Laing for the cocoa. The Full Court entered judgment for the respondent for the sum of £6,375 and costs. If the respondent is entitled to recover, this figure is not disputed. This means that the appellants are to pay a second time for the same cocoa on the alleged ground that the respondent cannot be charged with any responsibility for the sale by Laing, his consignee, and the receipt of payment by Laing.

The respondent is a grower of cocoa, and the appellants are a limited company carrying on business at Accra, including a business of general export and import. The co-defendant Laing is dead, but it is in evidence that he had on previous occasions in the year 1920 purchased cocoa on credit from the respondent, or the respondent's factor.

A question raised in the appeal is whether the cocoa about which the dispute has arisen had become the property of Laing, so as to place him in a position to transfer it with a good title to the appellants. The judge of first instance held that the property in the cocoa had passed from the respondent to Laing, and if it had so passed the appellants would be entitled to judgment. The Full Court held that the sale of the cocoa had not been completed between Laing and the respondent.

A material question in the case is whether a certain letter of April 30, 1920, is genuine. The judge of first instance was not satisfied as to the genuineness of this letter, but the Full Court held that without deciding whether it was genuine, or not, the case could be decided apart from that. The Board is of opinion that the alleged letter cannot be relied upon as a genuine letter.

The other correspondence is as follows: the first letter of April 28 stated that the respondent has that day "consigned 482 bags, viz: 242 in waggon No. 1274 and 250 bags in waggon No. 1213" and the letter adds this important sentence, "And consignment note of it I have attached to this letter and I am sure you will get it safely." This letter covers part of the

cocoa in question in this case. The letter ends: "Expect me on the coming Monday, and I will come and see you."

A second letter was written on April 29 stating that a further consignment had been made, and adding: "Consignment note of it enclosed with my best compliments." The cocoa referred to in these two letters cover 756 bags out of the 1,050 bags included in the writ of summons. A further letter was written on April 29 stating that the respondent had shipped 250 bags of cocoa, but these bags are not part of the cocoa in question. It includes, however, the sentence "Find more money (cash) and I will come on Monday, May 3, 1920, to receive it."

Laing sold the cocoa to Lawson, the transport manager of the appellants, and handed him the consignment notes. Lawson took delivery by recognising the bags in which the cocoa was packed to the railway sidings of the appellants. It is not disputed that the actings of the appellants were in good faith, nor that the purchase was made in ordinary course of business and for full value.

It turns out that although Laing had the goods consigned to him, he and the respondent had a difference as to price, the respondent wishing Laing to increase the figure of 50s. a ton which Laing had named.

On May 1 the respondent came down to Accra and saw Laing, who stated that he was prepared to pay the respondent 50s. a load, but this the respondent refused to accept. Their Lordships incline to agree with the decision of the Full Court that the price of 50s. had not been accepted by the respondent when he forwarded the consignment note to Laing, and that consequently no contract of sale had been completed at the material date.

It was further argued before their Lordships that although the property in the cocoa had not passed from the respondent, yet that the respondent so acted as to estop him from setting up his title in answer to the claim of the appellants. Reliance was placed on the well-known statement of Ashurst J. in *Lickbarrow v. Mason* (2 T.R. 63, 70), "that where one or two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Their Lordships are clearly of opinion that the present is a plain case for the application of that principle. There is no kind of speciality in this case such as occurred in *Farquharson Bros & Co. v. King & Co.* ([1902] A.C. 325), the parallel to which would be that the goods were delivered to Laing by the fraudulent act of respondent's agent: the goods were in fact delivered over to Laing by the direct act of the respondent himself.

To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (2 T.R. 63, 70).

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Full Court set aside with costs, and the judgment of Beatty J. restored. The respondent will pay the costs of the appeal.

Solicitors: Linklaters & Paines; Denton, Hall & Burgin.

NANKA-BRUCE APPELLANT
AND
COMMONWEALTH TRUST, LIMITED RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST]

[1926] A. C. 77

1925 May 4, 5; July 21 Lords Atkinson, Shaw and Parmoor

Gold Coast—Sale of goods—Passing of property—Checking weight—Absence of condition precedent—Purchase in good faith.

The appellant arranged to consign cocoa to one L. by rail at 59s. per load of 60 lb. L. was to resell the cocoa to merchants and to transfer to them the railway consignment notes; the merchants were to check the weights, L. was to pay according to the weights so checked. The appellant consigned 160 bags of cocoa to L., and he sold it to the respondents, transferring to them the consignment note. The respondents bought and took delivery in good faith, and credited L. with the purchase price against a large debit due to them from him. The appellant brought an action in the Supreme Court of the Gold Coast to recover from the respondents damages for conversion of the cocoa—

Held, that the checking of the weights by the merchant was not a condition precedent to the passing of the property to L., that the respondents having bought in good faith obtained a good title against the appellant, and, accordingly, that the action failed.

Cundy v. Lindsay (1878) 3 App. Cas. 459, 463 applied.
Judgment of the Supreme Court affirmed.

APPEAL (No. 127 of 1924) from a judgment of the Full Court of the Gold Coast Colony (November 23, 1923) affirming a judgment of Beatty J.

The action was brought by the appellant in the Supreme Court of the Gold Coast Colony, against the respondents and one Laing, to recover the value of 160 bags of cocoa or alternatively damages for their conversion.

The facts appear from the judgment of the Judicial Committee.

The trial judge dismissed the action, and his decision was affirmed by the Full Court.

Hon. Geoffrey Lawrence K. C. for the appellant.
Clauson K. C. and *J. Forster* for the respondents.

July 21. The judgment of their Lordships was delivered by LORD SHAW: This is an appeal from the judgment of the Full Court of Gold Coast Colony affirming a judgment of Beatty J. without a jury.

The appellant is a planter and shipper of cocoa, carrying on business at Accra. The respondents carry on business at Accra as general exporters and importers.

One, Laing (the co-defendant with the respondents in the action), was an editor of a newspaper in Accra and a buyer and seller of cocoa. He had previously made purchases of cocoa from the appellant.

The claim of the appellant against the respondents is for damages for conversion of 160 bags of cocoa. The history of this cocoa, so far as is material to the present case, and stated neutrally, is as follows: The appellant entered into a general arrangement with Laing, under which Laing was to receive cocoa from the appellant at the price of 59s. per load of 60 lb. It was recognised that Laing would resell the cocoa to other merchants, and that when these other merchants took delivery by a transfer of the consignment notes the goods would be weighed up at their premises

and the weights tested there. That operation being completed, the amount payable by Laing on the contract made with the appellant was, of course, ascertained.

On April 24, 1920, the 160 bags of cocoa were despatched by rail by the appellant to Accra under a consignment note made out in favour of Laing. Laing then acted with the goods thus: He sold them to the respondents, and handed to the respondents' representatives the railway consignment note. The respondents took delivery and, against a large debt due to them from Laing, credited him with the price at which they had purchased the goods. Laing's conduct seems unquestionably to have been dishonest conduct. Both Courts have, however, found that the conduct of the respondents was quite honest, and that they purchased the goods for value and without any notice of any objection to, or defect in, the title of Laing, or the contract under which he had acquired the goods. Both Courts have concurrently found that Laing purchased the cocoa from the appellant. The appellant attacked this finding as erroneous in law, alleging that the weighing up of the goods must be treated as having been a condition precedent to an operative sale.

Their Lordships agree that the provision as to the weight of the goods being tested was not a condition precedent to a sale. The goods were transferred, their price was fixed, and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale or a condition precedent to it. To effect such suspension or impse such a condition would require a clear contract whatsoever to carry into effect the weighing, which was simply a means to satisfy to purchaser that he had what he had bargained for and that the full price claimed per the contract was therefore due.

The law upon this branch of the contract of sale is thus expressed by Lord Cairns L.C. in *Cundy v. Lindsay* (3 App.Cas. 459, 463, 464):

"Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

Applying that law their Lordships find no difficulty in affirming that these goods were *de facto* sold to Laing by the appellant, and that so far as the respondents were concerned they were honestly and for value bought by them from Laing. Suppose it to be the case that the appellant, defrauded by

Laing to whom he had sold the goods, could have treated the transaction as voidable on that account and sued Laing for remission accordingly, that cannot in law form a ground of impeachment as against buyers in good faith and for value from the person, like Laing, thus vested in the goods by a *de facto* contract.

This is an end of the case. Another point might have been raised—namely, whether the respondents should not succeed on the ground that Laing, whether vendee or not, was put in possession of the goods of the appellant and in the position of selling them to others, in short on the principle just applied by this Board in the case of *Commonwealth Trust v. Akotey* ([1926] A.C. 72). But such an argument need not be entered upon.

Their Lordships are of opinion that the conclusion arrived at in the careful judgment of the Full Court was right. They will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors: *Denton, Hall & Burgin; Linklaters & Paines.*

YEMIKE KWEKU APPELLANT
AND
ANNOR ADJAYE RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[1926] A.C. 755

1926 June 3, 21

Viscount Haldane, Lords Atkinson and Darling

Gold Coast—Arbitration—Order failing to fix time for making award—Power to set aside award—Filing award in court—Award to have effect of judgment—Absence of right of appeal—Supreme Court Ordinance (No. 4 of 1876 Gold Coast), Order LII, rr. 3, 12 (c), 13, 14.

The Supreme Court Ordinance, 1876, of the Gold Coast, provides by Order LII, r. 3, that a reference by the Court to arbitrators shall fix the time for delivery of the award; by r. 12 (c), that if an objection to the legality of an award is apparent on its face, the Court may remit it for reconsideration; by r. 13, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators; by r. 14, that if no application shall have been made to set aside or remit an award, or if the Court has refused an application for that purpose, either party may file the award in Court, and that it shall thereupon have the same force and effect as a judgment:

Held, following *Nusserwanjee Pestonjee v. Meer Mynooddeen* (1855) 6 Moo. I.A. 134, that an award which recited an order of reference not fixing a time for delivery of the award was *prima facie* liable to be set aside, but that rr. 12 (c) and 13 of the Ordinance prevented the omission from having that effect; further, that where, an application to set aside having been made and dismissed, an award had been filed in Court, r. 14 did not make it a judgment so as to give a right of appeal.

Judgment of the Supreme Court of the Gold Coast affirmed.

APPEAL (No. 122 of 1924) from a judgment of the Full Court of the Supreme Court of the Gold Coast Colony (March 20, 1923) dismissing an appeal from an award of an arbitrator.

By an order of a Divisional Court in the Gold Coast Colony the matters in dispute in a suit were referred under Order LII of the Supreme Court Ordinance to an agreed arbitrator, but the time for the delivery of the award was not fixed by the order.

The arbitrator delivered his award on June 21, 1919; the award recited the order under which it was made. On September 29, 1919, a motion to modify correct, or set aside the award was dismissed by a Divisional Court; an appeal from the order was dismissed by the Full Court. On April 24, 1922, the present respondent (who had been substituted for the original party, Kwesie Morbah) filed the award in Court. Subsequently the appellant appealed to the Full Court against the award, but the appeal was dismissed upon the ground that the Court had no jurisdiction, as there was no appealable judgment.

The material provisions of the Ordinance appears from the judgment of the Judicial Committee.

Narasimham and P. V. Subba Rao for the appellant.
Montgomery K.C. and *T. B. Ramsay* for the respondent.

June 21. The judgment of their Lordships was delivered by LORD ATKINSON. This is an appeal from a judgment dated March 20, 1923, of the Full Court of the Supreme Court of the Gold Coast Colony, dismissing an appeal from an award of an arbitrator, dated June 21, 1919, and filed in the Supreme Court on April 24, 1922.

The appellant is the Chief of Sinibu in Western Appolonia and the respondent is the Omanhin or King of Beyin, who is the paramount Chief in Western Appolonia. On August 19, 1912, the appellant issued a writ of summons against the predecessor of the respondent, in the Supreme Court of the Gold Coast Colony (as subsequently amended by order of Court, dated December 2, 1916), by which he claimed to

“ establish his title to the Kobina-Sua and Akah lands situate in Appolonia, bounded with the defendant by the Ailaim stream with Kofie Enima by Bissaw stream, and for perpetual injunction restraining the defendant, his agents, nominees, assignees, and people from interfering with the plaintiff as to receipts of rents of concessions granted by the plaintiff within the aforesaid area or otherwise interfering with the plaintiff in his enjoyment of the said land.”

On August 9, 1916, Watson J., sitting in the Divisional Court, made the following order in this cause:

“ Under Order LII, r. 1, of the Supreme Court Ordinance I make this order of reference and by consent of parties I hereby appoint Mr. John Maxwell, Provincial Commissioner, Western Province, to be arbitrator in this case, and I give parties leave to submit in writing any matters or former judgments or orders which parties desire to bring to the notice of the Arbitrator.

Parties agree to sign the following document agreed upon by counsel on their behalf:

We, the undersigned parties in this action, on behalf of ourselves, our elders and subjects, hereby agree that the matter in dispute between us in this case (writ of summons No. 91/1912) be submitted to the arbitration of John Maxwell, Esq., Provincial Commissioner, Western Province.

We further agree that the decision of the said arbitrator shall be final and conclusive as between us subject to the provisions of Order LII, of the Supreme Court Ordinance, No. 4 of 1876, and that the arbitrator shall have full powers to invite the co-operation of any natives of the colony as assessors or otherwise as he may deem fit, and that the

question of the costs of this arbitration shall follow the event.

We further agree to abide by any orders or direction made by the arbitrator consequent upon this arbitration."

Subsequently, certain amendments (immaterial for the purpose of this appeal) made were by the order of the Court in the writ of summons.

It is to be observed that though this order provides that the decision of the arbitrator shall be subject to the provisions to Order LII of the Supreme Court Ordinance No. 4 of 1876, it does not, as is required by r. 3 of that order, fix the time for the delivery by the arbitrator of his award. That rule runs thus: "The Court shall, by an order under its seal, refer to the arbitrators the matters in difference in the suit which they may be required to determine and shall fix such time as it may think reasonable for the delivery of the award, and the time so fixed shall be specified in the Order."

If one turns to the award, one finds that it begins with a recital of the order of reference setting out that that order was made under Order LII of the Supreme Court Ordinance, No. 4 of 1876, and then proceeds to recite the fact that the parties have agreed that the decision of the arbitrator shall be final and conclusive as between them (*i.e.* the parties themselves) subject to the provisions of Order LII of the Supreme Court Ordinance No. 4, of 1876. This obviously means subject to all the provisions of Order LII applicable to the case, amongst which r. 3 must be included, because the fixing of the time for the delivery of the award is not a mere trivial provision regulating procedure; it is a matter of vital importance designed to prevent the decision of the matters in controversy between the parties being indefinitely postponed.

The effect of the omission of any specification of the time for the making of the award under a legislative provision somewhat similar to r. 3 of Order LII has been considered and decided in the case of *Nusserwanjee Pestonjee v. Meer Mynodeen* (6 Moo.I.A. 134).

There the applicable legislative provision was the Bombay Reg. VII of 1827. By cl. 1 of its third section it was enacted, amongst other things, that the deed of reference "must contain the time within which the award is to be given," and it was held that as the deed of submission contained no provision as to when the award was to be made by the arbitrators, it was bad and unenforceable.

It appears to their Lordships that the omission from the recited order made under Order LII of the above mentioned Ordinance of any indication of the time when it is to be made is such a defect, apparent upon the face of the award, as would *prima facie* make it bad and liable upon proper proceedings being taken to be set aside. But r. 12 (c) of this same Order LII protects the award from being so dealt with. It provides that if an objection to the legality of the award is apparent upon its face the Court can remit it for reconsideration by the arbitrator or umpire upon such terms as it may think proper, and then by r. 13 enacts, as complementary to the preceding rule, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators. The effect of these two rules necessarily is, in their Lordships view, that an award cannot be set aside merely for an illegality appearing on the face of it, where that illegality does not amount to perverseness or to misconduct of the arbitrator.

Rule 14 then provides that if no application shall have been made to set aside the award or to remit it or any of the matters referred for reconsideration, either party may file the award in Court, and the award shall thereupon have the same force and effect as a judgment. Those

provisions obviously mean that the award cannot be filed unless no application to remit it or to set it aside shall have been made, or if made shall have failed. If its legality has not been attacked or if that attack has been made and failed, the award ceases to be assailable, and may by either party be filed and enforced.

The contention put forward by Mr. Narasimham on behalf of the appellant is wholly in conflict with such a construction of Order LII. According to him, though the award has successfully run the gauntlet of the provision of the Order, the filing of it is a new point of departure, the objections to its validity already dealt with may be renewed, because it is provided that when filed it shall have the same force and effect for all purposes as a judgment, and a judgment can always be appealed from. In their Lordships' view that contention on behalf of the appellant is unsound, because r. 14 does not enact that the award is or becomes a judgment. The nature of the award is not changed. It is still an award, but after running the gauntlet it is, if filed, given the force and effect for all purposes of a judgment.

The learned counsel frankly admitted that if the arguments submitted by him were held to be unsound his appeal must fail. It appears to their Lordships that this frank admission is perfectly accurate. The judgment appealed from is that of March 20, 1923, of the Supreme Court of the Gold Coast Colony, and it is quite clear from that judgment that the appeal to that Court was based on the contention that the use of the word "judgment" in r. 14 necessarily gave to a party to the submission or award the right of appeal. The learned judge who delivered the judgment of the Court, in the penultimate passage of his judgment said: "Were it otherwise, it would be possible for a party to move to set aside an award, and to continue appealing through the various Courts, and then, if still unsuccessful, as soon as the other side had filed the award to start the same process all over again on the same subject-matter."

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *A. L. Bryden; Ashurst, Morris, Crisp & Co.*

FREDERICK GERMANO MARTINS APPELLANT
 AND
 EMILY FOWLER RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1926) 7 N.L.R. 8

1926 June 18

Viscount Haldane, Lords Atkinson and Darling

A Privy Council appeal—Marriage Ordinance, 1884—"Marriages declared to be valid by the Ordinance" distinguished from "Marriages validated by the Ordinance."

This was an appeal to the Judicial Committee of the Privy Council from judgment of the Full Court (5 N.L.R. 43) setting aside a decision in the Divisional Court.

It was held in the Divisional Court that the Marriage Ordinance validated a marriages contracted previous to its enactment.

On appeal it was held by the Full Court that the Marriage Ordinance cou

not "validate" such marriages as were already valid before the Ordinance.

The practical importance of the distinction rested on the fact that in the case of marriages declared valid the real estate of an intestate would devolve according to English law, while in the case of validated marriages the Ordinance directed that the realty of an intestate should be distributed as though it had been in fact personality.

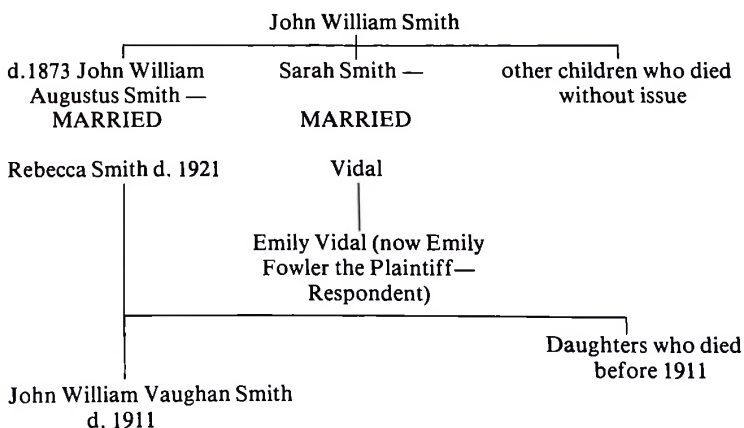
On further appeal, to the Privy Council, the judgment of the Full Court was affirmed and upheld.

Held by the Privy Council, that certain marriages having been declared valid by the Ordinance their status was perfect and could not be validated by any further enactment, contained in the Ordinance.

June 18. The judgment of the Judicial Committee of the Privy Council, was 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 the 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 section 38 of the Ordinance applied to all marriages before the commencement of the Ordinance, whether otherwise valid or not, section 39 did not include marriages which were valid before the commencement of the Ordinance, on the ground that the words in section 38 "marriages declared to be valid by the Ordinance" were wider than the words in section 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 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* [1907] 1 K.B. 218, and also from the Privy Council in *Union Steamship Company of New Zealand, Ltd., v. Melbourne Harbour Trust Commissioners*, 9 AC 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.

CHARLES ADENIRAN BUCKNOR AND JOHN
BENJAMIN HOLLOWAY APPELLANTS
AND
BARCLAYS BANK (DOMINION, COLONIAL AND
OVERSEAS), formerly called and sued as
THE COLONIAL BANK. RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1926) 7 N.L.R. 5

1926 June 21

Viscount Haldane, Lords Atkinson and Darling

A Privy Council appeal—Banking account—Overdraft—Security.

This was an appeal to the Judicial Committee of the Privy Council from a judgment of the Full Court affirming a decision in the Divisional Court.

The appellant Bucknor was a trader and he obtained certain advances of money from the respondent Bank, giving as security certain produce which he hypothecated to the lenders.

The Bank became uneasy regarding a substantial part of the hypothecated produce which remained up-country and was not under their control. The appellant Holloway then came forward and executed a mortgage in the Bank's favour of specified premises to secure advances already made or to be made in the future by the Bank to Bucknor.

Bucknor then asked the Bank for a further overdraft, but the Bank refused to make any further advances until the value of the hypothecated produce up-country had been realised.

It was contended for the appellants that the Bank, in refusing further advances to the appellant Bucknor, had broken their agreement with the appellant Holloway and that therefore the mortgage of premises made in their favour by Holloway should be rescinded.

The Divisional Court declined to uphold this view and appeal was made to the Full Court.

Held, by the Full Court, affirming the decision of the Divisional Court, that the consideration for the mortgage was the continuing of Bucknor's banking account, and that there was no obligation on the part of the Bank to make further advances.

The case was taken on appeal to the Judicial Committee of the Privy Council.

Held, by the Privy Council, affirming the decision of the Full Court, that rescission of the mortgage was not a remedy open to the appellants; that the appellant Bucknor was under a continuing obligation to realise the hypothecated produce up-country, and that there was nothing in the mortgage deed to impose on the Bank the obligation to make any particular advances.

The judgment of the Judicial Committee of the Privy Council was delivered on the 21st day of June, 1926, by VISCOUNT HALDANE. In this case their Lordships have no hesitation in advising that the decision of the Supreme Court of Nigeria should be affirmed. The appellant Bucknor was a produce merchant who carried on business in Lagos. On the 9th March, 1920, he wrote to the respondent Bank that, in consideration of the Bank having (as they had in fact done) advanced to him £5,902 10s. he hypothecated and charged to them certain produce mentioned, undertook to ship such produce when requested, and until reimbursement held it on trust for the Bank and undertook to deliver it to the Bank when requested. On the 12th May, 1920, the Bank called on the appellant Bucknor to give the Bank security for £2,500 at which they valued certain of the said produce which had been retained by him up-country and was not under the Bank's control. As the result a mortgage was granted to the Bank by the

second appellant (the first appellant concurring in it). It was dated the 17th May, 1920. This mortgage provided that "in consideration of the Bank continuing a banking account with the debtor" (the first appellant), the premises specified (being certain buildings belonging to the second appellant) were conveyed by way of mortgage to the Bank to secure payment of all moneys and liabilities already advanced, paid or incurred to or for the debtor by the Bank or that the Bank may at any time advance pay or incur to or for the debtor.

The Bank thereupon kept open the banking account of the first appellant. On the 20th May the first appellant wrote to the Bank asking if he could have an overdraft up to £3,000 in view of the security which had been deposited with them, and on the same day the Bank wrote to him declining to allow "any overdraft until the position of your hypothecated produce had been cleared up and same shipped." Then followed correspondence, extending to February, 1921, in the course of which the Bank informed the first appellant that if the overdraft was not paid off the Bank would realise the mortgage security. On the 28th December, 1922, the Bank demanded payment of £5,168 7s. being the amount then owing on overdraft, and intimated that if it was not paid the security would be realised. On the 16th June, 1923, the Bank advertised the premises mortgaged as for sale, and on the 27th June, the action on which this appeal arises was commenced by the appellants, claiming rescission of the mortgage and an injunction to restrain the sale.

Rescission is not a remedy open to the appellants in the circumstances. Nor does it appear that the respondent Bank have committed any breach of their agreement in the mortgage deed. Evidence has been given that Mr. Miller, the manager of the Bank, said at the time when the mortgage was being negotiated that the Bank would make advances up to £2,000, but after the mortgage had been made the Bank intimated that before any overdraft could be allowed, the position of the hypothecated produce must be cleared up and the produce (which had been left up-country and out of the control of the Bank), shipped. In a letter of the 11th February, 1921, the Bank, having inspected the produce in the first appellant's store in Lagos, drew his attention to a substantial shortage. In their Lordships' opinion nothing in the conversation with Mr. Miller nor anything that happened since precluded the Bank from protecting themselves by insisting on the terms of the mortgage already quoted.

The first appellant was under a continuing obligation, apart from these terms, to ship the produce which had been left up-country, and there is nothing in the mortgage deed which either interferes with these terms, or imposes on the Bank an obligation to make any particular advances. What the first appellant got by the mortgage was the continuance of his banking account, and the relation of banker and customer appears to have been continued for more than two years, until December, 1922.

Their Lordships agree with the reasons given for dismissing the action by the two Courts below, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

KOFI NUMAH SUBSTITUTED FOR CHIEF KWEKU
MENSAH

APPELLANT

AND

KOJO PAMPING

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 92

1926 July 15 The Lord Chancellor, Lord Darling, Lord Justice Warrington

Land—Agreement to be bound by evidence of witness.

The appellant brought an action in the Native Tribunal for certain land and an order was made that judgment should depend on the evidence of a certain witness. The witness having given evidence, the Tribunal decided against the appellant. On appeal the Provincial Commissioner reversed the decision of the Tribunal. On appeal from this decision, the Supreme Court restored the judgment of the Native Tribunal on the ground that it was a correct deduction from the evidence given by the witness. On appeal to the Privy Council:

Held: That, the evidence of the witness was quite capable of being understood in the sense accepted by the Native Tribunal and the Supreme Court, and the appeal must therefore be dismissed.

THE LORD CHANCELLOR. Everything possible has been said in this case by Counsel for the appellant, but their Lordships feel no doubt as to what should be the result of the appeal.

The suit was brought by Chief Kweku Mensah against Kojo Pamping, claiming the ownership of some land near Nsaba, in the Gold Coast Colony, and known as part of the Duaboni land. The suit was heard by a Native Tribunal, which, after hearing a great deal of evidence, made an order, which was agreed to by both parties, that the evidence of a certain Chief, named Kweku Amoah, was necessary before giving judgment in the case. The order was to the effect that, if Kweku Amoah came and stated that he had a boundary only with the plaintiff, judgment should be given in the action for the plaintiff; but that, if he stated that he had a boundary partly with the defendant and partly with the plaintiff, judgment should be given for the defendant. The Chief did not come himself, but he sent his linguist or spokesman to give evidence; and the linguist (whose evidence has been accepted by all parties as equivalent to evidence by the Chief himself) gave a history of the land and said that "after Pamping (the defendant) had taken his part, leaving that of Kweku Mensah (the plaintiff), Kweku Mensah formed boundary with Pamping on the Nsaba side," that is, on the side farthest away from the land of the Chief. The Native Tribunal took that to be evidence that the land of Kweku Amoah ran with that of the defendant and gave judgment for the defendant.

On appeal to the Provincial Commissioner, the learned Commissioner, giving apparently no weight to the evidence of the linguist, reversed the decision of the Native Tribunal and gave judgment for the plaintiff; but on appeal to the Supreme Court of the Colony the Court, giving great weight to the evidence of the linguist and understanding that evidence in the same way as the Native Tribunal had understood it, restored the judgment of the Native Tribunal. It is only necessary to read one passage from the judgment of one of the learned Judges who formed the Court, Mr. Justice Hall. He said: "The learned Commissioner in his judgment stated that he was not satisfied with the evidence of Akeseh (the linguist). I quite agree that his evidence might have been more clearly given, but it is all we have to go upon

as regards the agreed point ”—that means the point which it was agreed to refer to the Chief—“ and I am satisfied that the judgment of the Tribunal was a correct deduction from the evidence of Akesseh, and I have no doubt that the Tribunal were far better able to understand Akesseh’s meaning than either the learned Commissioner or the Members of this Court.” It seems, then, that the learned Judge, who was, no doubt, very familiar with the position himself, understood the evidence of Akesseh in the same manner as the Native Tribunal had understood it; and it appears to their Lordships that it is quite capable of being understood in that sense. In these circumstances their Lordships see no reason for disturbing the result at which the Supreme Court has arrived.

It is only necessary to add that a suggestion of bias on the part of the person presiding at the Native Tribunal was negated by the Courts in the Colony, and their Lordships see no ground for questioning their decision, especially as the result of the case depended not on the view of the individuals composing the Native Tribunal so much as on the nature and effect of the evidence given by Akesseh.

For these reasons their Lordships are of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed with costs.

KOJO PON APPELLANT
 AND
 ATTA FUA RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[1927] A.C. 693

1927 May 5 Viscount Haldane, Lords Shaw and Warrington of Clyffe

Gold Coast Colony—Procedure—Appeal in colony—Bond to secure costs—Bond executed by agent—Authority of agent—Dismissal of appeal—Failure to do justice.

The appellant obtained leave to appeal in the Gold Coast Colony conditionally upon entering into a bond. On July 10, 1922, the native agent of the appellant who, in accordance with the rules of Court, had conducted the litigation, executed a bond on his behalf in the presence of the chief registrar of the Court, who accepted it without objection. Upon the appeal coming on for hearing in April, 1924, the appellate Court dismissed it upon a preliminary objection that the authority of the agent to execute the bond should have been strictly proved. Under the rules of the Court there was power to make any order which was considered necessary for doing justice:

Held, that there had been a failure to do justice between the parties, and that the case should be remitted to be heard, the appellate Court giving an opportunity to prove the authority, if that was deemed necessary in the circumstances.

Judgment of the Supreme Court reversed.

APPEAL (No. 48 of 1925) from a judgment of the Supreme Court of the Gold Coast Colony (April 10, 1924) dismissing, upon a preliminary objection, an appeal from a judgment of Smyly C.J.

The sole question upon the appeal was whether the Supreme Court had rightly dismissed an appeal, upon a preliminary objection at the hearing, on the ground that it was not proved that the person who executed a bond, the giving of which was a condition to the appeal, had authority to do so on behalf of the appellant.

The facts appear from the judgment of the Judicial Committee. The Full Court is delivering its judgment referred to previous cases in which it had held that a defect in the bond was fatal to an appeal.

Montgomery K.C. and J. A. Johnston for the appellant.
The respondent did not appear.

The judgment of their Lordships was delivered by VISCOUNT HALDANE. In this case their Lordships have the difficulty, which imposes the necessity of great caution, that the appeal comes here *ex parte*. Consequently they felt it right to look very minutely at what has been said and at the particular rules that concern it; nevertheless, on those rules and on what has transpired they think that there is sufficient before them to enable them to deal with the case at once.

The appeal is brought from a judgment of the Supreme Court of the Gold Coast Colony, which had to entertain an appeal from the judgment of Sir Philip Crampton Smyly C.J. He had non-suited the plaintiff in an action on the ground for want of jurisdiction, and the appeal really involved the whole merits. It raised an elaborate question as to the title to native lands. When the present appellant proposed to appeal to the Supreme Court of the Gold Coast he had of course to conform with what the rules of Court required, and he applied for and obtained from the Divisional Court conditional leave to appeal against the judgment of the Chief Justice, subject to certain conditions being fulfilled within one month of the date of his application. Among these conditions was this, that £100 was to be paid into Court to await any order as to costs that might be awarded to the respondent by the appellate Court in the case of his success, or a bond was to be entered into with two sureties to be justified in the sum of £50 each. It was on July 7, 1922, that that order was made, and the appellant proceeded to enter into the bond prescribed by the order. There is no doubt, their Lordships think, that it was quite in accordance with the rules to prescribe this.

The rules of Court are enlightened and comprehensive and they give practically all the powers that the Court here have. Under Order v. of the first schedule to the rules there is a direction that "the Court may in all causes and matters make any order which it considers necessary for doing justice whether such order has been expressly asked by the person entitled to the benefit of the order or not." Then there is a series of further rules contained in Order xi., which are, again, very comprehensive. When by the rules of the schedules of this Ordinance any act may be done by any party in suit such act may be done either by the party in person, or by his solicitor or agent, if it can be legally done by an agent."

Under Order LIII of Sch. 2, the appellant has to give security for costs of an appeal; but that obligation is imposed only in very general terms. There are specific directions as to the powers of the appellate Court to require security for costs, and then generally, that they may make any order necessary for determining the real question in controversy in the appeal, and that there is full jurisdiction over the whole suit if the same had been instituted and prosecuted in the appellate Court as a Court of first instance, with power to give any judgment and make any order which ought to have been made and to make such further order as the case may require.

That being the law and the plaintiff having been ordered to give security for the costs of his appeal, the plaintiff proceeded to enter into the bond which he was directed to execute. He was represented through the

proceedings by Kwabena Asiamah, and Kwabena Asiamah, who conducted the proceedings for him, executed the bond. The bond was dated July 10, 1922; it provided security for the costs of the appeal to the respondent if they were given to the respondent. It was executed by Kwabena and two sureties in the presence of the chief registrar to the Court, and it purported to be executed by Kwabena as the representative of Kojo Pon. That was as long ago as July 10, 1922, and, whether or not the parties know about it, the Court must be taken to have known that their registrar had accepted the security.

The case came on by degrees, and finally it was reached for hearing by the appellate Court in April, 1924, and it was heard and judgment was delivered on April 10, 1924, by Michelin, Hall and Gardiner Smith JJ. Those learned judges accepted a point which their Lordships think they ought not to have accepted. It was argued by counsel for the respondent, by way of preliminary objection, that the conditions of appeal had not been fulfilled, inasmuch as the bond for the costs of the appeal was not signed by the appellant, but by Kwabena, purporting to act as his representative. It was argued that the Court having granted only conditional leave to appeal, it was incumbent on the plaintiff himself to execute the bond, and Kwabena could not execute the bond, unless he had first obtained an order from the Court authorising him to do so. The learned judges held that, as regards the bond to be entered into with two sureties to be justified in the sum of £50 each, no proof had been given of the authority of Kwabena to execute on behalf of the appellant; the authority of Kwabena ought to be strictly proved; and the bond must, therefore, be taken to have been invalid and the defect was fatal to the appeal.

Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done. That may not always be possible. There may be conditions in the local law or in the rules which preclude the possibility of getting round technical obstacles and doing complete justice. The Court was invested with the widest powers, and it might have adjourned the hearing of the appeal until a proper bond was executed, or it might have said that an affidavit was sufficient; and that was the more incumbent on the Court because its own registrar had accepted the bond executed by Kwabena on behalf of the appellant.

Under the conditions their Lordships think that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and they are of opinion that the case must be remitted to the Court below to deal with it again, hear it, and, if necessary, get some formal proof of Kwabena's authority; but, as a present advised, their Lordships do not think that necessary, inasmuch as Kwabena's authority was accepted by the registrar, and inasmuch as he had acted right through, and nobody till the other day ever challenged his authority. However that may be dealt with by the Court below, if they think it necessary to deal with it at all. For the present it is enough to say that the case must go back and be heard out.

Then comes the question of what to do with the costs of this appeal. It has only been *ex parte* before the Board, and it may be that the appeal will not be fruitful; it may so turn out.

Their Lordships therefore think that the right course will be that the appellant's costs should be included in any costs he may recover in the Court below. If he recovers no costs in the Court below, he will not get any costs of this appeal, but he will not have to pay any costs. On the other

hand, if he succeeds, he will get these costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Ashurst, Morris, Crisp & Co.*

A. H. BULL & CO., INC. AS AGENTS
FOR THE UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION

APPELLANTS

AND

WEST AFRICAN SHIPPING AGENCY AND
LIGHTERAGE COMPANY, LTD

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1927) 7 N.L.R. 13

1927 May 24

Viscount Haldane, Lords Shaw and Warrington of Clyffe

A Privy Council appeal—Loss of lighter hired by respondents from appellants—Desertion of lighter by labourers in charge—Responsibility for their negligence

This was an appeal from a judgment of the Full Court (6 N.L.R. 14) dated the 8th March, 1926, reversing by a majority the judgment of the Divisional Court (6 N.L.R. 8) dated the 21st December, 1925, in favour of the appellants, who were plaintiffs in that Court.

The Privy Council allowed the appeal and restored the judgment of the Divisional Court.

The judgment of the Judicial Committee of the Privy Council was delivered by LORD SHAW. This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria (6 N.L.R. 14) reversing, on the 8th March, 1926, and by a majority, the judgment of the Divisional Court (6 N.L.R. 8) dated the 21st December, 1925. The Divisional Court had given judgment in favour of the appellants for £2,376 5s. 2d. with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned.

The facts are very simple. Both parties are ship-owners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June, 1925, the appellants let on hire to the respondents a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighterboys, that is coloured labourers. The lighter was transferred on the 2nd June, and the mischance sued for occurred upon the night of the 5th June. The coloured labourers were, from the moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship *Rijnland*. She was lying in the harbour of Lagos, and on the evening of the 5th June a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the *Rijnland*; and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do what was required should the ropes be unable to stand the strain of the current. The simplest of

all things would have been to catch a rope if thrown from the *Rijnland*, and the boatswain of the *Rijnland* explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped; and they had forsaken the duties which they were bound to perform, both of taking charge of the barge, and of giving obedience to the orders of the officers of the *Rijnland*. The consequence was that the barge, having parted her moorings, drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be saved.

These are substantially the relevant facts as found in the judgment pronounced by the learned Judge, Mr. Justice Tew. Their Lordships think it right to say in a word, with regard to that judgment, that in their opinion the learned judge not only came to a right conclusion upon the facts, but that his review as a clear and accurate review of this part of the law, and the decided cases thereon, meets with the Board's entire approval.

The Full Court (Maxwell J. dissenting) reversed this judgment—in particular upon the ground that there was no evidence that the lighter boys were at any time necessary except when the craft was under weigh or in active use. One of the plaintiffs' witnesses had said, "I do not think it advisable as a precaution for one lighter boy to remain on board all night. I don't think it could do any good." Upon this the learned Chief Justice observes: "I can find nowhere in the other evidence before the Court an expression of an opinion to the contrary of that held and expressed by the plaintiffs, representative."

Their Lordships have some difficulty in understanding this opinion which seems to be quite out of accord, not only with the defendants' evidence but with the admissions made in the Court below.

Fontein, the defendants' agent, swore: "When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night."

Brunt, the Master of the *Rijnland* says: "There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved"; and on the special point in issue Van Duyn, the boatswain of the *Rijnland* says plainly: "In my opinion all lighter boys ought stay on lighter."

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think the proved facts are correctly viewed by Tew J. and not by the Full Court.

The Full Court, however, went further, and held on the question—"Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . . keep a boy on board the lighter at night?" in the negative. In the opinion of their Lordships this was wrong. The appellants had entrusted for the period of the hiring the control of their chattel to the respondents. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on; and the suggestion that the lighter boys passed into the control of the defendants during that active lighterage, but out of the control and back into the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law of the position is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to

furnish others so that the chattel might not be lost.

Upon the law of the case, it may be said, the facts being as just put, that the cleavage of opinion in *Laugher v. Pointer* (5 B. & C. 547) in which the judges were equally divided, has been long disposed of in *Quarman v. Burnett* (6 M. & W. 499). Baron Parke thus dealt with it: "We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer* . . . we have considered them fully, and we think the weight of authority, and legal principle is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale."

Quarman's case was stronger on the facts than that of *Laugher*. In *Laugher's* case the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case the owners of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing, so much so that the owner of the carriage even provided the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan v. Laing* ([1893] 1 Q.B. 629), for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case the defendants contracted to lend to a firm who were engaged in loading a ship, a crane with a man in charge of it; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants, yet as he had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

Lord Justice Bowen put the matter thus:

"The law on the matter now before us seems to me to be perfectly clear . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act . . . It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do."

The same law had practically been laid down in *Rourke v. The White Moss Colliery Company* (2 C.P.D. 205). In the opinion of their Lordships the law stands exactly where Cockburn C.J., there put it, namely, as follows: "When one person lends his servant to another for a particular employment the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

These cases have a habit of repeating themselves, and there are others in the books to the same effect, but their Lordships think it only necessary to refer to *Bain v. The Central Vermont Railway Company* ([1921] 2 A.C. 412) decided by this Board, in which Lord Dunedin approves of the language of Mr. Justice Cross in the Court of King's Bench of Quebec, who had adopted the suitable phraseology of "patron moementane" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men being away from the barge was not negligence. They had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed: the judgment of the Full Court set aside with costs; and the judgment of the Divisional Court restored.

The respondents will pay the costs of the appeal.

MANCHE ANEGE AKUE APPELLANT
 AND
 MANCHE KOJO ABABIO IV RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 99

1927 June 16 Viscount Haldane, Lords Shaw and Warrington of Clyffe

Land—Purchase by Government—Rival claims to purchase money—Exclusive use and occupation—Native custom.

Under statutory powers, the Government purchased certain land in Accra for public purposes. The respondent, as Manche of Alata, claimed the purchase money on behalf of that community, while the appellant, as Manche of Sempe, claimed a share on behalf of the communities of Sempe and Akumaji.

Both the Courts below found that the land was exclusively used and occupied by the Alatas, and that by the custom of the Ga tribe land which had been exclusively used by the inhabitants of a particular quarter belonged exclusively to that quarter. They consequently decided in favour of the respondent.

The Privy Council held that no ground had been shown for interfering with the decisions of the Court below, and further that the onus of proof was on the appellant and that he had wholly failed to discharge himself thereof.

LORD WARRINGTON OF CLYFFE. The subject matter of the litigation in which the present appeal arises is a sum of money representing the purchase money paid by the Government of the Colony for certain lands taken by them for public purposes under statutory powers.

Rival claims were made to this money. The appellant, the Manche or chief of Sempe, claiming on behalf of communities known as Sempe and Akumaji, asserts that those communities are entitled to share in the fund. The respondent, the Manche of James Town and also the Manche of Alata

asserts, that he, as Manche of Alata, is solely entitled to the fund on behalf of that community.

On the 24th July, 1918, the Divisional Court, consisting of the Chief Justice, Sir Philip Crompton Smyly, rejected the claim of the appellant and gave judgment in favour of the respondent. On the 16th May, 1924, this judgment was unanimously affirmed by the Full Court, composed of Michelin, J., and acting Judges Gardiner Smith and Aitken. Leave to appeal from this judgment to His Majesty in Council was obtained on the 18th August, 1924.

The town of Accra consists of three divisions, of which one is James Town. Each division has a Manche, or chief, who is himself subordinate to a superior chief called the Ga Manche. The respondent is the Manche of James Town.

James Town is divided into three quarters, known as Sempe, Akumaji and Alata respectively, each with its own Manche subordinate to the Manche of James Town. The appellant is the Manche of Sempe. The respondent, as Manche of James Town, claims to have vested in him all property belonging to any of the three stools of Sempe, Akumaji and Alata. This claim was formerly disputed by the Manche of Sempe, but was upheld by a judgment of the Full Court in an action by the present respondent against one Quartey.

The question at issue is whether the lands, the purchase money for which is the subject of the litigation, were lands of the three quarters of Sempe, Akumaji and Alata in common or of the quarter of Alata alone.

According to a tradition which appears to be accepted by both sides, the Alata people came into the country with one Wetse Kojo from Lagos in or about the year 1642. They assisted the Sempe and Akumaji people in their wars with a neighbouring tribe, and as the result the lands of the Sempe and Akumaji people were placed under the stool of Wetse Kojo, and he and his successors thus became not only Manches of Alata, but also Manches of James Town.

It was found as a fact by both Courts in the Colony that the lands in question were exclusively used and occupied by the Alatas, and it was admitted by counsel for the appellant that the finding means that those lands were originally settled by the Alatas, the several villages and so forth being founded by them. This finding is accepted by the appellant.

It was further found by both Courts that by the custom of the Ga tribe land which had been exclusively used by the inhabitants of a particular quarter of James Town belonged exclusively to that quarter.

At the trial, the contest appears to have been mainly in reference to the question of the exclusive use and occupation by the Alatas, and it does not seem to have been seriously disputed that if this were established the result mentioned above would follow.

In their Lordships' opinion no ground has been shown for interfering with the decisions of the Courts below, and the appeal therefore fails.

The appeal might be decided on the further ground that inasmuch as the land was, when taken by the Government, in the exclusive use and occupation of the Alatas, the appellant must, in order to succeed, establish that he has a better title than the respondent; in other words, that the onus is entirely on him and that he wholly fails to discharge himself thereof.

On either ground the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

SUNMONU APPELLANT
AND
DISU RAPHAEL (SINCE DECEASED) RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

[1927] A.C. 881

1927 June 24, 27 Viscount Haldane, Lords Atkinson, Blanesburgh and
Warrington of Clyffe

Nigeria—Native lands—Nature of title—Rights of family—Limitation.

Although it is possible by special conveyancing to confer a title to land in West Africa on an individual native, there is a strong presumption that the title of a native is a usufructuary right held on behalf of the community or family. Consequently, a native holding land in Lagos under a grant from the Crown is to be presumed to hold on behalf of his family, and so unable to acquire by exclusive possession an individual title against other members of the family.

Amodu Tijani v. Secretary of Southern Nigeria [1921] 2 A.C. 399 applied.
Judgment of the Supreme Court affirmed.

APPEAL (No. 30 of 1926) from a judgment of the Supreme Court of Nigeria (January 30, 1922) affirming a judgment of Pennington J.

The respondent, since deceased, brought an action in the Supreme Court of Nigeria against the appellant, claiming a declaration of title to a piece of land in Victoria Road, Lagos. The land had originally been the property of the plaintiff's father, Sule Raphael, deceased; the defendant was also a son of Sule Raphael, and half-brother of the plaintiff. The plaintiff sued on behalf of himself and the other children of Sule Raphael. The defendant had been in sole possession of the property since 1895. The main question in the appeal was whether the suit was barred by the Real Property Limitation Acts, 1833 and 1874, which were stated to apply in Nigeria.

The facts appear more fully from the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiff, and that decision was affirmed by the Full Court.

The concluding paragraph of the judgment of Van der Meulen J. in delivering the judgment of the Full Court was as follows:

“ It has however been contended that the plaintiff cannot now maintain this action because for a considerable number of years he has stood by and has acquiesced in the defendant Sunmonu dealing with this property as his own. It must however be remembered that Sunmonu is himself a member of the family, and it is no unusual thing in Lagos for one member of a family to be in occupation and possession of family property without his either wishing or intending thereby to deprive the other members of the family of their rights and interest in it. Therefore I think it is impossible to regard the occupation of this property as constituting adverse possession, as might have been the case had Sunmonu been a stranger to the family. There is however evidence to show that the plaintiff did not acquiesce in the defendant's claim to an exclusive title, for he says that some eleven years ago, and again four years later, and also as recently as last year, he asked the defendant for the title deeds of the property and also offered to repay the 13 which he had borrowed.”

1927, June 24, *Bischoff and Irving* for the appellant referred to *Attorney-General of Southern Nigeria v. John Holt & Co.* ([1915] A.C. 599, 608); *Amodu Tijani v. Secretary of Southern Nigeria* ([1921] 2 A.C. 399); *Lewis v. Bankole* ((1909) 1 N.L.R. 81) and *Akpan Awo v. Cooley Gam* ((1913) 2 N.L.R. 97).

The respondents did not appear.

June 27. The judgment of their Lordships was delivered by VISCOUNT HALDANE. The appeal before their Lordships comes from the Supreme Court of Nigeria, and that Court affirmed a judgment of Pennington J., sitting as judge of the Divisional Court. The appeal is that of the defendant, who appeals on the ground that he was entitled to enforce his right to the property in question. The original respondent is dead, and he is represented by Awonotu, a daughter, but she has not appeared on this appeal, whether from want of money or otherwise is not important. Anyhow those were the parties.

The claim was to land in Victoria Road at Lagos, and the claim was that of the plaintiff, who is called Disu Raphael, now deceased. Disu Raphael said that this was property which belonged to the family, and he claimed a declaration that the property was the property of Sule Raphael, deceased, his father, and he claimed it for himself and for the rest of the family of Sule Raphael. The defendant, Sunmonu, was a half-brother of Disu Raphael. They were both sons of Sule Raphael, but by different mothers. It was claimed at one time that Raphael Sule had made a Christian marriage in Brazil with a Christian woman, and that consequently, according to the law of Nigeria, his property went according to English law, so that his eldest son, Disu Raphael, would have been exclusively entitled. This, however, was not urged at the Bar, and could not have been successfully urged, because both Courts concurred in finding that the Christian marriage was not established. There was, therefore, a native marriage, and, according to the native law, the property which descended, that is the estate, went for the benefit of the family.

It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important; because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani v. Secretary of Southern Nigeria* ([1921] 2 A.C. 399, 404), a decision of this Board; in the judgment the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends *prima facie* to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individual in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification.

The matter is very well stated in the report made by Rayner C.J. on Land Tenure in West Africa. It is a report made in 1898, and the passage to which reference is made is adopted by the Privy Council in the case of *Amodu Tijani v. Secretary of Southern Nigeria* ([1921] 2 A.C. 399, 404), which is called the "white cap" case, Rayner C.J. says:

"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual

ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the chief or headman of the community or village or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community."

Their Lordships are aware that that was said of the title of the white cap chief. Their title was the question in that case, but the principle applies generally.

Sunmonu was sued in the way stated by Disu Raphael, and he pleaded possession, the Statute of Limitations, and also a purchase and the grant of the primary title to it. The history of the primary title is this: Before 1895 when Sule Raphael died, he had bought the land from Agebodeh, who had a Crown grant of it dated 1866, that is, he had a Crown certificate; he had no conveyance. It does not appear to have been usual in those days for the Crown to make grants; they granted a certificate of title. That was acquired by Sule Raphael from Agebodeh, and he took over the Crown document at the death of Sule Raphael. Sunmonu and other members of the family were in possession. Shortly afterwards the others departed, leaving Sunmonu in sole possession. In 1905 Sunmonu went and got a fresh primary title for himself. He surrendered the old one and got a new document comprising the land in question and additional land.

Now various things were set up. Sunmonu said he had purchased from his mother, the widow of Sule Raphael; but the Courts below agreed in pointing out that the lady could have no right to sell, and that, more than that, the land officer of the Crown, the Commissioner, would have had no power to grant a new title which varied or superseded the old one, and the new grant must therefore be regarded as made to Sunmonu on behalf of the family, and they also said that there was no evidence of acquiescence in exclusive occupation by Sunmonu to the exclusion of the other members of the family. The usufruct remained right through, whether they exercised it or whether they did not, and it was usual for somebody to be in possession as trustee for his family, and, therefore, his occupation was in contemplation of their right.

The Courts agreed in finding the facts as stated, and what they say is well expressed in the concluding paragraph of the judgment of the Full Court delivered by Van der Meulen J. The result is that Sunmonu must be taken to have got in consistently with a native title and to have got in on behalf of his brother and sisters and the family generally.

In that state of things no statute of limitations could render any assistance to the appellant; there is no evidence about acquiescence, and the result is that their Lordships do not feel themselves able to disturb the judgments of the Court below, which are unanimous.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. As the respondent appeared there will be no order as to costs.

Solicitors for appellant: *Lawrence Jones & Co.*

MENSA AKUAMANKRA, SINCE DECEASED
(NOW REPRESENTED BY OHENE KWASI BOAHENE)

APPELLANT

AND

PAUL AND ANOTHER

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 51

1927 July 12

Viscount Haldane, Lord Shaw and Sir Arthur Channell

Appeal—Not filed in time—Leave to appeal refused—Principle of Privy Council

The appellant's appeal was out of time, and the Court of Appeal refused to entertain it, and refused leave to appeal to His Majesty in Council.

The Privy Council gave special leave to appeal, stating that their principle is to do justice according to substance as well as to form.

The facts are not stated, but the decision of the Court of first instance was affirmed.

VISCOUNT HALDANE. Their Lordships have given careful consideration to the arguments in this case and are in a position to dispose of the appeal. It is a case involved in a good deal of obscurity, and it is important that their Lordships should, if possible, have had before them the judgment of the Court of Appeal, reviewing that of the Court of first instance. But owing to the fault, as it has been put, of the appellant, however, much that fault may be excusable, he did not appeal in time. The Court of Appeal refused to entertain the appeal, and, when the matter was considered, they would not give the necessary leave to appeal to His Majesty in Council. Then the case came here, and special leave to appeal was granted, because their Lordships' principle is to do justice according to substance as well as to form. It, after hearing the arguments, they had been satisfied that there was a strong *prima facie* case of the Judge who tried the case having come to a wrong decision, they might have sent the case back to the Court of Appeal. But they are not so satisfied. As their Lordships have said, the case is one involved in considerable obscurity, but they are not prepared to differ from the decision of the learned Judge who tried the case, and as they have not, through the appellant's fault, had the assistance of the Court of Appeal, they see no alternative, on the principles on which they exercise justice, but humbly to advise His Majesty to dismiss this appeal.

TETTEH ANIMLE II

APPELLANT

AND

THEOPHILUS KWABLA OTIBO AND ANOTHER

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 102

1927 July 27

Viscount Haldane, Mr. Justice Duff and Sir Adrian Knox

Practice—Non-suit—Effect—Discretion of Judge

The appellant claimed a declaration of title to certain land, but was non-suited by the Divisional Court on the ground that he had failed to prove nis

claim. The Court in the exercise of its discretion gave no direction that the judgment should not have the same effect as a judgment on the merits. On appeal to the Full Court, the form and substance of the judgment were approved. On appeal to the Privy Council.

Held: That, there was nothing in the circumstances justifying interference with the discretion exercised by the learned Judge of first instance.

SIR ADRIAN KNOX. In this action, as now constituted, the appellant claimed against the respondents a declaration of his title to a parcel of land in the Volta District of the Gold Coast Colony, more particularly described in the writ of summons. On the trial of the action the learned Chief Justice of the Colony refused to accept the evidence of the witnesses called on behalf of the appellant, and, being of opinion that the appellant had failed to prove his claim, non-suited the appellant. Having regard to O. xxxix of the Rules of Court in force in the Colony, the effect of this order is the same as a judgment against the appellant so far as either of the respondents is concerned but the respective rights of the respondents *inter se* are not affected by it.

An appeal from that Judgment to a Full Court of the Supreme Court of the Colony was dismissed, the Court being of opinion that no sufficient reason had been adduced which would justify it in coming to a different conclusion on the question of the appellant having failed to prove his claim. This is an appeal from that decision.

At the hearing of this appeal the only grounds relied on by counsel for the appellant were (1) that the verdict was against the weight of evidence and (2) that even if the learned Chief Justice was right in non-suiting the appellant he should have directed that the non-suit should not have the same effect as judgment on the merits—see Order xxxix, r. 3 of the Rules above referred to.

With regard to the first ground the questions decided on the trial of the action were questions of fact the decision of which turned on the evidence given orally. The onus of proving his title was on the appellant, and the learned Chief Justice, who had the advantage of seeing the witnesses and hearing them give their evidence, was not favourably impressed by the witnesses called for the appellant and refused to accept their testimony. On this ground and on this ground only he held that the appellant had failed to establish his claim. The Full Court of the Colony saw no reason to differ from the conclusions of the learned Chief Justice on the question whether the evidence was sufficient to establish the claim of the appellant. There are, therefore, concurrent findings of fact by the Court of first instance and the Court of Appeal in the Colony which, if accepted, dispose of the appellant's claim. Their Lordships find nothing in the arguments advanced before the Board which would justify them in setting aside the concurrent decisions of the Courts of the Colony on the question of fact which was really the only question to be decided *viz.*, whether the Osudoku people were in occupation and possession of the lands in dispute, and the only remaining question is whether the judgment ought to be varied by inserting a direction that it shall not have the same effect as a judgment on the merits. It is clear that the learned Chief Justice in omitting to give any such direction exercised the discretion given to him by the Rules after full consideration of the circumstances of the case. The Full Court of the Colony approved of the form as well as of the substance of his judgment, and there is nothing in the circumstances of this case to warrant their Lordships in inserting in the judgment a proviso which was deliberately omitted by the Chief Justice who was in a better position than their Lordships to determine which form of

order would best serve the ends of justice. For these reasons their Lordships are of opinion that the appeal should be dismissed with costs to the second respondent who alone appeared, and they will humbly advise His Majesty accordingly.

AMUAH GYEBU XII, SUBSTITUTED FOR
OHENE AMUAH GYEBU

APPELLANT

AND

OHENE KWESI ABUAGYI III, SUBSTITUTED
FOR OHENE KWESI ABUAGYI II

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 105

1927 Nov. 10 Lords Buckmaster, Carson, Darling, Warrington of Clyffe and Sir Lancelot Sanderson

Appeal—Native Jurisdiction Ordinance, 1883—Limitation—Ground of appeal not raised in Court below—Submission to treat finding of Court as final.

The respondent sued the appellant for trespass in the Native Tribunal and judgment was partly in his favour. More than six months after judgment, the defendant obtained leave to appeal, but when the appeal came on for hearing before the Provincial Commissioner, it was dismissed as being out of time under section 23A of the Native Jurisdiction Ordinance, 1883, which enacts that no appeal shall be entertained except within six months after the judgment is enforced. The Full Court upheld the decision of the Provincial Commissioner.

On appeal to the Privy Council, a ground not raised in the Courts below was urged on behalf of the appellant, namely that under the Rules of the Supreme Court the time for appeal could be extended.

Held: That, the Board will not decide a point of procedure until they have had the advantage of hearing what the judges on whom the procedure is binding have themselves decided, and that the Supreme Court Rules were not applicable; section 23A of the Native Jurisdiction Ordinance was the applicable enactment; and, as the respondent had been in possession for more than six months after the judgment, the appeal was incompetent, and if, as was alleged, the appellant had agreed to treat the finding of the Native Tribunal as final such an agreement should be enforced.

LORD BUCKMASTER. In disposing of this case their Lordships have the satisfaction of knowing that everything that could possibly be urged on behalf of the appellant has been heard by them, but, having listened to these arguments, they are of opinion that this appeal must fail.

It has arisen out of a dispute as to the ownership of certain lands and villages that are situated between the Rivers Dadua and Kyirema in the Gold Coast.

This dispute was put to the test of an action which was begun by Ohene Kwesi Abuagyi II, now represented by the respondent, against Ohene Amuah Gyebu, whose successor became defendant.

The claim was a claim for trespass and was heard by the native tribunal on 22nd January, 1919. That tribunal gave a judgment which, in part at least, was in favour of the plaintiff. Nothing whatever was done under that judgment until August, 1919, when the defendant applied to the Commissioner of the Western Province asking for leave to appeal, and that leave was granted. The case accordingly came on for trial before the

Provincial Commissioner, and it was then objected that the appeal was incompetent, upon the ground that, by virtue of section 23A of the Gold Coast Native Jurisdiction Ordinance of 1883, as amended in 1910, it was impossible in the circumstances for any appeal to be maintained after the expiration of six months from the date when the judgment was given. The words of the section are these:

“ If a judgment of a native tribunal for land has been enforced by the party in whose favour it was given being placed in or allowed to take or retain possession of the land . . . the Court shall not entertain an appeal from or review such judgment except within six months after it was so enforced.”

It is urged on behalf of the appellant that that section has a limited application and applies only to those cases where by the exercise of some executive act on the part of the Court a litigant has actually been put into possession of the property which was the subject of the dispute. The Board agrees with the view that it is difficult to understand exactly how to enforce a judgment by allowing a person to retain possession, but it is unnecessary to consider difficulties of language, because the critical words are plain, and those words provide that if a party has been allowed to retain possession for the period of six months no appeal can be brought after expiration of that time.

It is further urged on behalf of the appellant, first, that the plaintiff never was really in possession and, consequently, was never allowed to retain it, and, secondly, that the provisions of the Ordinance of 1883 do not apply; but that there are other rules under the Supreme Court Ordinance Act which enable the Court, if they in their judgment think fit, to vary and extend the times which are limited by the rules for the performance of any act. He recognises that even under those rules the limitation of the time for appeal is six months, but he says, by virtue of Order IV, that period of six months can be extended. Apart from other considerations, their Lordships would not propose to consider the accuracy of that contention for the reason that the point was in fact never before the Court from whom this appeal is brought, and on such a matter of procedure it is of the greatest consequence that no point shall be decided by this Board until they have had the great advantage of hearing what the judges on whom the procedure is binding have themselves decided as to what its proper interpretation should be. Apart from this they do not think that the rules are the applicable rules. They regard that section 23A as the one that applies, and unless the appellant is in a position to establish that the plaintiff, who is the respondent here, has never in fact been in possession or been allowed to retain it, this appeal must fail. The appellant did indeed argue that the conditions had not been satisfied, but the answer to that is to be found in the District Commissioner's own judgment. He on his own finding showed that the plaintiff had in fact been before the action in possession of a considerable portion of this disputed territory, though it may be the defendant had also been in possession of the rest, and that finding is enough for the purpose of deciding this case, because if he had been allowed to retain possession of that property which was in dispute for the period of six months from the date of the judgment, he cannot now be dispossessed. On such a question as this it is impossible to split the judgment.

In these circumstances their Lordships think the condition of section 23A has been satisfied; the plaintiff has in fact been allowed to retain possession for the necessary period of time. After the lapse of that time the appeal was

incompetent and it was not within the power of any tribunal acting under the authority of the Gold Coast Native Jurisdiction Ordinance to vary or extend the time.

Their Lordships have made no reference to another matter which arises in this case; that is, as to whether the appellant would be bound, by virtue of an alleged submission to treat as final the finding of the Native Tribunal. It is unnecessary for this purpose to do so; but there are two comments they desire to make: first, that the statement by one of the learned judges, whose business it is primarily to consider these matters on the spot as to the desirability of exact information relating to any such agreement is one which they would have carefully regarded, and the other that it is desirable as far as possible when agreements have been made and have been found to exist with regard to the termination of litigation that those agreements should be enforced.

In their Lordships' opinion, this appeal must fail, and they will humbly advise His Majesty that it should be dismissed with costs.

OMAHENE KWEKU DUA III APPELLANT

AND

OMAHENE KWAMIN TANDOH RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 109

1927 Nov. 15

Lords Buckmaster, Atkinson, Carson, Darling,
Warrington of Clyffe

Land—Trespass—Tradition—Tribute.

About the year 1920, the respondent, who was head of the Sefwi-Wioso tribe, sent messengers to collect tribute from cocoa grown on lands occupied by the Sefwi-Bekwai tribe, whose chief was the appellant. The appellant refused tribute and instituted proceedings against the respondent for trespass. The Court of first instance, relying mainly on traditional evidence, decided in the appellant's favour, but this decision was reversed by the Full Court. On appeal to the Privy Council the decision of the Full Court was upheld on the grounds that

There was very strong evidence, not discredited by the trial judge, that tribute was constantly paid by the Bekwai people to the respondent, and there was evidence on both sides that if people living on land pay tribute, they do not own such land. The traditional evidence as to the appellant owning the land lost its force when opposed by facts which were inexplicable if the tradition was accurate.

LORD BUCKMASTER. In territory alleged to have once formed part of the realm of the King of Ashanti, there are certain lands, containing about 105 square miles, whose western and eastern boundaries are respectively the Subure and the Kyiara streams.

For many years past these lands have been occupied by members of the Sefwi-Bekwai tribe, whose chieftain, Omahene Kweku Dua III, is, as representative of his people, the plaintiff in this action and the appellant in this appeal.

It appears that these lands are chiefly forests, whose value lay in the big game and edible snails which they supported and the rubber they produced. Upon them the Bekwais have established villages and maintained

themselves without any extensive agricultural operations until about 1916, when, in response to the representations of the Government, they proceeded to plant and cultivate cocoa trees. These trees take some four or five years to become productive, and in 1920 or thereabouts, as the trees began to bear, the respondent, who is the head of the Sefwi-Wioso tribe living on the west side of the Subure, sent messengers to collect tribute in respect of the cocoa, claiming that the land belonged to his people. This claim the appellant refused to recognise and instituted these proceedings, claiming damages for trespass and an injunction. He succeeded before the Judge of first instance but failed in the Full Court, and hence this appeal.

Their Lordships are clearly of opinion that the facts proved and admitted establish that the Bekwai people are in possession of the disputed land, and this fact throws upon the respondent the burden of proving his title. The trial did not proceed strictly upon this line, but the plaintiff in the first instance called evidence to support the right of the Bekwais, and the defendant answered; this is, however, immaterial. The real question is, Did the evidence rebut the *prima facie* title of the Bekwais shown by possession. The learned Judge who tried the case thought that it did not, and relied upon the evidence of one Yaw Atwidei, the chief linguist sent by the chief of the Bantuma tribe, who are in the position of overlords over both the plaintiff and defendant. This evidence was traditional, handed down by one chief linguist to another, and as a tradition there is no reason to think it was not fairly given. But tradition, though of great value when supported by action and facts, becomes of lessened consequence when brought into collision with a series of definite incidents inexplicable if the tradition be regarded as accurate. In the present case their Lordships think that the learned Judge who tried the case has failed to give due weight to this consideration and has not sufficiently regarded the importance of the opposing facts which their Lordships will proceed to examine.

There is evidence on both sides to show that "if tribute is claimed, it indicates that the people living on the land do not own it." These words are taken from the evidence of Kobina Ackah, the next man to the Omahene of Bekwai, and the first witness for the plaintiff. It is, indeed, denied by Kwesi Buachi, another of the plaintiff's witnesses, though he seems to admit it in cross-examination; but it is supported by Kwamin Aidoo and Kweku Minta, defendant's witnesses, the last of whom says: "If a Wioso man settled on the disputed territory, he would not have to pay tribute to defendant, but Bekwai people, being subjects of another chief must pay tribute." This evidence is in accordance with the reason of the matter, and their Lordships accept it as a true statement, indeed, it is not challenged on the judgment of any of the Judges.

If, therefore, it is proved that tribute has in fact been constantly paid to the defendant by the Bekwai people who live upon this land, the plaintiff's case must fail.

Now the evidence in support of this payment being made is very strong.

Up to the planting of the cocoa trees, rubber and snails and portions of wild beasts appear to have been the only subjects on which tribute was levied, but in respect of these it is stated to have been constantly collected. Kweku Duku, who is a Bekwai, and whose evidence the learned Trial Judge thought might have been biased by ill-feeling, states the payment distinctly. He says: "I know Enchi Wury, Buku Rubber is made there, and tribute sent to defendant. Kwesi Mensah succeeded Attah on this land. He, too, paid tribute to defendant. I succeeded Kwesi Mensah. I pay tribute to defendant. Did his evidence stand alone, the fact that it was not accepted at

the trial would have the greatest weight against its acceptance now, but corroborated by several witnesses, by Kwamim Aidoo, by Kwesi Nkua Kofi Nkua and Kweku Minta. These last two witnesses are of great importance as they speak to the actual collection of the tribute themselves, and in the case of the former he identifies as present at the time one Kwesi Egyaku, a son of Essel, a Bekwei man, and the headman of the district of Sorano, as the man who carried the snails collected as tribute from Sorano, one of the villages in dispute, and neither Essel nor his son called in contradiction.

With the exception of Kweku Duku, the learned Judge nowhere definitely discredits this evidence, though the appellant strongly urges that the fact that the plaintiff's case was accepted involves this conclusion.

The Board are however unable to find that the learned Judge ever considered in detail the evidence as to tribute and certainly nowhere decided in terms that it was false.

The evidence of ownership of the lands by the defendant which is thus afforded is strengthened in certain respects. Some witnesses speak of the payment of definite sums of £1 2s. by Bekwai families for permission to settle, and there is further evidence of one Andoh Konto, who asserts he obtained from the defendant and worked a gold concession in Sorano. This fact, though disputed, is apparently accepted at the trial, though comment is rightly made on the circumstance that no concession is produced. This omission robs the evidence of its full value, and the Board do not therefore treat it as doing more than showing the exercise of an obvious act of ownership by the defendant.

There is, finally, the evidence as to collection of sums for the Red Cross. In a most praiseworthy effort to testify their loyalty to the Empire in times of great difficulty, sums of money were subscribed by, among others, the Bekwai people living on this territory for the Red Cross and were paid by them to Note Nkua, a sub-chief of the Wioso chief. Their Lordships regard this as a matter of interest rather than evidence for strictly it is inadmissible and has no value in this dispute.

Their Lordships think, however, that the other matters already mentioned establish acts of ownership which, if the evidence be accepted is conclusive in defendant's favour. They much regret that, regarding this point, they have not the advantage of a definite finding of the learned Judge who, in their opinion, confined himself too closely to the evidence of history and tradition, but in the absence of this guidance they are of opinion it must be accepted and the appeal must fail.

This opinion, therefore, confirms the judgment of the Full Court, but for different reasons. They appear to have been greatly impressed by the evidence of District Commissioner Ross, who, in 1915, enquired into the whole question of this boundary. His statement is contained in a letter dated 13th February, 1915, made evidence by his answers to interrogations administered in the course of further investigation which the Full Court directed.

Their Lordships think that too much importance may have been attached to this letter. The investigation Mr. Ross made was not in the exercise of any judicial functions he possessed, nor does there appear any evidence of agreement between the parties to submit the dispute to his determination. Such agreement was inferred and not proved, but it does contain an admission—by the then Omahene of the Bekwais—that the boundary is as the defendant asserts, but such admission was not made in judicial proceedings and does not go far. Their Lordships have not over-looked the

facts that one of the chief places of worship of the Bekwais is on the ground in question nor the argument based on the inability of the Wioso chief to cross a stream, but arguments based on these considerations are insufficient against the evidence above mentioned. It is on the grounds afforded by this evidence that their Lordships think this appeal must fail and be dismissed with costs, and they will advise His Majesty to that effect.

They desire to add that this decision does not touch the question of whether tribute is in fact leviable on cocoa trees, or if it be leviable, what is its true measure. Though the claim to this tribute was the cause of the action, these questions have never been the subject of inquiry; this action asked for title to land, and that action has failed.

W. E. A. MACAULEY APPELLANT
 AND
 JUDGES OF THE SUPREME COURT OF
 SIERRA LEONE AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE]

[1928] A.C. 344

1928 April 27, 30; May 18 Lord Hailsham L.C.,
 Lords Buckmaster and Warrington of Clyffe

Sierra Leone—Legal practitioner—Striking off roll—Reasonable cause—Partially civilized country—Importance of Integrity of Bar—Supreme Court Ordinance (Sierra Leone), 1924, s. 57.

In a country which is only partially civilised it is necessary to induce the inhabitants to resort to the Courts for the settlement of their disputes rather than to personal violence; with that object it is essential that they should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but also for the honesty and fairness of those who practise before them.

The appellant, an enrolled barrister and solicitor, of the Supreme Court of Sierra Leone, obtained by way of professional remuneration from a native chief, who was entirely illiterate and unfamiliar with legal proceedings, the sum of £135 by professionally irregular conduct and £50 (part of a larger demand) by misrepresentation. The Chief Justice, who by Ordinance had power, for reasonable cause, temporarily to suspend any barrister or solicitor, or to order his name to be struck off the roll ordered the appellant's name to be struck off:

Held, that the order should be affirmed, a mitigation of the penalty to a suspension from practice being refused, upon the ground that the authority of the Chief Justice in the matter should not be interfered with, having regard to the consideration above stated.

APPEAL (No. 14 of 1928) *in forma pauperis* by special leave from an order of the Chief Justice of the Supreme Court of Sierra Leone (April 20, 1927) ordering that the name of the appellant be struck off the roll of barristers and solicitors of the said court.

The facts appear from the judgment of the Judicial Committee.

1928. April 27, 30. *Glanfield* for the appellant. *Hon. Stafford Cripps* K.C. and *S. E. Pocock* for the respondents.

[Reference was made to *In re Iles* (1922) 66 Sol.J. 297 (P.C.)]

May 18. The judgment of their Lordships was delivered by LORD

WARRINGTON OF CLYFFE. This is an appeal from an order dated April 1927, of the Chief Justice of the Colony of Sierra Leone, whereby it was ordered that the name of the appellant should be removed from roll of barristers and solicitors of the Supreme Court of the Colony.

By an Order of His Majesty in Council made on December 20, 1927, the petition of the appellant, it was ordered that the appellant should be granted special leave to appeal *in forma pauperis*.

The appellant is a native of the Colony. He was called to the English bar by the Honourable Society of Lincoln's Inn on January 26, 1923. He then returned to the Colony, and was duly enrolled as a barrister and solicitor of the Supreme Court. In the Colony the two branches of the profession are united.

By the Supreme Court Ordinance of 1924 it was by s. 57 provided that the Chief Justice should have power for reasonable cause to suspend any barrister or solicitor from practising within the jurisdiction during any specified period or order his name to be struck off the roll of the Court. The order appealed from was made under this provision.

On February 4, 1927, the appellant was, at the instance of the acting Attorney-General of the Colony, served with a notice of motion and certain affidavits in support thereof, calling upon him to show cause why the Chief Justice should not, in the exercise of the power aforesaid, order his name to be struck off the roll of the Court or suspend him from practising within the jurisdiction of the said Court upon the grounds:

(a) That after having accepted and agreed to hold a brief on behalf of the Hon. Claude Emile Wright, barrister-at-law, to represent the defendant in the case of *Macarthy v. Pa Kaini*, then pending in the Circuit Court at a fee of 20 guineas, the appellant did on or about June 10, 1926, without any just reason and cause receive and obtain from the said Pa Kaini a certain large sum of money to wit, the sum of £135 for or in respect of his appearance on behalf of the Hon. Claude Emile Wright in the said proceedings, contrary to good conscience and honest dealing and without the authority of the said Hon. Claude Emile Wright.

(b) That being briefed as aforesaid to defend Pa Kaini in the Circuit Court, the appellant did on or about July 1, 1926, demand from the said Pa Kaini a further sum of £200 for his services in connection with the appeal to the Full Court then pending and did by the said demand induce the said Pa Kaini to deliver to him an additional sum of £50 without the knowledge and authority of the said Hon. Claude Emile Wright and without being authorised by the said Hon. Claude Emile Wright to appear on his behalf in any appeal from the judgment of the Circuit Court.

The motion was heard by the Chief Justice on April 4, 5 and 7, 1927, on evidence, both oral and by affidavit, and on April 20, 1927, he delivered his judgment and made the order now under appeal.

Certain technical objections to the order were raised, both before the learned Chief Justice and before the Full Court, on an application for leave to appeal. These objections were overruled and leave to appeal was refused. These objections were not pressed before this Board, and the learned counsel for the appellant, who conducted the case with admirable tact and discretion, and said all that could be said on his client's behalf, confined himself to an attack upon the order on the merits.

The following facts were either admitted or proved to the satisfaction of the Chief Justice. Prior to June 8, 1926, Claude Emile Wright, a leading barrister and solicitor at Free Town, and a member of the Legislative Council of the Colony, had been instructed by the defendant to act for him

in the action above mentioned, and had agreed to accept a fee of 30 guineas for so doing. Mr. Wright had received no instructions from Pa Kaini, his client, except the writ and particulars of damage. On June 8, 1926, Mr. Wright, finding that the case was to come on for trial in the Circuit Court at Moyamba in a day or two, and that he would be unable to undertake the defence himself, as he had to attend a meeting of the Legislative Council, sent for the appellant whom he knew as a son of his chief clerk, and asked him to hold the brief for him at a fee of 20 guineas. These terms were accepted by the appellant, and he went to Moyamba accordingly. Mr. Wright at the same time sent a telegram to his client in these terms: "Macauley representing me proceeds to Moyamba, your case. Please pay him retainer, 30 guineas." The appellant at the hearing admitted having seen this telegram, but stated that he did not remember its contents.

The appellant contended before the Chief Justice, and repeated this contention before this Board, that Mr. Wright had transferred the case to him, that it was then exclusively his own case, and that the relation of solicitor and client existed between himself and Pa Kaini, Mr. Wright being no longer concerned in the matter at all.

As to this point the learned Chief Justice on the evidence before him arrived at the following conclusions of fact:

"I am unable to take the view that Mr. Wright ever handed over this case to Mr. Macauley in the sense that he entirely went out of the case and Mr. Macauley came into it," and again, "It is to my mind clear beyond all possible doubt that Mr. Macauley with full knowledge of his exact position entered on this transaction on one footing only, and that was that he went to Moyamba to hold Mr. Wright's brief for him in the Circuit Court in the action *Macarthy v. Pa Kaini* and agreed to accept 20 guineas for so doing."

There was ample evidence to support these findings, and no sufficient reason was alleged for rejecting them, but their Lordships feel it right to add that, having read the evidence, they concur in the findings. The second of the two findings that Mr. Macauley entered on the transaction with full knowledge of his exact position disposes of his contention before this Board that he honestly believed that the case was his own, whether it were so in fact or not.

Before stating what happened at Moyamba it is right to say something of the nature of the action, because the appellant has sought to justify his subsequent conduct by the suggestion that the case was one of great importance and difficulty, involving a heavy claim—upwards of £4,000—against the defendant and that the fee of 30 guineas was altogether insufficient.

The judgment of the circuit judge was delivered on June 12, the case having been opened on June 11. From this it appears that the plaintiff was a small trader in the defendant's village, and sued for damages on the allegation that the defendant as paramount chief had wrongfully interfered with his trade by picketing the plaintiff's shop and forbidding his people to trade with him. The defence was that the defendant's conduct was justified by the failure of the plaintiff to pay the settlers' fees. The circuit judge, after stating that the facts of the case were simple and largely not disputed, found that the defence was established, and gave judgment for the defendant. The judge added a comment on the exaggeration of the claim for loss of profit—at the rate of £12 a day, exclusive of Sundays—nearly £4,000

per annum in respect of a small general store in a village of fifteen to twenty houses containing at least two other traders.

The appellant has given several accounts of what happened at Moyamba. The main difference between them being on the question whether he, the appellant, asked for a further fee or whether this was voluntarily offered by the chief. On this point the learned Chief Justice said: "I entertain no doubt that Mr. Macauley sought the interview at Moyamba and demanded 300 guineas. I entirely reject his assertion that the offer of a further fee came from Pa Kaini and that so to speak this money was almost forced upon him, the evidence to my mind absolutely refutes any such version of the matter."

Their Lordships accept this finding also, but whatever may be the precise circumstances, there is no doubt that the appellant required a further fee of 300 guineas, which, at the request of the chief and his followers, he reduced to £250, of which they paid him £105 with a further sum of £30 for expenses, making together £135, leaving £145 still owing in respect of the fee. The chief was a native, entirely illiterate and unfamiliar with such matters as those with which he was dealing. The appellant has sought to justify his request for the large further fee by the amount of work he says he had to do. It only amounts to this, that, inasmuch as neither Mr. Wright nor himself had received any preliminary instructions, he had to ascertain the facts of the case on the spot. As appears from the judgment of the circuit judge, the facts were simple and largely admitted. Their Lordships are not impressed by this excuse on the part of the appellant.

On his return to Free Town the appellant went to see Mr. Wright, and reported the result of the case. Mr. Wright then asked whether he wanted the balance of his fees, as Pa Kaini had sent him (Mr. Wright) £20. The reply was to the effect that he did not want the balance, as they had made him a very handsome present. The appellant said nothing to Mr. Wright as to the case having been made over to him or as to his transactions with the chief in reference to the fee, and in fact Mr. Wright knew nothing of what had taken place until he heard of the facts through the District Commissioner in August.

In their Lordships' opinion, the first of the two charges was fully established, and it is clear that the appellant made use of his pretended position as solicitor in the case to the exclusion of Mr. Wright to obtain from an ignorant and unsophisticated native the promise of a fee out of all proportion to the importance of the case and the work done by him and payment on account of £105 with the further sum of £30 for his expenses at the rate of £5 a day for six days.

As to the second charge, the facts are that, on July 5, the appellant went to Mafengre, where Pa Kaini lived, and saw him and his nephew, Kapr Massim, and demanded a further fee of £200 for conducting an appeal which he said had been commenced. This demand was made on the same pretence that the case had been transferred to him. On this occasion the chief paid him the further sum of £50 mentioned in the second charge.

On July 19 the appellant wrote a letter to Pa Kaini, in which he demanded a further sum of at least £50 on account of the promised fee of £200 in respect of the appeal. In the course of that letter he said: "You must realise that I have a great deal to do in the matter and I wish to be refreshed now and again." As a matter of fact, he had had no work whatever to do in connection with the appeal. The further £50 was not paid. At some time—but whether before or after the date of this letter is not quite clear—he was distinctly informed by Mr. Wright that he (Mr. Wright) was

acting in the appeal. It is apparently still pending, and in it Pa Kaini is represented by Mr. Wright. Since July 19, as well as before that date, the appellant has had no work to do in connection with the appeal.

Their Lordships are of opinion that the second charge also was fully established and that the learned Chief Justice had "reasonable cause" for the exercise of the power conferred upon him by s. 57 of the Ordinance.

A strong appeal was made by counsel for a change of the sentence from one of removal from the roll to one of suspension only. No doubt the sentence is a severe one, as it deprives the appellant of the means of livelihood to which he has devoted much study and expense. But the learned Chief Justice is necessarily more familiar with the position of affairs in the Colony than are their Lordships.

In the course of his judgment he makes use of the following expressions:

"It is a startling proposition and one which I cannot for a moment assent to that people holding the peculiar views which Mr. Macauley apparently does hold with regard to the relation or otherwise of solicitor and client should be allowed to run loose especially in such 'an Alsatia' as the Sierra Leone Protectorate without being answerable to any authority for their professional conduct."

Their Lordships appreciate the necessity in a country so described of inducing the inhabitants to resort to the Court for the settlement of their disputes rather than to the possibly more familiar means of personal violence. For this purpose it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but for the honesty and fairness of those who practice before them. To use the Chief Justice's words, the circumstances disclose "a disgraceful combination of rapacity and dishonesty" and their Lordships feel that if they were to recommend a mitigation of the sentence in this case they would be dealing a serious blow at the authority of the judge entrusted by law with the discipline of the profession in the Colony.

Their Lordships, however, cannot part with the case without commenting on one part of the judgment of the learned Chief Justice. He expressed the view that it ought to be inferred that the appellant and Kapr Massim were cooperating in obtaining the money in question from Pa Kaini. From the evidence before their Lordships they do not think such an inference should be drawn; enough, however, was proved without it to justify the order.

For the above reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, but, as the appellant appeals *in forma pauperis*, without costs.

Solicitors: *Leader, Plunkett & Leader; Burchells.*

TOM BOEVEY BARRET APPELLANT
 AND
 AFRICAN PRODUCTS, LIMITED RESPONDENT
 SAME APPELLANT
 AND
 SAME RESPONDENT

IN THE MATTER OF AFRICAN PRODUCTS, LIMITED
 (IN LIQUIDATION)

(Consolidate Appeals)

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[P.C. 1874-1928] 114

1928 May 21 The Lord Chancellor, Lords Buckmaster, Warrington of Clyffe

Company—Bogus shares—Payment to shareholder—Mistake of fact—Money had and received—Allegation of disability in presenting defence.

In July, 1918, a company named African Products, Ltd., was incorporated in the Gold Coast. The appellant had been the promoter of the company, and at the material time was the holder of one share only, though he appeared on the books as the holder of 1,001 shares. He was paid a dividend and bonus as the holder of 1,001 shares.

The company sued him for the return of the bonus and dividend on 1,000 shares, and obtained judgment.

On appeal, the appellant challenged this judgment on the grounds that:

- (1) the evidence did not support the claim;
- (2) ill-health and other disabilities prevented him from presenting his defence;

The Privy Council, affirming, the judgment, *held* that:

- (1) On the interpretation of the facts most favourable to the appellant, the payment in respect of the 1,000 shares was made under a mistake of fact common to him and the company and money so paid can be received as money had and received to the use of the company.
- (2) There was no evidence, original or supplementary, that the appellant was so ill or under such other disability as prevented him from presenting his defence.

LORD BUCKMASTER. Five judgments are challenged by these consolidated appeals.

1. A judgment of the Divisional Court of the Eastern Province of the Gold Coast Colony, dated the 1st April, 1922, ordering the appellant to pay £10,062 10s. to a company known as the African Products, Limited, who are respondents to the main appeal.

2. A judgment of the Full Court dated the 3rd November, 1923, dismissing the appellant's appeal from (1);

3. A judgment of the Divisional Court of the 27th January, 1925, refusing to set aside the dissolution of the said Company which had been ordered on the 2nd June, 1922.

4. A judgment of the 30th January, 1925, refusing leave to appeal against the order of the 27th January, 1925;

5. A decision of the Full Court refusing leave to appeal from (4).

As leave to appeal has been given against all these judgments, it follows that the judgments of the 1st April, 1922, and the 27th January, 1925, are

the only ones material, for the others are consequential upon these. The foundation of the whole dispute lies in the facts underlying the judgment of 1st April, 1922, and they need careful examination.

In July, 1918, the appellant, who was at that time in the Gold Coast, promoted and caused to be incorporated the company known as African Products, Limited, with a capital of £100,000 divided into 100,000 £1 shares; the date of incorporation was the 17th July, 1918, and its business was that of general merchants. The laws applicable to this company are certain ordinances of the Gold Coast Colony, which in the material respects reproduce the English Companies Act of 1862. It appears that limited companies were not commonly known in the Colony—this one was only the 23rd that had been registered—and it may well be that subsequent events were affected by this ignorance. The seven signatories of the memorandum were the appellant and six of his nominees, who each signed for one share.

The company began business in August, 1918, and immediately entered into successful contracts for the purchase and resale of cocoa, which produced a profit after paying all expenses for the period ending 31st December, 1918, when the accounts were made up, of a sum alleged to be £20,998. None of the share capital had by this date been paid up and no shares had been issued or allotted, but the accounts represented a sum of £1,007 as having been received under the following head "Shares a/c £1,007" and there is a corresponding entry on the other side under this head, "We to debit Bank w. cheq. per T. B. Barrett, 1007." No such sum had been paid, but on 4th January, 1919, the appellant did in fact pay this sum to the company and the private cash book of the company contains the two following relevant entries:

"1918, Cash received for shares, £1,007."

and on the other side:

"1919, Cash to general account, £1,007."

On the 14th February, 1919, a general meeting of the company was held and it was resolved that a dividend of 15 per cent. be paid for the period ending 31st December, 1918, and a bonus at the rate of £10 per share. Pursuant to this resolution £10,000 was paid to the appellant as a bonus on his 1,000 shares and £62 11s. 3d. as a dividend for the five months. A large number of further shares were subsequently issued with which it is unnecessary to deal and the company having fallen from prosperity into difficulties a winding-up order was made by the Court on the 13th November, 1920.

The appellant was subsequently prosecuted for having obtained the £10,010 by fraudulently and falsely representing himself as a shareholder for 1,000 shares and was sentenced to three years' hard labour. (The £10,010 was a mistake for £10,000. There was no doubt that he was entitled to the £10 as holder of one share.) Into the merits of that conviction their Lordships cannot inquire, for the purposes of this appeal the fact is not material and it would not have been alluded to by them but for circumstances hereinafter stated.

On the 29th April, 1921, proceedings were taken by the company against the appellant to recover the said sum of £10,062 10s. on the ground that such money was received for the use of the company, it having been paid on the false statement that the appellant held 1,000 shares and judgment was given for the amount claimed on 1st April, 1922, less an admitted counter-claim.

The main grounds of objection to this judgment are two. (1) That the evidence given could not support the claim, and (2) that if it were sufficient

the appellant's evidence in answer was not heard and that disabilities due to his confinement and his ill-health prevented him from presenting his case.

As to (1): Their Lordships think the evidence given was complete. Glencross, the Official Liquidator, who had access to all the books and documents, and was one of the original shareholders, stated that all shares held up to June, 1919, by the appellant was only one; as no records were issued or allotted until long after February, 1919, and no record was to be found in the books or papers, other than those mentioned, relating to any application for shares, this statement threw upon the appellant the onus of disproving it. It follows that, in the absence of such proof, the payment made to the appellant in respect of his 1,000 shares was on a misinterpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, viz.: that the appellant was a shareholder for 1,000 shares, when in truth he was not, and money paid can be recovered as money had and received to the use of the company, and this was the form of the action. It is urged, however, that the case was improperly supported by evidence of the appellant's conviction and indeed on the application for leave to appeal to this Board it appears to have been thought that the evidence in the criminal charge itself was used. This is a profound mistake. In the evidence in chief of Mr. Glencross, the only reference to this conviction was a statement in the following terms: "When I was in Accra, I remember certain proceedings were taken against Barret in respect of the company and it resulted in Barret's conviction." Such a statement was both unsubstantial and irrelevant, but it certainly cannot be used for suggesting an unfair attempt to use the conviction as evidence since even the subject of the conviction is not mentioned.

Finally, however, no further examination by the Court, the following question and answer were made:

" Q.—Regarding this claim of the African Products, Ltd.: how did Captain Barrett obtain the amount? A.—He obtained it by stating he held a 1,000 shares in 1918. That statement was not correct. He obtained the money by false statement. He has been prosecuted on the charge and convicted."

Their Lordships regard as unfortunate the fact that this statement should have been made; it was not evidence and was not due to any question put by the Court, but it is unreasonable to think that it influenced a judgment which was completely supported by the evidence to which attention had been called.

ESHUGBAYI ELEKO

APPELLANT

AND

THE OFFICER ADMINISTERING THE
GOVERNMENT OF NIGERIA AND ANOTHER . . . RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

1928 June 19

(1928) 8 N.L.R. 1

The Lord Chancellor, Lords Buckmaster and
Warrington of Clyffe

A Privy Council appeal—Deposed Chiefs Removal Ordinance—History of writ of habeas corpus—Application for writ may be made to successive Judges of the same Court.

This was an appeal to the Judicial Committee of the Privy Council from a judgment of the Full Court (6 N.L.R. 81) affirming the decision of Tew, J. (6 N.L.R. 76) that he had no jurisdiction to entertain an application for a writ of *habeas corpus* which had been heard and refused by Webber, C.J. (Acting) (6 N.L.R. 73).

Held, that the judgments of Tew, J. and the Full Court were wrong, and that on successive applications for the writ being made to different Judges of the same Court each Judge must consider the application on its merits.

LORD HAILSHAM, L.C. The facts which give rise to this appeal can be shortly stated; but the question of law involved is one of grave constitutional importance to His Majesty's subjects in this country as well as in the Overseas Dominions.

By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that:

"When a native chief or native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor . . . the Governor may: (a) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . by an Order under his hand direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor. (2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the Governor . . . shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct."

On the 6th August, 1925, the Acting Governor purported to make an order under the said Ordinance in the following terms:

"Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent."

On the 8th August, 1925, the Acting Governor made a further order reciting the order of the 6th August, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the Province of Oyo.

Immediately upon service of the order of the 6th August, the appellant gave notice of motion for leave to set aside the order and to stay execution upon it. This motion was heard on the 7th and 8th August by the Acting

Chief Justice of Nigeria, and on the 8th August the motion was dismissed. Upon the dismissal of the motion the appellant gave notice of motion on the 8th August for leave to issue a writ of *habeas corpus*, and on the 10th August leave was granted for a rule *nisi* for a writ of *habeas corpus* returnable on the 13th August. On the 13th August, cause was shown against the rule and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same 8th August issued a writ against the Acting Governor and the Chief Secretary of the Government of Nigeria, claiming a declaration that the order of the 6th August, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the Order. On the 19th August the Attorney-General moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the Court. The motion was heard by the Acting Chief Justice and on the 7th September, 1925, he ordered that the action should be dismissed on these grounds.

On the 18th September, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of *habeas corpus*, and on the 12th October, 1925, the Acting Chief Justice gave judgment refusing the motion. The learned Judge held that the orders of the 6th and 8th August had been validly made and that the detention of the appellant was therefore lawful. On the 4th December, 1925, the appellant gave a fresh notice of motion for a writ of *habeas corpus*. This motion was heard before Mr. Justice Tew on the 8th December, 1925, when the Attorney-General took a preliminary objection that a similar application based on the same material had been made by the appellant and had been dismissed by the Acting Chief Justice, and that in view of that refusal the application could not be entertained; and on the 14th December, 1925, the learned Judge gave judgment upholding the objection and dismissing the motion on that ground. The appellant appealed against this decision and, on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground; and the Court directed that the case should be returned to the learned Judge in order that evidence might be filed upon these points. Accordingly, on the 9th March, 1926, an affidavit was filed by the Solicitor-General, and on the 15th March, 1926, Mr. Justice Tew reheard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on the 1st June, 1926, the Full Court in a considered judgment dismissed the appeal and upheld the view of Mr. Justice Tew that the preliminary objection prevailed and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended in the first place that there never had been a decision on the merits of his application and that the dismissal of the second motion for a *habeas corpus* by the Acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the Acting Chief Justice, and that the refusal was based expressly upon the learned Judge's view upon the merits of the application.

But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of *habeas corpus*, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal

of co-ordinate jurisdiction, even if the grounds urged are exactly the same. On behalf of the respondent, Mr. Stafford Cripps admitted the existence of the right to make successive applications; but he urged that the applications must be to different Courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that Court had determined the matter by dismissing the application on the 12th October, no fresh application based upon the same materials could be entertained by the Court. In support of this argument he cited the language of Lord Esher in *Ex Parte Cox* (20 Q.B.D. 13): "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession." He pointed out that, although the decision of the Court of Appeal had been overruled in the House of Lords, where the case is reported under the name *Cox v. Hakes* (15 A.C. 506), none of the learned Lords dissented from Lord Esher's statement of the law, and Lord Bramwell's language at p. 523 seemed to indicate that his view of the old practice was the same. He further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (18 N.Z.L.R. 601) and of the Court of Appeal of British Columbia in *Re Loo Len* (No. 2) (1924) 1 Dom.L.R. 910) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in Hale's *Pleas of the Crown*, Vol. II, p. 143; in Bacon's *Abridgement* under the title "*Habeas Corpus*, Section B"; in Sir William Blackstone's *Commentaries*, Vol. III, p. 131 *et seq.*, and in the Discussion of Blackstone's Opinion appearing in Lord Eldon's Judgment in *Crowley's Case* (2 Sw. at p. 39 *et seq.*) From these authorities it appears that the writ of *habeas corpus* was originally issuable out of the Court of King's Bench and out of the Court of Chancery; but that in very early days the Courts of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the seventeenth century the Habeas Corpus Act, 1640 (16 Chas. I, c. 10), expressly recognises the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679 (31 Chas. II, c. 2, sec. 10), enacts that it shall be lawful to move and obtain *habeas corpus* as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or any one of His Majesty's Justices might grant a *habeas corpus* in vacation and imposed heavy penalties upon any Judge who wrongfully refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive Judges of the same Court. This led to the curious result upon the respondent's argument that if application were made in vacation it could be renewed to each Judge of the Court, but that if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of Common Law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873. That statute combined into one Court the old High Court of Chancery the Court of Queen's Bench the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty

and Probate Courts and the Court for Divorce and Matrimonial Causes, therefore, the respondent is right in contending that an application for a writ of *habeas corpus* can only be entertained once by any one Court. It necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three Common Law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for the simplification of procedure should have materially cut down the protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

It is true that there is no reported case before the year 1873 in which applications being made to successive Judges of the same Court; but it must be remembered that the Common Law Courts usually sat *in banco* so that an application to the Court was in effect an application to all the Judges sitting together; and there is a precedent for application being made to a Judge of the Court of Exchequer sitting in Chambers and a subsequent application being made to the Court of Exchequer in the case of *Ex parte Partington* (13 M. and W. 679), where Baron Parke says:

" This case has already been before the Court of Queen's Bench on the return of a *habeas corpus* and before my Lord Chief Baron sitting in Chambers on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment and therefore we have thought it proper to examine attentively the provisions of the Statute without considering ourselves as concluded by these decisions."

If it be conceded that any Judge has jurisdiction to order the writ to issue then in the view of their Lordships each Judge is a tribunal to which an application can be made within the meaning of the rule and every Judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other Judge has already refused a similar application. The same principle must apply in the case of the Judges of the Supreme Court of Nigeria.

It follows that, in the opinion of this Board, the learned Judge was wrong in refusing to hear the application in the present case on its merits, and that appeal must be allowed. In expressing that view, their Lordships must not be taken to be offering any opinion upon the merits of the application or upon the validity of the orders impugned. These matters will be investigated by the learned Judge who hears the application and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of his appeal here and below and the costs of the application before Mr. Justice Tew must abide the result of the re-hearing. Their Lordships will humbly advise His Majesty accordingly.

KWESI BEDIKU APPELLANT
 AND
 AKOSUA MAINOO RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

[F.C. 1926-1929] 532

1928 Nov. 15

Viscount Sumner, Lords Blanesburgh and
 Warrington of Clyffe

The appeal raises a pure question of fact. The usual practice of the Privy Council is (not to disturb concurrent findings of fact) that the Privy Council is bound by concurrent findings of fact.

VISCOUNT SUMNER. This is a suit between the appellant, who was then plaintiff, and the respondent, defendant, with regard to the right to certain lands in Ashanti called Krobo. In accordance with practice the parties attended before the Native Tribunal, on which sundry chiefs sat, and evidence was given, with the result that the Tribunal was in favour of the appellant.

The practice under Section 30 of the Ashanti Administration Ordinance of 1902 fixes 30 days as the time after the date of the decision of a cause by a Native Tribunal within which the party aggrieved, if he desires to appeal, shall address to the Commissioner having jurisdiction in the district a letter stating the grounds on which he applies to be allowed to appeal.

There was accordingly an appeal by the defeated defendant to the District Commissioner, who reversed the decision of the chiefs. Thence an appeal was taken by the present appellant to the Chief Commissioner, who affirmed the District Commissioner; and thence again to the Supreme Court, from which Court the appeal comes to their Lordships.

The evidence which was given in the Native Tribunal was before the subsequent Courts, and in each of the appeals—that is, to the District Commissioner and the Chief Commissioner—some further evidence was given. It is not necessary to consider what it was or why it was admitted. No objection has been taken to its admission, and the result is that the evidence upon which the case has been ultimately dealt with was only completed before the Chief Commissioner and in his Court. It follows that there are two decisions upon the completed facts of this case, that of the Chief Commissioner and that of the Chief Justice, Sir Crampton Smyly, in the Supreme Court, and they concur in deciding the case against the appellant. No ground has been pointed out for dealing with their decisions other than as decisions on questions of fact. It is true that there is some allusion to some previous decisions by King Prempeh at some date not stated which are alleged to throw light on the right to this land, but they certainly do not appear to have been between the same parties nor, so far as can be ascertained, directly between the predecessors in title of the parties themselves, if in any view of Ashanti law there is such a thing as a predecessor in title. The value of these previous decisions, therefore, appears to be evidential. That being so, the case raises a pure question of fact where no error of law is suggested. There are concurrent findings against the appellant and by them their Lordships, following the usual practice, must be bound.

Nothing need be said about the possibility of a difference in the practice

had the evidence all been completed before the first Court, except that their Lordships do not desire to encourage the view that that would have made any difference at all, and no special circumstances have been pointed out upon which their Lordships could legitimately depart from the strict practice of the Board. On the merits, therefore, there is no ground for admitting the appeal.

There is, however, a point which, although it may be called technical, is of importance. The appeal under the rule had to be within a limited time and, according to the documents in the case, until the hearing before the Chief Justice there was no assertion that the rule had not been complied with. No objection was taken to the appeal as being too late, and no endeavour was made to stop the progress of these appeals upon that ground.

Putting aside, not as immaterial, but as one that need not be pursued, the question whether this could be anything more than an irregularity in procedure which was waived by the conduct of the appellant in not taking an objection, but proceeding to contest the appeal on the merits, the question seems to reduce itself to this, whether, when the objection was ultimately taken before the Chief Justice in 1926—about four years after the original hearing—the course which he then took as justified by the materials which he had before him. Briefly it stands thus. Objection was taken by the plaintiff-appellant's counsel that the judgment appealed against had actually been given on the 14th September, 1922, the very day on which the hearing commenced, and more than 30 days before the application for leave to appeal. Submission that that made the whole proceedings incompetent. Reliance placed in support of the submission on the copy of the proceedings certified by the registrar of the Chief Commissioner's Court.

The learned Chief Justice, who no doubt knows much more about the regularity of the official records than their Lordships do, observes that this was not enough to satisfy him, and accordingly went on not to decide but to hear the arguments on the merits and withheld judgment for further inquiry to be made as to the actual date when judgment was delivered by the Native Tribunal. The materials then brought before him were on an affidavit filed by the appellant's advocate, in which he exhibited a telegram from the trial chiefs, or some of them, whose names were appended, saying, "Decision given on 14th September, 1922," in favour of the now appellant. This, which was, of course, a very informal mode of giving the evidence, led the Chief Justice to direct that the respondent should be summoned to give evidence orally and to be cross-examined, and that the registrar of the Native Tribunal should be summoned to produce the record book of the Native Tribunal. There is nothing whatever to show that he would not have willingly heard any other evidence that the parties had desired him to hear, which appeared to be relevant; but no application was made to him to hear other evidence. The registrar was not only summoned to produce the registrar's book, but he was allowed to give evidence and he was cross-examined. The result of the hearing was that the Chief Justice came to the conclusion that the evidence of the registrar, which was to the effect that the true date was the 14th September, could not be relied upon; that the book that he produced as the contemporary record of the Court was kept in a manner so suspicious, as well as so irregular, that he could not place any reliance upon it in itself, and that the evidence of the respondent should be accepted to the effect that the date of the conclusion of the hearing and of the judgment in the case was the day before the notice of

appeal was given. If her evidence was right, that disposed of the matter and, without going through it in detail, or considering what comment might have been made on it, she said what was necessary to support her case and the Chief Justice, with the witness before him, accepted it.

Their Lordships think it unnecessary to review the careful examination which this evidence has received at the hands of Counsel. They are greatly impressed by the fact that the appellant, who must have known the facts and certainly has not shown that he did not know the regulation, took no objection at the time when objection ought to have been taken. Thus the matter, turning upon a mere question of dates, was not raised so that it could be investigated until it was stale, and for some reason or other other witnesses, who must have been available at the hearing before the Chief Justice and had been present at the hearing before the Native Tribunal, were not called to add to the evidence or correct the evidence of the registrar.

Without going into the matter in further detail, their Lordships think that it is quite impossible for them to say that the conclusion of the learned Chief Justice was wrong or to arrive at a different conclusion for themselves; and quite impossible also that any further inquiry should be allowed or that the case should be remitted to take any further evidence. Seeing that the parties have had every opportunity of raising the merits of this particular technical question at the time and in the place where it could be investigated, they have no one but themselves to blame if they failed to take advantage of it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

JONATHAN COLLINS ZIZER APPELLANT
 AND
 THE JUDGES OF THE SUPREME COURT
 OF NIGERIA RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

1928 Nov. 30

Viscount Dunedin, Lords Shaw and Blansburgh

Legal practitioner—Misconduct—Affidavit found to be untrue

The misconduct alleged was in connection with the making of an affidavit prepared by the appellant and sworn by the appellant's client. The affidavit contained a paragraph (8) stating that no information had been sworn by anyone to necessitate a warrant for the client's arrest. The statement proved to be untrue.

Held: (1) Paragraph 8 of the affidavit containing the statement, both from its nature and also when read in conjunction with the other paragraphs, imports, on a strict scrutiny, no more than a statement based upon the dependent's knowledge, information and belief the extent of which, as disclosed by the client to the appellant, was sufficient to justify the insertion in the affidavit of a paragraph as so qualified.

(2) It was, at the least, an error of judgment on the part of the appellant to omit an express statement of the limitation to which the dependent's assertion was necessarily subject—and the Privy Council would be slow to impute in all the circumstances more blame to the appellant for the omission.

LORD DUNEDIN. This is an appeal from an order of the Supreme Court of Nigeria dated the 12th November, 1927, ordering that the appellant, a barrister and solicitor, should be suspended from practising within the jurisdiction of the Court for three months from that date.

The misconduct alleged was in connection with the making of an affidavit prepared by the appellant and sworn by the appellant's client. The affidavit contained a paragraph stating that no information had been sworn by anyone to necessitate a warrant for the client's arrest. This statement proved to be untrue.

Their Lordships think that para. 8 of the affidavit containing the statement, both from its nature and also when read in conjunction with the other paragraphs, imports, on strict scrutiny, no more than a statement based upon the best of the deponent's knowledge, information and belief, the extent of which, as disclosed by the client to the appellant, was sufficient to justify the insertion in the affidavit of a paragraph as so qualified. Literally read, however, the paragraph is quite unqualified.

In these circumstances it was in their Lordships' opinion at the least an error of judgment on the part of the appellant to omit an express statement of the limitation to which the deponent's assertion was necessarily subject, and while they would be slow to impute in all the circumstances moral blame to the appellant for the omission, they think that the standard of care to be exacted from practitioners in the Colony is pre-eminently a matter for the Judges of the local Court. Accordingly their Lordships are not prepared to interfere in this matter with the order of the Supreme Court of Nigeria; but they think that although the appeal therefrom must be dismissed, it should be dismissed without costs.

They will humbly advise His Majesty accordingly.

BAKARE AJAKAIYE AND ANOTHER APPELLANTS
AND
THE LIEUTENANT-GOVERNOR,
SOUTHERN PROVINCES RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1929) 9 N.L.R. 1; [1929] A.C. 679

1929 July 1 Viscount Sumner, Lords Warrington of Clyffe and Atkin

Privy Council case—Public Lands Acquisition Ordinance—Ikoyi Lands Ordinance—Titles to land at Ikoyi—Failure to assert title within the prescribed time.

The Government acquired certain lands at Ikoyi for public purposes. The appellants claimed to share in the compensation to be paid by the Government, on the ground that they were the owners of a portion of the land acquired. They had taken no steps to establish their claim to this land at the time when the Ikoyi Lands Ordinance was promulgated.

Held: that the prescribed time had elapsed without any claim to ownership being made and therefore the land must be deemed to be Crown Land.

The judgment of the Judicial Committee of the Privy Council was delivered by VISCOUNT SUMNER. In October, 1924, the Governor of the Colony and Protectorate of Nigeria, requiring for public purposes certain lands round the Okepa village, Ikoyi, in the island of Lagos, took steps to acquire them under the Public Lands Acquisition Ordinance, and, in accordance with section 5, gave public notice of his requirement. Thereupon the appellants, as heads of Iga Iduntafa, lodged a claim in respect of the said lands, and in due course a summons was issued under

section 10, on which the respondent was plaintiff and the appellants were claimants and defendants. This came on for hearing before Van der Meulen, J., in April, 1926. The claim was for an alleged right of ownership in the lands and for a share in the money to be paid by the respondent as compensation for the lands taken. The appellants claimed as owners, not as inhabitants, but no doubt their alleged right was intended to be such as is described in the judgment of their Lordships' Board in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399, and others besides themselves would have enjoyed usufructuary rights under them in accordance with local law and custom.

On the hearing of the summons the claim was met by a preliminary objection that the lands in question were conclusively deemed to be Crown lands by virtue of section 7 of the Ikoyi Lands Ordinance, 1908. If so, the alleged ownership could not avail the claimants. The objection was allowed by the learned Judge, whose decision was sustained by the Full Court. Hence the present appeal, for which leave was given, has been brought before their Lordships' Board.

The question turns on the true construction of the Ikoyi Lands Ordinance, and particularly on section 7. The matters, for which that ordinance was intended to provide a remedy, are fully stated in the preamble. At the date of the ordinance much doubt existed as to the title to various lands in the island of Lagos, lying east of the MacGregor Canal therein, within which described limits the Okepa lands in dispute admittedly lie. By treaty, dated the 6th August, 1861, Docemo, King of Lagos, transferred to Her Majesty Queen Victoria his sovereign rights over the port and island of Lagos; and in 1865 the fee simple in possession of the greater part of the portion situate to the east of the MacGregor Canal (generally known as "Ikoyi") was granted to the British Crown. In subsequent years the Crown made various grants of parts of this land, but by 1908 the position of the majority of the lands thus alienated was found to be insufficiently defined, all the more because the lands themselves had in many cases been deserted for years. Beside the lands which had been granted to the Crown there were private lands of smaller extent, and it had accordingly become desirable that the boundaries of all private lands still occupied should be defined, and that the areas of the Crown lands should be clearly ascertained.

The object of the ordinance was to establish a procedure, under which matters could be cleared up once for all by an investigation of rights and titles, and a survey and demarcation of any area to which rights might be established. It is obvious that this involved calling on claimants to come forward and assert their claims, so that they might be investigated and determined. It is obvious also that cases might and would arise, in which claims, otherwise not substantial, were either not asserted within the time limited (and some limitation was essential *ut sit finis litium*) or never asserted at all. It is obvious also that the land within the area named might involve questions of various sorts. Land might be (1) in the possession of private persons, or (2) included in Crown grants, or (3) held under some title not originating in a grant from the Crown, and no doubt all such descriptions of land were in need of investigation for practical purposes.

Theoretically the area might have been classed as Crown lands and private lands, Crown lands including both such as were still in the hands of the Crown and such as had been granted away by the Crown, and private lands including such as were not King Docemo's to grant to the British Crown, whether because they had already fallen into private hands by

grants from him or his predecessors prior to his transfers to Queen Victoria or because they had never been his at all, but under native custom or otherwise, had belonged independently to private owners. Such a classification would, however, be purely theoretic unless it could be known that there actually were particular private lands owned under titles arising prior to 1861 and independently of the local Sovereigns. Historically, such a matter would be difficult to establish and, as a practical measure, the readiest road to a settlement would be to investigate all private claims and to demarcate all lands not private but remaining vested in the Crown, and the wording of the sections is strong to show that this practical course was adopted.

Section 2 runs: "All private persons claiming to be possessed of lands situated" in the part of the island of Lagos in question, "shall, within twelve months, exhibit their titles." These expressions are advisedly made general. The only qualifications upon "all persons" are that they shall be "Private," and shall claim to be possessed, and the only way in which the lands are particularised is by their situation. Section 3 then deals not with all lands claimed by private persons, but with such of them as purport to be included in Crown grants. It says nothing of lands claimed, which do not so purport. Sections 4 and 5 prescribe the course to be pursued with lands, in respect of which titles are exhibited to the Commissioner under section 2. Lands included in old Crown grants are to be resurveyed and new grants are to issue for them. Lands held under any title, other than Crown grants, are to be demarcated and recorded on plans kept for the purpose. Section 6 provides the requisite legal procedure in case of deficiency of *prima facie* proof of title or of conflicting claims, and then comes section 7: "All lands situated within the limits above described, to which no claim is made within the prescribed time, shall be deemed to be Crown lands thenceforward."

In itself this section could hardly have been more explicit or clear. The lands, to which this appeal relates, were within the described limits and the prescribed time had elapsed without any claim to the ownership of them being put forward by the appellants or any other persons. Accordingly, both Courts below held themselves bound to deem them to be Crown lands, and it followed that they must dismiss the appellants' claim. Such an interpretation of words sufficient in themselves completes the scheme of the ordinance, for it clears up all ambiguities of title. The two interests concerned are those of the Crown and of private persons. Private persons are called to "establish their titles," however arising. If they succeed, old Crown grants if any, lapse, and are replaced by new and better defined grants. If they fail, the Crown's title arising from the cession is unchallenged and unchallengeable thereafter. If they do not come forward in time the title is deemed to be in the Crown, and any outstanding Crown grant, which might be inconsistent with it, lapses. Where private persons come forward and establish titles, otherwise than by an original Crown grant, in which case they would be entitled to the demarcation which their new Crown grants would contain, their lands are finally demarcated for them *in situ*.

The present question is entirely one of construction of the ordinance, and the appellants' argument may be summarised as follows: (1) If the ordinance applies to lands belonging to private persons under a native title, not dependent upon or acquired by or through any Crown grant, which is the title now asserted, the interpretation placed by the Courts upon section 7 involves confiscation of property in a summary fashion without compensation. (2) To avoid such a result, it is legitimate to consider as

materials for a proper construction (a) the title, and (b) the preamble of the ordinance on accepted principles of constructions of statute, and (c) the marginal summary of the contents of each clause, which is prescribed by Clause 27 of the Royal Instructions for Southern Nigeria of 8th February, 1906. Accordingly, as the ordinance is described in the entitling part as "an ordinance to provide for the proper identification and demarcation of lands granted by the Crown to private owners and situated, etc.," and as the marginal caption to section 2 is "private owners to exhibit titles," the "private persons" mentioned in section 2 must be identified as being such as are named in the title and description of the ordinance, and so are exclusive of the appellants, whose claims are not to a title granted by the Crown. In support of this construction, reliance is placed on the apparent admission contained in the preamble that there was a part, though a minor part, of the portion of the island now in question, which never had been ceded to the Crown, and that the Crown had never purported to alienate the whole of that area. If so, when the ordinance came into force, there remained private lands which, though dubiously delimited, were still occupied and had never been abandoned in the years intervening since the recited treaty was made with King Docemo. Reliance was placed on the authority of *The Commissioner of Lands v. Oniru* ((1912) 2 N.L.R. 71), and on a passage in the judgment of Combe, C.J., in the present case, which said that

"there were certainly two classes of persons who might claim to be owners of land to the east of the MacGregor Canal—namely (a), the owners of that portion of the land which had not been granted to the Crown; and (b) persons who had acquired title under Crown grants issued after 1865 in respect of land within the portion which had been granted to the Crown. These latter persons are referred to in the ordinance as 'private persons.' Provision was made in the ordinance for determining the areas, which both classes of claimants were entitled to continue to hold as owners."

On the other hand the case of *The Commissioner of Lands v. Kamajalodun*, decided in 1911, was set out and relied on in the judgment. It showed that, on the hearing and determination of the inhabitants' claim to fishing and other privileges in respect of the same parcels as those to which this appeal refers, not only was no adverse ownership claim set up, but the present appellants or their predecessors did not even appear or seek to be made parties, and it was assumed and expressly stated that the Crown had, without dispute and in the exercise of a right which was apparently proprietary, permitted to the inhabitants the enjoyment of privileges, which it would only have been competent to proprietors to allow. A declaration was thereupon made in the presence of the Crown officers that the inhabitants were so entitled as of right, and that declaration still stood.

Their Lordships are unable to adopt the reasons or the conclusions of the appellants. It can only have been by inadvertence that the learned Chief Justice expressed himself as he did. If his words in themselves mean (which is by no means certain), that persons claiming as the appellants claim are not within some limited sense to be put upon the words "all private persons" in section 2 of the ordinance, they are inconsistent with the decision of the Court and must be rejected. The *Oniru* case was not cited in the judgment appealed from and, probably for some reason not known to their Lordships, was not mentioned to the Court. At the same time, it had been so recently decided that it could hardly have failed to be in the

recollection of the learned Judges, and there may well have been some fact connected with it which, in the view of all parties, made it inapplicable. At any rate, it does not bind their Lordships, and as a decision adverse to the particular point of construction now in question, but not further or otherwise, they do not follow it.

As to the ordinance itself, it is a misnomer to describe its operation in the sense adopted in the Courts below as "confiscation." No doubt in its effect, if parties concerned fail to assert in time a title which they might otherwise have established, they are divested of their property, but this is thanks to their own inaction. The same would have been the result of a statute of limitations or an ordinance making obligatory and effective a system of land registration and of proof of title by entries in the register. The ordinance itself must have been notorious to those concerned, and the community within which possible claimants could be found must have been small. The opportunity for claims appears ample, but in any case this is a matter of policy, not of interpretation.

Their Lordships think that there is little need to resort to the title or to the preamble of the ordinance in order to construe these clear sections. It is not contended that section 7 of the ordinance is "foreign to what the title of such ordinance imports," so as to be *ultra vires* and void, as being prohibited by Clause 15 (2) of the Instructions, but only that its limited terms affect, if they do not control, the construction of section 7. As for the marginal captions, they are not to be taken to hold that the rules referred to are anything but directions as to the form to be adopted and the mechanical framework to be used in drafting ordinances, but in any case the caption here carries matters no further. It does not purport to refer to the wording of the title and description of the ordinance for any purpose of limiting or construing the words "any private persons." The title of the ordinance itself, "Ikoyi Lands Ordinance," is quite general, and the following words—"proper identification and demarcation of lands granted by the Crown to private owners"—are descriptive of the major part of the purposes of the ordinance, but do not purport to be exhaustive of them. Accordingly, they cannot prevail against the enacting words. Section 5 quite clearly and in terms deals with demarcation of lands, other than such as have been granted by the Crown. This section certainly cannot be expunged or modified by the words contained in the title and description of the ordinance. The same holds good of section 2. The contention that "exhibit their titles" in the latter section assists the argument or operates to limit the "private persons" to grantees from the Crown is unsound, for the expression is quite general. The title is not defined, nor is the expression "exhibit" limited, and, for anything that appears to the contrary, it is a fit expression to cover not only written instruments but all the indicia or symbols of right that occur in such a community as that of Lagos. As for the preamble, it appears to their Lordships to go far to establish a situation in which the exclusion from the operation of the sections of any persons interested in any way in lands within the area would have tended to defeat the object of the ordinance and would, for no good purpose, have perpetuated the uncertainty and confusion which so urgently demanded an effective remedy.

Their Lordships will for these reasons humbly advise His Majesty that this appeal should be dismissed with costs.

LUIGI AMBROSINI, LIMITED APPELLANTS
AND
BAKARE TINKO AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1929) 9 N.L.R. 8

1929 Oct. 15 Lords Darling and Tomlin and Sir Lancelot Sanderson

A Privy Council appeal—Trial at Nisi Prius—Vital issue discovered by Judge of first instance when writing his judgment—Such issue never having been raised in the course of the trial—Amendment of plea allowed by the Full Court.

In considering his judgment the learned trial Judge disclosed an issue which had escaped the notice of counsel. The issue was vital, and he gave judgment accordingly.

On appeal the Full Court held that permission should be granted to amend the plea. The plea was amended before the Full Court and, after argument, the judgment in the Court below was upheld.

On further appeal the Lords of the Privy Council held that the case should be tried *de novo*. But they refused to grant any costs of the appeal.

The judgment of the Judicial Committee of the Privy Council was delivered by LORD DARLING. Allen, one of the defendants, was a man in the employment of the plaintiffs, and he together with the second and third defendants—Tinko and Bickersteth—had entered into a bond in these terms:

“ Know all men by these presents that we Victor Ade Allen, of 9 Adam Street, Lagos, Nigeria (hereinafter called the Principal Obligor) of the one part and (1) Bakare Tinko, Trader, of Tokunboh Street, Lagos, (2) Charles Togonu Bickersteth, of Tokunboh Street, Lagos, Nigeria (hereinafter called the Sureties) of the other part, are held and firmly bound to Luigi Ambrosini, their heirs, administrators and assigns in the sum of Five hundred pounds sterling (£500) for which payment well and truly to be made we jointly and severally bind ourselves and each of us our heirs and executors and administrators by these presents sealed with our respective seals, dated the 15th day of January, 1924.

Whereas at the request of the Principal Obligor and the Sureties the said Luigi Ambrosini has agreed to engage the Principal Obligor as Produce Buyer at Lagos or elsewhere in Nigeria upon the said Principal Obligor and the said Sureties entering into a Bond and giving the said Luigi Ambrosini a security in the above-mentioned sum of Five hundred pounds sterling (£500) with such condition as is hereunder written for the faithful discharge by the said Principal Obligor of his duties as such Produce Buyer.

Now the condition of the above-written Bond or obligation is such that if the said Principal Obligor shall faithfully discharge his duties as such Produce Buyer or the Sureties, their heirs, administrators and assigns shall of all times hereafter indemnify and keep indemnified the said Luigi Ambrosini, their heirs, administrators and assigns against all losses, costs, shortages, damages and expenses which the said Luigi Ambrosini may pay, sustain, or be put into by reason of any act of embezzlement, mismanagement, neglect, reclamation [*sic*] of business secrets, or default of or by the said Principal Obligor whilst in the employ of the said Luigi Ambrosini.

Then in any of the cases the above-written Bond shall be void otherwise the same shall be and remain in full force and virtue.

(Sgd.) Ade Allen (Seal)

(Sgd.) B. Tinko (His X Mark) (seal).

(Sgd.) C. T. Bickersteth (Seal).

Signed, Sealed, and Delivered by the within named parties the foregoing Bond having been first read over and explained to Bakare Tinko in the Yoruba language when he seemed perfectly to understand the same before affixing his mark thereto in the presence of:

(Sgd.)

Solicitor's Clerk,

10, Campos Square, Lagos."

The action was brought against Allen for money said to be due from him to the plaintiffs, and against the second and third defendants, the present respondents, who were sued as sureties for Allen.

At the trial on the 17th March, 1926, the bond was put in, and the second and third defendants admitted themselves to be liable to the extent of the liability of the first defendant. On the 19th March, 1926, according to the note of the trial Judge, Van der Meulen, J.:

"Irving—counsel for the plaintiffs—here states that without admitting any legal liability he is prepared to accept judgment for £600 if this is agreed to by the defendant. After counsel have conferred Doherty—counsel for defendant Allen—states that his client accepts judgment for £550 against him.

Adjourned to 22-3-26 for the two sureties to consider their position."

The words of plaintiffs' counsel, "without admitting any legal liability" appear to refer to the counter-claim of defendant Allen.

On the 23rd March, 1926, Van der Meulen, J., gave judgment, of which the note is:

"The court states that in view of the defendant's admission of liability for £550, and the plea of the second and third defendants that they are liable to the extent to which the first defendant is liable, such amount not exceeding the amount for which they have given security, there must also be judgment against second and third defendants for £500 the amount for which they have given security.

The court therefore gives judgment for the plaintiffs against the first defendant for £550 on the claim and against the second and third defendants jointly with the first defendant for £500 of that amount."

From this judgment the second and third defendants appealed, a ground of appeal being that the learned judge was wrong in holding that the second and third defendants were bound by the first defendant's submission to a judgment by consent, to which they refused to assent.

After various vicissitudes the case came before the Supreme Court of Nigeria on the 12th January, 1927, when that Court directed that the case be sent back to the Court for re-trial as between the plaintiffs and the second and third defendants.

The re-trial began on Friday, the 21st October, 1927, before Petrides, J. Several adjournments took place. On the 18th January, 1928, after a final hearing the Court adjourned to consider the judgment.

On the 1st February, 1928, Petrides J., gave judgment. The learned judge recounted the proceedings which had taken place and then said:

" At the re-trial before me further evidence was taken and judgment reserved.

While considering my judgment I found that while the account Ex. ' A ' filed by the plaintiffs showed that a balance of £732 15s. 4d. was due by the first defendant on the 31st January, 1925, this amount was arrived at by taking an account between the plaintiffs and the first defendant from the 4th April, 1923, to the 31st January, 1925. The bond Ex. ' B ' on which the second and third defendants were sued was not, however, executed till the 15th January, 1924, from which date the plaintiffs suffered no losses, costs, shortages, damages and expenses by reason of any act of the first defendant. In fact, far from the plaintiffs suffering any loss after the execution of the bond the first defendant reduced his liability to them by a sum of £499 15s. 4d. It seemed to me that in view of the fact stated in the preceding paragraph the plaintiffs had failed to establish that the second and third defendants were liable as sureties under the bond."

The learned Judge thereupon gave judgment for the second and third defendants. From this judgment the plaintiffs appealed on the 29th March, 1928, alleging as a ground of appeal:

Judgment was wrong in law in that the learned Judge after reserving judgment decided the case in the defendants' favour on an issue or plea that had not, throughout the proceedings, been raised or tried.

Judgment was delivered by the Supreme Court of Nigeria on the 31st May, 1928. There was much argument as to whether the defendants should be allowed to amend their plea so as to raise the defence discovered by Petrides, J., and ultimately the Court of Appeal allowed the amendment, but directed that the second and third defendants should pay all costs as the price of so great an indulgence. The Court of Appeal then, by a majority, dismissed the plaintiffs' appeal; the Court taking the view that the point discovered by Petrides, J., was a good one entitling the sureties to judgment.

It may be that the point discovered by Petrides, J., is one which was, as he himself regarded it, fatal to the plaintiffs' claim; and the Court of Appeal agreed with him; but in their Lordships' opinion that point has not necessarily all the consequences which they imputed to it; since it ignores the rule in *Clayton's Case* (1 Merivale 572) as to the appropriation of subsequent payments in a running account to previous items of debit in that account. That rule may, for all they knew, be applicable in this present case. It appears to their Lordships that the account between the plaintiffs and Allen was one to which, from its nature, the rule in *Clayton's Case* would be applicable; but evidence might be called to show that properly this cannot be so; and, were such evidence given, it is obvious that it would then be permissible to the plaintiffs to call evidence in rebuttal. In their Lordships' view Petrides, J., in the course of his consideration of his judgment, discovered a point until then unargued and unsuspected. It was in the course of his judgment sprung upon the plaintiffs, who had no chance of dealing with it, nor, from that moment, with the merits of the case. He gave judgment for the defendants, the present respondents. The plaintiffs, the present appellants, thereupon appealed as shown, from that judgment; and the Supreme Court in the course of the hearing of that appeal amended the record in favour of the defendants the sureties. No opportunity was thereafter given to the plaintiffs of dealing with the matters involved on the new basis which that amendment established: yet, certainly, this should have been afforded them.

In the opinion of their Lordships the judgment of Petrides, J., in favour of the second and third defendants and the order of the Supreme Court of Nigeria should be discharged, and a new trial ordered. They would suggest that this trial should be had on pleadings in writing—as the case is not a simple one.

Further, in their Lordships' opinion, there should be no order as to costs in either of the proceedings below, except that the costs of the first trial up to the production of Exhibit G, should be in the discretion of the trial judge who may re-hear the case. No costs of this appeal should be allowed.

Their Lordships will humbly advise His Majesty accordingly.

KNUT KNUTSON

APPELLANT

AND

THE ATTORNEY-GENERAL

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

1929 Nov. 7

Lords Blanesburgh, Warrington of Clyffe,
Sir Charles Sargant*Pleading—Incorporation by reference—Pleading possession.*

The appellant pleaded in paragraph 9 of his Statement of claim that "in November, 1924, the Nigerian Custodian of Enemy Property, by the authority of a proclamation of the Governor of Nigeria, approved by His Majesty's Secretary of State for the Colonies, caused the aforesaid land to be sold by auction in London."

Held: This in itself is obviously not a sufficient allegation of possession. And, even if the reference to the proclamation is enough to bring into the statement of claim the whole of the provisions of the proclamation, those provisions themselves do not go beyond a vesting of the land in the Custodian and a direction that he shall sell.

SIR CHARLES SARGANT. In order to succeed on this appeal, it is, of course, necessary for the appellant to show that the allegations in his statement of claim are sufficient to raise a sustainable cause of action against the Crown. And for this purpose the first, and perhaps the most crucial, question to be determined is whether there is to be found in the claim an allegation, either express or by necessary intendment, that the land in question ever came into the possession of the Crown or of some agent for the Crown.

Now, in the statement of claim itself, there is a singular absence of any allegation as to possession. In that document there is no averment that the appellant ever acquired any possession of the land, still less that he was in possession in the year 1916, when the British forces occupied the country, or in the year 1924, when the sale by the Nigerian Custodian of Enemy Property took place. The statement of claim is quite consistent with the assertion by the appellant of a mere paper title to the land, entirely divorced from any kind of possession.

Further, the statement of claim nowhere alleges that the Crown or any alleged agent of the Crown, or even the Nigerian Custodian of Enemy Property, ever took possession of the land. The nearest approach to such an allegation is to be found in the averment in para. 9 of the claim that "in November, 1924, the Nigerian Custodian of Enemy Property, by the authority of a proclamation of the Governor of Nigeria, approved by His

Majesty's Secretary of State for the Colonies, caused the aforesaid lands to be sold by auction in London." This in itself is obviously not a sufficient allegation of possession. And, even if the reference to the proclamation is enough to bring into the statement of claim the whole of the provisions of the proclamation, those provisions themselves do not go beyond a vesting of the land in the Custodian and a direction that he shall sell—provisions which do not involve any vesting in him of possession or any taking by him of possession. The whole of the duties of the Custodian under the proclamation could be performed without possession; and therefore no allegation of possession is involved in the embodiment of the proclamation in the statement of claim.

This conclusion is arrived at after taking into account in the appellant's favour a proclamation which he in fact repudiates, and is quite independent of the many other difficulties in the appellant's path, such, for instance, as that of establishing the view that the Custodian was an agent of the Crown or that of showing that his claim was not one in tort. On all these points their Lordships have heard no arguments and express no opinion whatever. They base their decision against the appellant on this one ground of the absence of allegation of possession.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

ABRAHAM ESSELL APPELLANT
 AND
 REBECCA DAVIS *per* JOHN
 EKWAN SAMPSON RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

(1929) 2 W.A.C.A. 5

1929 Nov. 15

Lords Blanesburgh, Warrington of Clyffe and
 Sir Charles Sargant

Action for account—Title to land may properly be raised and determined in claim for account—Status of caretaker of land.

(1) A defendant in an action for account of rents collected in respect of land can properly raise the question of plaintiff's title to the land in question and the court may determine the question in the same action.

(2) The caretaker of land, according to the law or custom of the Gold Coast, appears to be, not a mere rent collector. He is entitled to the possession or receipt of the rents and profits of the land in his own right against third persons, though he has to account to the real owner.

LORD WARRINGTON OF CLYFFE. This appeal raises a question as to the title to certain lands in the Gold Coast Colony. The lands are not tribal or family lands, and it is common ground that the title to them must be determined substantially in accordance with English Law.

The action was in form an action by the respondent, Rebecca Davis, claiming as owner of the land an account against the appellant as caretaker thereof of the tributes, tolls and rents collected by him since the year 1911, and an order for payment of the amounts found due. The appellant defended on the ground that the respondent was not the owner of the land, but that the ownership thereof was vested in one Sara Quagraine, the devisee

thereof under the will of her father, Charles Barnes Acquah, deceased, for whom and for whose devisees the appellant was caretaker. It is common ground that the question of title is properly raised and may be determined in such an action.

The action was commenced on the 13th December, 1923. The name of one J. E. Sampson, a brother of the respondent, appears on the writ, which purports to be in the name of the respondent, "per J. E. Sampson." Mr. Sampson is dead. He appears to have had no personal claim to the land. The respondent was the real plaintiff.

The Native Tribunal before whom the action first came on for trial decided the question of title in favour of the respondent. On appeal to the Cape Coast Provincial Commissioner this order was reversed and the action was dismissed and the appeal allowed with costs. The respondent appealed to the Supreme Court of the Gold Coast Colony, who on the 9th July, 1927, allowed the appeal with costs and restored the order of the Native Tribunal. The present appeal is brought by leave granted on the 17th December, 1927.

The parties concerned are all natives of the Colony.

It will be convenient for the sake of clearness to state first the facts supporting the title of the said Sara Quagraine, on whose behalf the appellant is prosecuting the appeal, and then to consider the claim set up by the respondent.

The lands in question are called Agissu, and are part of a larger area called Ekwambassie, situate in the Saltpond District. Ekwambassie includes also three other parcels of land, the names of which need not be mentioned, but may be referred to as "The three other parcels." These three other parcels were formerly the property of Charles Barnes Acquah. The nature of his title is immaterial to the present question.

Prior to the 16th February, 1881, the Agissu lands were the property of one Abina Owoodoowa (hereinafter referred to as Abina).

She appears to have been indebted to one F. A. Parker, who recovered judgment against her in an action in the Supreme Court of the Colony.

On the 16th February, 1881, the following certificate was issued under the hand of the Judge or Commissioner, viz.:

CERTIFICATE OF PURCHASE OF LAND
IN THE SUPREME COURT OF THE GOLD COAST COLONY,
PROVINCE

A.D. 1881.

Between FRANCIS A. PARKER

and

ABINA OWODOOWAH

Suit No.

Plaintiff

Defendant

THIS IS TO CERTIFY that FRANCIS A. PARKER has been declared the Purchaser of the right, title and interest of Abina Owoodoowah in the messuages, lands and tenements hereinafter that is to say all that land situated at Aguisoo called Aguisoo on the North is lied a river called Kina on the East the same river Kina on the West is bounded with three Coconuts trees, 1 BOXWOOD tree in the End which said messuages lands and tenements were sold in execution of a decree in the above suit by order of this Court dated 24th day of January, 1881.

Dated at Saltpond the 16th day of February 1881.

(Signed) JOHN SMITH,
(Signature of Judge or Commissioner).

On the 19th February, 1881, Parker executed a conveyance of the Agissu

land to Charles Barnes Acquah, his heirs, executors and assigns. The explanation appears to be that the debt, the subject of the action, though nominally owing to Parker, was really a debt due to Acquah, Parker being a mere nominee or trustee for him. This appears from a document signed by Abina and printed at page 64 of the record.

The title of Acquah to the Agissu lands was impeached by or on behalf of Abina in an action tried on the 17th August, 1882, before the then acting Chief Justice, who decided in favour of Acquah, though he, for reasons not now apparent, considered the transaction by which Parker obtained the land from Abina to be of a very doubtful character.

There is no direct evidence of any further claim of Abina against Acquah in respect of the ownership of the Agissu lands.

On the other hand, on two occasions in his lifetime, *viz.*, in 1895 and in 1909, Acquah successfully maintained actions for trespass upon the said lands. Acquah died on the 18th May, 1909, having by his will dated the 6th March, 1907, devised the Agissu lands and the three other parcels of land to his wife, Elizabeth Acquah, for her life, and after her death to his daughter, Sarah Quagraine, absolutely. By a deed of gift dated the 8th March, 1907, he gave the same lands to his wife, but as this deed contains no words of inheritance, she presumably took thereunder a life estate only. This last fact is not disputed.

The present appellant was appointed by Acquah, caretaker of the Agissu lands, and this appointment was continued after his death by Elizabeth, his widow, and after her death by Sarah Quagraine. The caretaker of land, according to the law or custom of the Colony, appears to be not a mere rent collector, but to be entitled to the possession or receipt of the rents and profits of the land in his own right as against third persons, though of course, he has to account to the real owner.

The appellant as such caretaker regularly collected tribute from farmers on the land, both before and after the death of Acquah. He has successfully maintained actions for trespass on several occasions, in one of which a rival caretaker appointed on behalf of the respondent was a defendant. In this action he obtained a judgment, dated the 27th February, 1914, declaring that he was entitled to hold, possess and occupy the Agissu lands as caretaker against the respondent. Subsequently by another order in the same action, dated the 10th June, 1914, it was declared that, according to the true construction of the order of the 27th February, 1914, the appellant had no authority to evict any person living or being on the lands other than persons living or being on such portion of the lands as he was entitled to occupy himself. This order appears only to affect his right as against certain occupiers to actual possession, but not his right to receive tribute. In giving judgment on the 27th February, 1914, the Court expressly declined to make any declaration as to the right or title of the present respondent to the Agissu lands.

So far, from the date of the transactions in 1881 down to the present time, the actions of the parties and the results of the somewhat extensive litigation were consistent with the ownership by Acquah and his successors of the Agissu lands. In 1911, however, during the trial of an action in which Elizabeth Acquah was plaintiff and Rebecca Davis was defendant, an incident happened which has proved the occasion for the present trouble. The writ in that action has not been produced, but it appears from the judgment of the Full Court in the present action that the action was one in which Elizabeth Acquah claimed as against the respondent a declaration that she was entitled to the three other parcels of land, as, indeed, under the

will and the subsequent deed she was, but as tenant for life only. Whether this claim extended to the Agissu lands is not proved, but their Lordships think that it may be inferred that it did from what took place at the trial. The case was heard before Earnshaw J. on the 28th April, 1911. Mr. Bucknor was counsel for the plaintiff, who, it must be remembered, was only tenant for life of the Agissu lands. The defendants as to the three other parcels of land relied on a deed of gift, dated the 20th June, 1898, by Acquah to the respondent. It would seem that this was accepted as sufficient evidence of her title to the three other parcels of land, and the judgment declared that she was so entitled. There appears in the record in that action the following passage as quoted by Hall J. in his judgment in the present case.

“ Mr. Bucknor for plaintiff.

Mr. Brown and Sampson for defendant.

Mr. Bucknor for plaintiff said that on going through documents he had found a certificate of purchase showing that Rebecca Davis had purchased and was the owner of Agissu land. The plaintiff Kojo Mbroh possesses through Rebecca Davis. Mr. Bucknor therefore asked to withdraw the claim. Mr. Brown consented.

Claim struck out with costs for defendants to include yesterday and to-day.

Certificate of purchase with receipt attached was produced on notice by the plaintiff and was delivered to the defendant Davis as being hers by the Court.”

This judgment was afterwards attacked by Sera Quagraine, Elizabeth Acquah having died, but only so far as it related to the three other parcels of land, and on the ground that the deed of gift of 1898 was fraud on creditors.

The documents produced were a Certificate of Purchase given in an action in which Acquah was plaintiff and Abina was defendant, and a receipt endorsed thereon.

The certificate is in the following terms, viz.:—

“ THIS IS TO CERTIFY that REBECCA DAVIS has been declared the PURCHASER for the sum of TEN POUNDS TEN SHILLINGS of the right, title and interest of ABINA OWOODOOAH in the messuages lands and tenements hereinafter mentioned, that is to say:

All that piece or parcel of land situate at Agisso bounded on the North by river Kina on the South by Charles B. Acquah's land and on the East by Abams land and river Oki and on the West by Ocra and Kobina Buatin's land.

Which said messuages land and tenements were sold in execution of a decree in the above suit by order of this Court, dated the 31st day of October, 1892.

Dated at Cape Coast the 11th day of January, 1893.

HAYES REDWAR.

(Signature of Judge) Acting.”

And it purports to be signed by the Acting Judge.
The endorsed receipt is as follows:

“ £10 10s. 0d.

Received from Mrs. REBECCA DAVIS the sum of Ten Pounds Ten Shillings being a piece of land which she bought in the satisfaction of the Writ of *Fi. Fa.* issued on the above case.

Ekuamabasi,

30th November, 1892.

(Signed) C. S. VERTAGE,
Sheriff Messenger.”

The Court in the order now appealed from have accepted the view that the lands mentioned in this certificate were identical with those mentioned in the certificate and transfer of 1881, and that, notwithstanding the last-mentioned certificate and transfer, the transaction of 1893 effectually vested the lands in the respondent.

The Provincial Commissioner avoided the difficulty by holding that there was no sufficient evidence of the identity of the lands described in the two certificates respectively. On this point their Lordships are of opinion that there are no sufficient materials on which to arrive at a definite conclusion, but they are willing for the purposes of this judgment to assume that both certificates related to the same lands.

The title of Acquah and his successors under the transactions of 1881 appears to be a perfect title not only on paper, but one that is consistent with the subsequent conduct of Acquah and others, and it surely would require a clear case to defeat this by a subsequent transaction, not being, of course, a conveyance by Acquah or someone claiming under him.

Now, this certificate does not purport to relate to the sale and purchase of any right, title or interest of Acquah in the lands, and it would indeed be absurd to sell an interest of the plaintiff in execution of a judgment against the defendant. Nor can their Lordships accept the view that Acquah can be estopped from saying that Abina had no interest to sell. He is not the vendor. It is quite possible, especially seeing that in 1882 Abina had disputed the validity of the sale in 1881, that she although there is no direct evidence to that effect, was again asserting some claim, and that he himself became the purchaser, through the respondent who was his niece as nominee, of that claim, whatever it might be, especially as any money paid to the Sheriff would go towards discharge of the judgment debt under the *Fi. Fa.* Some colour is given to this possible solution by the fact that the certificate and receipt were retained by Acquah and were found, apparently by accident, among his papers two years after his death. Moreover, the respondent, though still alive, was not called to give any account of the alleged sale in 1893, or to say that she paid the purchase money, an omission all the more striking seeing that her evidence in support of her claim to the property given in 1914 was then described in the judgment of the Court as being most unsatisfactory. The receipt is signed by the Sheriff's messenger and not by Acquah, and does not amount to an admission by the latter of any payment by the respondent. No evidence was adduced to show that, by some means in the interval between 1881 and 1893, the land had reverted to Abina or that the transaction of 1881 was not a genuine transaction. Any admission by Counsel in the action of 1911 would not bind Sarah Quagraine, who was not his client.

Under these circumstances their Lordships are driven to the conclusion that the title prior in point of date must prevail, and that accordingly the judgment appealed from should be set aside and the judgment of the Provincial Commissioner restored, and that the respondent should be

ordered to pay the costs in the Courts below. As to the costs of this appeal: When the case was called on the appellant was not represented by Counsel, for no Counsel had then been instructed, and but for their Lordships indulgence in delaying the hearing to permit of Counsel being instructed and the case proceeded, but their Lordships think that, under the circumstances above mentioned, the appeal should be allowed without costs.

They will humbly advise His Majesty accordingly.

BENJAMIN KNOWLES

APPELLANT

AND

THE KING

RESPONDENT

[ON APPEAL FROM THE CHIEF COMMISSIONER'S COURT OF ASHANTI
(EASTERN PROVINCE)]

[1930] A.C. 366

1929 Nov. 18, 19

1930 Mar. 10

Lord Sankey, L.C., Viscount Dunedin, Lords Darling,
Atkin and Thankerton

Ashanti—Trial for murder without a jury—Statutory power so to try in certain circumstances—Presumption that circumstances existed—Privy Council practice—Absence of substance of fair trial—Conviction set aside—Ashanti Administration Ordinance (No. 1 of 1902), s. 9

The appellant was convicted of the murder of his wife, and sentenced to death upon a trial in Ashanti without a jury. By s. 9 of the Ashanti Administration Ordinance, 1902, "so far as it is practicable and local circumstances permit" the procedure, civil and criminal, in the Ashanti Court was to be the same as in the Supreme Court of the Gold Coast Colony; in that Court it was imperative by Ordinance that a trial for murder should be with a jury. The trial judge had not stated that a trial with a jury was not practicable or not permitted by local circumstances. It appeared on the appeal that there never had been trial by jury in Ashanti.

The death of appellant's wife resulted from a wound inflicted by a shot from a revolver while she and the appellant were together alone in a room. By a dying declaration she had stated that the revolver had been fired accidentally by herself in a manner which she described. The appellant in his evidence also attributed the wound to an accident by her. There was much circumstantial evidence:

Held, that it should be presumed that a trial with a jury was not practicable, or was not permitted by local circumstances, and accordingly that the appeal failed so far as it was based upon want of jurisdiction; but that the appeal should be allowed upon the ground that the appellant had not the substance of fair trial, and had suffered substantial and grave injustice, in that the trial judge, having come to the conclusion that the revolver had been fired by the appellant, had entirely failed to consider whether the evidence justified a conviction for murder as opposed to manslaughter, and the Board was clearly of opinion that it did not.

APPEAL (No. 54 of 1928) by special leave from a judgment of the Chief Commissioner's Court of Ashanti (Eastern Province), delivered on November 23, convicting the appellant of murder and sentencing him to death.

The appellant was tried in the Chief Commissioner's Court of Ashanti by the acting Circuit Judge sitting at Kumasi without a jury, upon a charge

under s. 224 of the Criminal Code of the Gold Coast Colony (applied to Ashanti by an Ashanti Ordinance of 1925) of having murdered his wife. The trial occupied from November 13 to 21, 1928, and on November 23 the Circuit Judge delivered judgment convicting the appellant and sentencing him to death.

On January 29, 1929, the Governor of the Gold Coast Colony in the exercise of powers vested in him granted the appellant His Majesty's pardon on condition that he be imprisoned for life.

On May 7, 1929, the Judicial Committee granted the appellant special leave to appeal from the conviction and sentence.

The terms of ss. 8 to 10 of Ashanti Administration Ordinance No. 1 of 1902, as amended, relating to the law and procedure in the Ashanti Court, and the material facts appearing upon the evidence, are stated in the judgment of the Judicial Committee.

The procedure in criminal cases in the Supreme Court of the Gold Coast Colony, which by s. 9 of the above mentioned Ashanti Ordinance is made applicable in Ashanti "so far as is practicable and local circumstances permit" is laid down in the Criminal Procedure Ordinance (Laws of that Colony, 1920, c. 13, c. 31 in 1928 ed.). Ss. 117 and 118 of that Ordinance provide:

" 117. In cases tried with a jury the trial shall be with a jury of seven men who may be common or special jurors.

118. Trials in all cases punishable by death shall be heard before a jury of seven special jurors, unless the said number of special jurors are not comprised in the jurors' list for the place where the trial is had, or not obtained when summoned, when the trial may be had with any less number of special jurors, the remainder of the jury being made up of common jurors."

Ss. 178 to 198 deal with the qualifications of jurors and the preparation of jury lists.

The powers of the acting Circuit Judge were derived from Ashanti Ordinance No. 9 of 1919, ss. 2 and 3.

1929. Nov. 18, 19. *Pritt K.C.* and *Horace Douglas* for the appellant. Having regard to s. 9 of the Ashanti Administration Ordinance, 1902, and s. 118 of the Gold Coast Criminal Procedure Ordinance, 1920, the Court had no jurisdiction to try the appellant without a jury unless it was not practicable, or not permitted by local circumstances, to have a jury. There could be no difficulty in Kumasi in obtaining the small jury required by s. 118. The trial judge has nowhere stated that it was impracticable to do so, or that local circumstances did not permit it. The printed case for the Crown contends that s. 118 did not apply because it is in a part of the Ordinance headed "Trials upon information" and the law of Ashanti makes no provision for informations. But even if that heading can affect the imperative terms of s. 118, the commissioner of police signed the charge, and for that purpose he represented in Ashanti the Attorney-General. If that part of the Ordinance does not apply there was no power in Ashanti to try an indictable offence; nor was there power to take the dying deposition, as the section providing for that is in the same part. The Judicature Ordinance of Ashanti (No. IX of 1919) contemplates that a trial for murder shall be with a jury, as it provides that a trial for murder shall not take place unless the Circuit Judge "presides over" the Court. Upon the facts the judgment was unsatisfactory in many respects. More particularly in that the trial judge, having come to the conclusion that the facts stated in the dying

declaration did not agree with the circumstantial evidence, treated a conviction for murder as the inevitable alternative. If the dying declaration is disregarded the rest of the evidence was wholly insufficient to justify a conviction. The trial judge failed to consider whether the evidence justified a conviction for murder, although the Criminal Code lays down circumstances in which homicide may amount to manslaughter only; those circumstances include loss of self-control due to extreme provocation. The appellant suffered substantial and grave injustice within the meaning of *In re Dillet* ((1887) 12 App.Cas. 459, 467); he had not "the substance of fair trial," and in *Ibrahim v. The King* ([1914] A.C. 599, 615) that was stated as also to *Vaithinatha Pillai v. The King-Emperor* ((1913) L.R. 40 I.A. 193).

Sir William Jowitt A.-G. and C. H. Pearson for the Crown. Under the maxim "*Omnia praesumuntur*," etc., it is to be presumed that a competent court has properly exercised its jurisdiction, and that rule applies in a criminal case: *Reg. v. Brennan* ((1847) 16 L.J.Q.B. 289, 292); *Morris v. Ogden* ((1869) L.R. 4 C.P. 687, 703, 704); *Broom's Legal Maxims*, 11th ed., p. 740. This case should be considered therefore as if the trial judge had stated in his judgment that it was not practicable to have a jury, or that local circumstance did not permit it. There is no provision in Ashanti for preparing jury lists or summoning jurymen; trial by jury has never been introduced into Ashanti. Trial by information, which is dealt with in that part of the Criminal Procedure Ordinance of the Gold Coast which contains s. 118, does not form part of the Ashanti system; there is no attorney-general and no provision for informations. With regard to the facts, while it is not desired that the Board should limit its jurisdiction, attention is drawn to *In re Dillet* ((1887) 12 App.Cas. 259, 267), and *Arnold v. The King-Emperor* ((1914) L.R. 41 I.A. 149) as to the practice of the Board in criminal cases. It is submitted that the evidence was sufficient to justify the conviction.

Pritt K.C. in reply. The maxim, and the cases referred to thereon, do not apply. First, because it is apparent that the trial judge dispensed with a jury not because it was impracticable to have one, but because in his view it was not necessary under the procedure in Ashanti. Secondly, because the Court as constituted was not a competent Court. By s. 8 of the Ordinance, 1902 the Court was to be guided by the law in force in the Gold Coast Colony, and by s. 14 of the Supreme Court Ordinance that included the common law of England. Further, even if it was not practicable to have a jury, the Court was not authorised to try the appellant without one. In order to comply with ss. 8 and 9 of the Ordinance of 1902 the proper course was to refer the case to the Supreme Court of the Gold Coast for trial; there was express power to do so by s. 17 of the Ordinance of 1902.

At the conclusion of the argument their Lordships stated that they would humbly advise His Majesty that the appeal should be allowed, and that their reasons would be stated later.

1930. March 10. The report of their Lordships was delivered by VISCOUNT DUNEDIN. This appeal, for which special leave was granted by His Majesty in Council, is against a conviction of the appellant for the murder of his wife, Mrs. Knowles, by the acting Circuit Judge of Ashanti on November 23, 1928. The case was tried by the judge without a jury and the appellant was not allowed the assistance of either solicitor or counsel. The grounds of appeal are first, no jurisdiction, and second, that there was no evidence on which a conviction of murder could be maintained.

The Court of Ashanti by which the appellant was tried was established by

the Ashanti Administration Ordinance No. 1 of 1902. The sections of the Ordinance as amended by subsequent ordinances, which bear on the methods of trial in criminal cases are the following:

S. 8: "Where not otherwise provided by some other statute, ordinance, or other law for the time being in force Ashanti, the Court shall in causes and matters brought or arising before it guided by the law in force in the Gold Coast Colony as set forth in ss. 14-19 of the Supreme Court Ordinance of the said Colony."

S. 9: "So far as it is practicable and local circumstances permit, the procedure in the Court, civil and criminal shall be the same as the procedure in the Supreme Court of the Gold Coast Colony."

S. 10: "In no cause or matter, civil or criminal, shall the employment of a barrister or solicitor be allowed."

It is unnecessary to quote the various sections of the Acts which regulate procedure in the Gold Coast, as it is clear that if the trial had been in the Gold Coast, it would have been imperative to have a jury for a capital case and the prisoner would, if he chose, have had the assistance of counsel and solicitor.

The appellant therefore contends that a jury for a capital case was a *sine qua non*, and that a conviction by a judge sitting alone cannot stand.

The Attorney-General stated, and it was not denied by the appellant, that as a matter of fact there never has been hitherto trial by jury in Ashanti.

Now the direction that in Ashanti the criminal procedure of the Gold Coast shall be the guide is not absolute, but is qualified by the provisions of s. 9. If jury trial is not practicable, or not permitted by local circumstances, then the direction does not apply. Practicability and the state of local circumstances are questions which can only be determined in Ashanti on the spot. It is impossible for their Lordships of this Board to form a conclusion on such matters, and it is not for them to turn themselves into a local tribunal. They are of opinion that this is a matter to which the maxim "*Omnia praesumuntur rite et solenniteresse acta*" clearly applies, and they are therefore unable to sanction this ground of appeal.

Before dealing with the question of the evidence their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in *Dillet's* case (12 App.Cas. 459, 467), there must have been "Substantial and grave injustice . . . done." In the present case if it had turned out that it was against the law for a judge to try a capital case without a jury, that would have been substantial injustice, for it would have been conviction without jurisdiction, and it was on that ground that leave of appeal was manifestly granted. But the case having been brought up it is incumbent on their Lordships to examine the judgment as given. Even in this somewhat exceptional case, however, their Lordships are still not sitting as an ordinary criminal court of appeal in which case they would be entitled to consider what would have been their own verdict. Though the criterion is hardly as strict as it would have been on an application for leave based on the simple ground that the evidence did not support the verdict, yet they must be satisfied that there is something which, to use the words of Lord Sumner in *Ibrahim v. The King* ([1914] A.C. 599, 615) "deprives the accused of the substance of fair trial."

Now the facts of the case as proved are simple enough. The appellant and his wife were alone in their bedroom after luncheon. There had been guests

at luncheon, who had gone away shortly after 2 p.m. without anything noticeable having happened. Their native servants heard loud voices suggestive of quarrelling. The appellant and his wife it was proved lived generally on good and, indeed, affectionate terms, but had occasional quarrels which were greatly induced by the fact that both the appellant and his wife were addicted to the taking of too much liquor, and the appellant drugs, and were often in a drunken or semi-drunken and dazed condition.

The evidence as to the time is confused and contradictory, but somewhere between 4 and 5 p.m. the native servants heard a shot and a cry. They were frightened, and one of them ran off to the district commissioner, who had been one of the guests at the luncheon and said what he had heard. The district commissioner took his car and went off to the house of the accused, whom he saw, and asked if there had been an accident. The accused said it was all right. The district commissioner then went away. The native servant went back again later and two hours later the district commissioner wrote a note saying the native servants were very excited, and asking if he could be of any service. To this letter he got no reply. About the same time the native servant was called into the room and told to clean up a pool of blood. The accused said to his wife he would like to send her to the hospital. He then said he would go himself, and went. When he was gone the cook, by desire of Mrs. Knowles, lifted a revolver which was by the bed and put it into a box, locked it, and gave her the key. While clearing up the blood he picked up something which he did not recognise, but which was a revolver bullet.

That evening the accused got a sleeping draught containing morphia from the dispensary of the hospital. Next evening he got a repetition of the medicine and a hypodermic syringe with two ampoules of morphia. About 3 o'clock that day Dr. Gush, who lived at Kumasi, heard that something had happened and in consequence drove down to Bekwai, where the accused lived. He found the accused in a somewhat dazed condition and bearing signs of the results of alcohol and the drugs referred to. The accused volunteered the information that there had been "a domestic fracas," and showed him his left leg covered with bruises which he said had been inflicted by his wife with the Indian club. He also said that she had been nagging him and he had said if she didn't stop he would put a bullet in her. Dr. Gush asked to see Mrs. Knowles, and heard her say she would like to see him. He then went into the bedroom with the accused and examined the wounds, which he found had been treated with iodine by the accused—a proper, though in the circumstances scarcely a sufficient, treatment. The wound was such a wound as would be inflicted by a revolver bullet. It was in a peculiar direction. The bullet entered the left buttock and proceeded in an upward direction, and making its exit at the lower side of the abdomen on the right side, having, as was afterwards disclosed at a post-mortem, pierced the intestine, the bladder and the uterus. It was not bleeding directly when Dr. Gush saw it, but there was some blood coming from the vagina. He asked Mrs. Knowles how the accident happened and she said she had been examining her husband's revolver which had been recently cleaned by the police, that she had put the revolver down on a chair, and shortly after sat upon it, that she tried to remove it from underneath her, but the open-work sleeve of her dress caught in the trigger and the revolver went off.

Dr. Gush said she must go to the hospital but that had better have a bath first. He found the accused at the fire quite dazed. He went to fetch his car; on coming back he got the revolver from Mrs. Knowles, and found in it five cartridges and one empty shell. He noticed a hole in the mosquito net which covered the two beds.

Mrs. Knowles died the next day, but before she died she made a dying declaration. This was to the same effect as to what she had said to Dr. Gush with two small differences. She mentioned that the revolver had been cleaned, but did not say "by the police," and she said that before it happened the boy had come in with afternoon tea.

Other matters to be mentioned are that the mosquito net had several holes in it: that the accused said that on one occasion his wife had put a bullet past him while he was in bed; that another bullet was found by the police and certain marks on the furniture. Further, on October 22, the acting and assistant commissioner of police went to Bekwai and found the accused in bed lying in bloodstained sheets having on blood-stained pyjamas. He was weak and ill, but they considered him rational. They told him that they were going to detain him on a charge of causing grievous bodily harm and that a dying declaration was to be taken from his wife. He then made several remarks, namely: "I think she will roll up" (*i.e.*, die). "This is a bad business, I may go to prison." "If she rolls up I am afraid for it." He went with them to Kumasi, and in the assistant commissioner's bungalow, while the acting commissioner went for a warrant, he said, "I don't care what happens to me, I am worried about my wife," and then, "If my wife rolls up it means a murder case, and again, "If my wife rolls up I will be hung by the neck until I am dead."

Their Lordships must now examine the judgment. In the judgment of the circuit judge is to be found what to a jury would have been the summing up, and then the verdict. Now the judge examines at great length the possibilities to which bullet of the two bullets found, one of which had made dents in the furniture, was the bullet which caused the wound. Upon this question he comes to no certain conclusion, being oppressed by the difficulties as to either theory. In their Lordships' view this inquiry is quite by the mark. It is quite certain that the deceased was killed by a revolver bullet, and there being no certain evidence as to the position of the parties at the time, no conclusions can be drawn from the possible indicia as to the flight of the bullet. The judge next takes up the story of the deceased as given in the evidence of Dr. Gush, and as given in the wife's dying declaration, and along with it the story as given by the prisoner himself when he gave evidence at the time. That story, abbreviated, is as follows: That he had had a quarrel with his wife about nothing, which ended, that he then went to bed to sleep, that he saw his wife come in and start to undress and afterwards went to sleep, that there was a shot fired which woke him, and he heard his wife say she had been shot, that he jumped up and said, "Show me, show me" (this was a remark heard by one of the servants behind the door), that he plugged the wound and put her to bed, and she said, "People will think I have done this purposely," he replied she had only to lie quiet and he would take the blame. That he did not trouble about the district commissioner's note, as being a medical man himself he had done what was needful and that he did not want her disturbed. That afternoon he took drink and drugs, and to use his own words, "I had the fixed idea of protecting my wife, and didn't realise until later that my statements were dangerous. I had an idea fixed that I would take any punishment if I could save my wife."

As regards the revolver he said that he usually kept it under his pillow fitted in a holster; that on this occasion he took it out of the holster, cocked it and laid it on the book-case. The judge then examines these accounts and finds them unsatisfactory. He is particularly impressed by the statement of Mrs. Knowles as to the servant bringing tea, which was not true, and he saw

no reason for the appellant taking out the revolver and cocking it, and points out the discrepancy as to its place, the appellant saying it was on the book-case, while Mrs. Knowles said it was on the chair. He lays stress on the various remarks made by the appellant after the event, which he considers were not made, except as those on October 22 when in a dazed condition, He thinks it proved that there was a domestic fracas, and considers the remarks that he would put a bullet through his wife if she did not stop, very significant. He therefore comes to the conclusion that the wife's story was not true, and then he says, "Taken as above the evidence against the prisoner is overwhelming."

Now the learned judge was entitled to draw his own conclusions as to whether Mrs. Knowles's account was true, and their Lordships, not being, as above stated, an ordinary court of criminal appeal, would not consider themselves entitled to set that aside upon the ground that they would come to a different conclusion on the facts as found. Having come to the conclusion that the story of an accident could not be substantiated, and the position and direction of the wound excluded all idea of deliberate self-infliction, he was driven to the conclusion that the shot was fired by the appellant. That there was criminality in what happened is a necessary result of that conclusion. In a fit of drunken recklessness to fire a shot to silence a nagging woman, which shot the woman, even though the shot was not intended to hit her, is a crime. But the fatal flaw in the judgment is that having set aside Mrs. Knowles's account of the occurrence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry whether the standard of proof required to prove murder as against manslaughter has in this case been reached. If the case had been before a jury and the judge had not explained to them the possibility of a verdict of manslaughter, but had said if not accident the only alternative is murder, that would have been an erroneous summing-up. That is what is to be found in the judgment. The question as between manslaughter and murder is entirely undealt with, and their Lordships are therefore, as the learned judge failed to consider the question, bound to consider whether the evidence here reached the standard of proof necessary to involve a conviction for murder. They are clearly of opinion that it did not. A conviction for manslaughter might have been a different matter, but that is not before their Lordships. They have therefore humbly advised His Majesty to quash the conviction.

Solicitors: *Wynne-Baxter & Keeble; Burchells.*

SAKARIYAWO OSHODI

APPELLANT

AND

MORIAMO DAKOLO AND OTHERS

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1930) 9 N.L.R. 25

1930 July 24

Viscount Dunedin, Lords Tomlin
and Russell of Killowen

Privy Council case—Land tenure in Lagos Colony—Effect of Government grants—
Effect of contingent right of reversion.

In its original form this case came before the Divisional Court as an action under the Public Lands Acquisition Ordinance. Under the provisions of this ordinance it was expressed to be a suit, between the Administrator of the Colony on the one side and the present litigants on the other, for the purpose of determining to what persons compensation should be paid in respect of certain lands acquired by the Government for public purposes.

The appellants' family were the original settlers on the land in question but from time to time they gave plots of land to others, either slaves of the family or strangers who had sought the protection of the family. Many of these plot holders were subsequently confirmed in their holdings by Government grant. The respondents in this action are persons who derive their title from one such plot holder.

The land on which the respondents were occupiers was acquired by the Government and the question arose as to whether compensation was payable to the Oshodi family or to the occupiers most of whom were purchasers for value from persons deriving through the original plot holder.

The Divisional Court held that compensation was payable to the occupiers, and that the Oshodi family had so acquiesced in the alienation of the land that they now had no interest for which they should be compensated.

The Full Court in confirming this judgment held that the Oshodi family still had a contingent right of reversion. But that this being a mere future possibility which might never arise was too slight to be taken into consideration in assessing compensation.

Their Lordships of the Privy Council upheld the judgment of the Full Court, but held that as there was a contingent reversion in the appellant, however remote it might be as a possibility, it must be taken into account and assessed for compensation, no matter how minute such compensation might prove to be.

The judgment of the Judicial Committee of the Privy Council was delivered by VISCOUNT DUNEDIN. In May, 1927, the Governor of the Colony of Nigeria gave notice that he intended to acquire for public purposes a compound known as Alfa Iwo Court, situated at Epetedo, in Lagos. This he was empowered to do under the Public Lands Acquisition Ordinance. Following upon that, summonses were taken out to determine the persons to whom the compensation money, which was payable on the acquisition by the Government, should be paid. Alfa Iwo Court consists of a set of houses set round an internal Court, which forms the access to them. The claimants are, on the one hand, Oshodi, who is the head of the family and who claimed it as paramount chief; and on the other the various occupants of the houses. The general character of the title of natives to lands in Lagos was examined by the Board in the case of *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399. What was laid down in that case was that the cession of the territory of Lagos by the King of Lagos to the British Crown in 1861 did not affect the character of the private native rights. That case had to do with community lands held under the White Cap Chiefs; but the general principle was held to apply to other lands not held by White Cap Chiefs in the subsequent case of *Sumonu v. Disu Rapheal* [1927] A.C. 881, where this was expressly stated at page 884. In general terms what the law comes to is this. The paramount chief is owner of the lands, but he is not owner in the sense in which owner is understood in this country. He has no fee simple, but only a usufructuary title. He may have some individual lands which he occupies himself, but as regards other lands they are occupied for his household, *i.e.* before the abolition of slavery for his slaves. These various occupiers have the right to remain and to transmit their holdings to their offspring, but in the event of the family of an occupier failing and being extinct the chief has a right of reversion.

In the lower court each of the two parties, who for convenience sake were called plaintiff and defendants, the chief being plaintiff and the occupants

as a body the defendants, claimed the whole of the compensation money. The lower Court decided in favour of the defendants and awarded to them the whole money. On appeal the chief modified his attitude. He no longer claimed the whole, but he said he was entitled to a share. This claim he based on two separate grounds. First, he said he was entitled to the money so far as it represented the value of the courtyard, because he alleged that the courtyard did not, so to speak, fall within the title of the various houses. Secondly, he said that he was entitled to something in virtue of his right to reversion.

The Supreme Court of Nigeria decided against him. From that judgment appeal has been taken to His Majesty in Council, and before this Board the plaintiff has maintained the same attitude as he did before the Supreme Court.

Now, the respondents first of all defend the judgment in their favour by alleging that the plaintiff has not proved his position as paramount chief in so far as this compound is concerned. That, however, was not the view of either of the Courts below. The history of the land in question was carefully inquired into by the Trial Judge. He came to the conclusion that one Oshodi Tappa, coming back out of exile, was put into possession of twenty-one compounds, of which this is one, for him and his household. There has been considerable litigation as to others of the twenty-one compounds, and the Trial Judge sums up his conclusions thus: "I find that Chief Oshodi Tappa was the original 'owner' of the land, in the sense that he had the disposition and control of it, and such rights as he had have descended to the plaintiff." And the learned Judges of the Court of Appeal in their unanimous judgment say: "The right of the Oshodi family to control the land at Epetedo, where Alfa Iwo Court is situate, has been always recognised by these Courts." And they cited a variety of cases to that effect. Now, these are concurrent findings on what is really a question of fact, and though the conclusion as to fact may be based on inferences in law so as to prevent the rigid application of the rule as to concurrent findings, their Lordships will be slow indeed to disturb a finding which depends so much upon an appreciation of local circumstances and is arrived at by two Courts without any dissentient opinion.

One other matter here must be mentioned. A government grant of the lands in question was passed in favour of one Okilu. Now Okilu was the headman placed in charge by the Oshodi family of this particular compound. It was the custom to put a headman in charge of each of the compounds, and when Government grants came to be issued the headmen were encouraged to get a Government grant. It has, however, been decided, and their Lordships have no intention of interfering with this decision, that grants given in such circumstances were really only grants in trust, and indeed left the property exactly as it was. This is a peculiar result. In truth Government grants are in their form inconsistent with the whole idea of native rights. They point to a transition state, but it is for legislation and not for the Board to bring to an end such a peculiar state of affairs as regards title.

But the result in this case is not doubtful. It makes it impossible for the respondents either to improve their own position or detract from that of the plaintiff by pointing to the Government grant in favour of Okilu.

To turn now to the plaintiff's claim. Their Lordships have no hesitation in finding that his claim so far as put forward in respect of the courtyard is unfounded. The courtyard was never in the actual possession of the plaintiff. It was used in common by all the inhabitants of the houses and

must be considered as being held along with the houses as an undivided share.

But with regard to the right of reversion the matter seems otherwise. The learned Judges of the Court of Appeal seem to have clearly appreciated the situation.

They say: "The Oshodi family would appear to have some contingent right, and, if they can dispose of the property on the contingency arising, it must be presumed they can dispose of the land by letting it and charging rent." And then, after pointing out that the Oshodi family did not occupy and did not receive any rent, they go on as follows:

"The family possess no rights which they can at present exercise—they possess the right which they might exercise on some contingent even in the future. There can be no doubt that by Government acquisition this possible contingent right has been taken away. Is compensation payable for the loss of this contingent right? We do not think, following the principles laid down on *Tijani's* case, that compensation is payable for possible future rights, that is to say, rights which are in embryo and may never fertilise."

It is here that their Lordships are unable to agree. The possible contingent right is admitted, and the fact is found that by the taking of the land by the Government that contingent right is put for ever at an end. But the learned Judges think that the principles laid down in *Amodu Tijani's* case (*supra*) in this Court evaluate that contingent right at nil. Their Lordships can find no such pronouncement in *Tijani's* case. All that *Amodu Tijani's* case decided was that the compensation payable for lands held as community lands under White Cap Chiefs was not to be paid to the White Cap Chiefs as if they were giving them a fee simple right, but was to be given to them to be distributed among the usufructuary occupants whoever they were. It did not deal with rights of reversion. Their Lordships therefore are of opinion that some portion of the compensation money in this case should be allotted to the plaintiff in respect of his possible right of reversion, which is cut off for ever by the compulsory acquisition. He has not exercised any rights of eviction, if he had any such, in respect of any of the present occupants, and counsel for the plaintiff quite properly explained that he did not propose to ask anything in respect of such rights of eviction if they existed, as seems possible from the history of the various occupants given by the Trial Judge.

It is clear that the possible right of reversion on the failure of the family of any of the occupants, though not actually elusory, must be of small value. Their Lordships do not attempt by the settling of any fraction to evaluate it, because it will be much better done by the learned Judge on the spot. Their Lordships think that the case must go back in order that the Court below may allot such portion of the compensation money to the chief as represents in their view the value of the possible rights of reversion.

As the success before their Lordships has been divided, their Lordships think there should be no costs awarded, but the respondents must repay the twenty-five guineas which were awarded to them as costs by the Court of Appeal, if they have in fact been paid.

Their Lordships will humbly advise His Majesty accordingly.

OSUMANYAWA YAW EWUA

APPELLANT

AND

NANA SIR OFORI ATTA

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

(1930) 2 W.A.C.A. 11

1930 July 28

Viscount Dunedin, Lord Blanesburgh and Anglin C.J.

Stay of Proceedings in another Court—Reasons for application forming defence in proceedings sought to be stayed.

It is improper to stop a case pending in one court by raising a case in another court and craving by means of a declaration to make good what is really the defence in the original action simply by alleging that the institution of the original case is malicious.

VISCOUNT DUNEDIN. This is an appeal *ex parte* against the judgment of the Supreme Court of the Gold Coast, affirming a judgment of the Chief Justice of the same Colony which dismissed an action brought by the appellant against the respondent on the ground that there was no cause of action disclosed. The appellant is a native of the Colony and the respondent is President of the Native Tribunal of Akyem Abnakwa. The proceedings in the Native Tribunal are regulated by an ordinance entitled "The Native Administration Ordinance."

The respondent issued a summons against the appellant alleging that he had contravened Article 28 of the Ordinance by attempting to undermine the authority of the paramount chief. Nothing so far as appears has actually yet been done under that summons, but the appellant instead of appearing before the Tribunal and pleading that he had not contravened section 28, raised the present action in the Divisional Court, in which he craves a declaration that the issue of the summons was *ultra vires* and oppressive and asks for an injunction against the respondent from proceeding further with the case in the Native Court. After service of the summons the appellant applied for an interim injunction, and he put in an affidavit in which he merely repeated *ad longum* the charges made by the original writ. Before the hearing the appellant tendered another affidavit which again repeated in substance what he had said before, but added a fresh allegation that the respondent before the taking of the process in the native Court had threatened to and meant to invade the appellant's lands. The Chief Justice refused to receive this second affidavit and gave judgment against the appellant, holding that no cause of action was disclosed. His judgment was very much wrapped up in allusions to procedure and did not proceed on the simple ground which was open to him.

On appeal the appellant made no motion to amend his writ of summons. The learned Judges of the Court of Appeal dismissed the appeal, and Hall, J. explicitly said that he was content to assume that the second affidavit was before the Court.

On the hearing before this Board the appellant's counsel complained that he had never had the opportunity of really stating the case on which his writ of summons was based. As their Lordships were very unwilling that the case should be decided merely on a point of pleading they allowed him to put in a statement of claim. The statement put in merely reiterated what had been said, but it added one allegation in a clearer form than had been stated in

the second affidavit. It was as follows: "The defendant before the commencement of this action threatened, both directly to the plaintiff and to other members of the said stool of Assamangkese and threatens forcibly to enter and trespass on the plaintiff's lands as aforesaid and to occupy and possess them in violation of his ownership and occupation thereof, and this without any lawful warrant or authority." He also claimed damages.

Their Lordships think that the judgment of the Court below was right upon very simple grounds which, indeed, are the foundation of the judgment of the Court of Appeal. There is no question but that the complaint as to the violation of section 28 of the Native Ordinance is a relevant complaint, properly brought before the Native Court. The appellant can put in a defence and if judgment is against him he can appeal and he can also apply for transfer. That being so it is quite out of the question, viewing it as a civil proceeding, to stop the case by raising a case in another Court and craving by means of a declaration to make good what is really the defence in the original action simply by saying that the bringing of the case is malicious.

As to *ultra vires* there is a serious misuse of the term. What could be *ultra vires* was not the action of the respondent, but the clause of the ordinance, and that point, if to be taken, must be taken in the Native Court. On the other hand, viewing the matter as one of malicious prosecution, no action in a Court to claim damages could lie until there has been an acquittal in the first Court.

The allegation in article 5, however, raises a separate question. The action there alleged is an action independent of the other process, and lays no foundation for stopping that process. It might have been a good case if made out for an injunction against trespass and for damages, but the writ of summons cannot be held to include it, and no motion was made to amend the writ of summons.

Their Lordships do not see that the motion if made would necessarily have been granted, for it would have been really grafting a good new action on one that was intrinsically bad; but at any rate the motion was not made in the Court below, and cannot be entertained by their Lordships now.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal.

ABAKAH NTHAH (SUBSTITUTED FOR
ABAKAH KANGAH, DECEASED) APPELLANT
AND

ANGUAH BENNIEH (SUBSTITUTED FOR
KWEKU ACKAH, DECEASED) RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

(1930) 2 W.A.C.A.1

1930 Nov. 17 Viscount Dunedin, Lords Atkin and Russell of Killowen

Ownership of land—Jurisdiction of native tribunals—Decisions of such tribunals not to be unnecessarily disturbed.

(1) Decisions of native tribunals on matters relating to ownership of land held under native tenure (which by legislation are placed within the exclusive

original jurisdiction of native tribunals) which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong.

(2) It is irregular to extend the dispute so as to give the Commissioner on appeal original jurisdiction over land which had never been in dispute before the native tribunal.

LORD ATKIN. This is an appeal from the Full Court of the Gold Coast Colony in an action in which the present respondent, Chief of Bakanta, as plaintiff, sought to establish his right to certain land, described as Kampuni land against the defendant, the present appellant, the Chief of Ampani. The action was tried in the native tribunal, the court of the paramount chief of the district, who sat himself with his counsellors. The native tribunal gave judgment for the defendant: on appeal to the Provincial Commissioner the appeal was allowed and judgment given for the plaintiff, and on further appeal to the Full Court the decision of the Provincial Commissioner was affirmed. The area of the land in dispute was imperfectly defined in the summons, which states that the plaintiff claims "to establish title to Kampuni land which defendant had permission from plaintiff's predecessor Ercheni, and dwelt on the said land for farming purpose." The plaintiff, however, at the hearing defined the land in dispute by reference to an affidavit sworn by him in a previous suit in which the land was described as "in the neighbourhood of Ayanzil, bounded on one side by Amanzuli river, on another side by the Aibi river, on the other side by lands belonging to Chief Yanwah Ambbonsah of Amihere Blay Bukasu, and on the other side by Fia River." This description specifies ascertained rivers which form the boundaries on the south, east and west. By reference to the map it is seen that the land lies near the coast; the Amanzuli river, which forms the southern boundary, flows easterly parallel with the coast, leaving a strip of land between it and the coast, on which are situate the villages of Bakanta and Ayansini. The river then flows southward into the sea, and on the coast, east of the mouth of the river, is the defendant's village, Ampani. The strip of coast line between the river and the sea is, as to the part immediately west of the river mouth, the property of the plaintiff, and if his property projected northwards beyond the Amanzuli it would include part, at any rate, of the land claimed, including the village of Kampuni. The plaintiff's case was that the land in question was his ancestral land, and that the defendant was only in occupation of part of it, and of that by express permission of the plaintiff's predecessor in title, granted at defendant's request about fifteen years before suit. He called a witness who spoke to the interview. This story was not accepted by the native tribunal or by the Provincial Commissioner or the Full Court.

The defendant's case was that his ancestors originally owned the strip along the coast as well as the land north of it on the north side of the Amanzuli; that he had founded the village Kampani, and had exercised rights of ownership over it, levying tribute or rent from the natives, who had taken up portions of it for farming. The native tribunal, after a long hearing of witnesses, made an extensive personal survey of the land in dispute accompanied by the litigants, obtaining information from the natives by the way, and putting such further questions to the parties as they thought desirable. No complaint is made of the conduct of the tribunal, who seem to have impartially fined witnesses on either side whom they considered to have given false evidence. Both litigants were fully cross-examined by the Court. An objection was indeed made that the tribunal had improperly rejected the evidence of the plaintiff's witness to the licence as

hearsay, whereas he professed to have been present. It is only necessary to say that all the Courts have rejected this part of the plaintiff's case. It was not pressed before their Lordships, and the question as to the admissibility of the evidence has become immaterial.

In the result the Court delivered judgment for the defendant. They found that there was no substantial evidence of the permission under which the plaintiff alleged the defendant held. They attached importance to the fact that the neighbouring chiefs claimed to be forming boundary with the defendant, that the defendant had for twenty years cultivated cocoa on the land, but the plaintiff had not demanded any tribute from him, that the defendant had collected tribute from the farmers on the land up to the present time. They considered defendant's account of his ancestral title supported by the local terminology, which pointed to an original migration from Aitirainoo as alleged by the defendant, and also by an order from the then paramount chief to the defendant's grandfather to sacrifice his nephew to the Amanzuli river to induce the river, which had overflowed, to return to its proper channel. This order, the tribunal remarks, would not have been given unless the grandfather had been a chief. It is satisfactory to know that the preparations for the sacrifice appeased the river, and that it returned to its bank before the consummation.

By colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong, and their Lordships fail to find such proof in the present case. The Provincial Commissioner determined the case on the evidence before the trial Court and on further evidence taken in this Court. He also had a view of the land in question, but his survey was not as complete as that of the native tribunal. He also was accompanied for part of the journey by the litigants, and he records in his notes of his survey that both parties agreed that Kampuni lands extend down to the sea.

Relying on this agreement the Commissioner in his judgment defined Kampuni lands as extending from the sea coast northwards, and allowing the appeal, gave judgment that the lands as above described, belonged to the plaintiff.

Their Lordships cannot regard this extension of the boundaries in dispute as satisfactory. In view of the admission by the defendant, made definitely both in the native Court and before the Commissioner, that at the present time Bakanta and Ayansini belonged to the plaintiff, it seems probable that there has been some misunderstanding as to the admission; but in any case in view of the legislation referred to, it appears quite irregular to have extended the dispute so as to give the Commissioner on appeal, original jurisdiction over land which had never been in dispute before the native tribunal, and as to which there was no reason for interfering with their jurisdiction if the dispute had been raised before them. The unfortunate effect of this misunderstanding was that the Commissioner who relied for his decision upon his view of the effective occupation of the land in dispute, took into account the occupation of the littoral as to which the defendant made no claim. Their Lordships are far from saying that the admitted ownership of the littoral was not evidence which the tribunal was entitled to take into account in considering proof of title to the ownership of the bush land north of the river; but it should not have been treated as admitted

ownership and occupation of the land in dispute. The actual oral evidence before the Commissioner does not appear to have added anything of substantial value to what was given before the trial Court.

The Full Court were unable to find any reason for differing from the Commissioner's view as to the weight of effective occupation. They do not appear to have had their attention drawn to the extension of the area of dispute to which their Lordships have already referred. In the result there appears to have been no sufficient reason for disturbing the decision of the native tribunal, which should be restored. As there appear to be other possible claimants to this land it may be advisable to state the obvious proposition that this judgment only determines the rights between the plaintiff and the defendant.

Their Lordships will humbly advise His Majesty to allow the appeal and restore the judgment of the native tribunal, dated the 23rd October, 1923. The respondent must pay the costs of this appeal and of the appeals before the Provincial Commissioner and the Full Court.

ESHUGBAYI, ELEKO

APPELLANT

AND

OFFICER ADMINISTERING THE GOVERNMENT
OF NIGERIA AND ANOTHER

RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

[1931] A.C. 662

1931 Feb. 3, 5, 6, 9; Mar. 24

Lords Blanesburgh, Atkin and
Lancelot Sanderson

Nigeria—Powers of Governor—Deposed Chief—Deportation order—Habeas corpus—Duty of Court—Native custom—Barbarous custom—Deposed Chiefs Removal Ordinance (Laws of Nigeria, 1923, c. 78 as amended by Ord. 9 of 1925), s. 2.

The Governor of Nigeria, purporting to act under the Deposed Chiefs Removal Ordinance, ordered the appellant to leave a specified area, and upon his failing to comply ordered his deportation to another place in the Colony. The appellant applied to the Supreme Court of Nigeria for a writ of *habeas corpus*, contending (1) that he was not a native chief, (2) that he had not been deposed, (3) that there was no native law or custom which required him to leave the area, and that consequently the condition did not exist entitling the Governor to make the orders.

Held, that the powers of the Governor under the Ordinance were purely executive, and that it was the duty of the Court to investigate the question raised by the appellant's contentions and to come to a judicial decision thereon.

The Governor can make a deportation order under s. 2, sub-s. (2) of the Ordinance without previous proceedings before a magistrate.

A native custom which originally was barbarous, and therefore one to which a Court could not give effect, may have become recognised by the native community in a milder and acceptable form without losing its essential character of custom, but the Court cannot itself transform barbarous custom into a milder one.

Judgment of the Supreme Court Nigeria reversed.

APPEAL (No. 42 of 1930) from a judgment of the Full Court of the Supreme Court of Nigeria (March 3, 1930) affirming a judgment of Tew J. (May 9, 1929) whereby a motion by the appellant for a writ of *habeas corpus* was dismissed.

The appellant's motion had been remitted to the Supreme Court for hearing by an Order in Council made upon a previous appeal—namely, *Eshugbayi, Eleko v. Officer Administering the Government of Nigeria* ([1928] A.C. 459).

The proceedings related to two orders made by the first respondent on August 6 and 8, 1925, respectively under the Deposed Chiefs Removal Ordinance, 1917 (c. 78 of the Laws of Nigeria, 1923), as amended by Ordinance No. 9 of 1925.

The facts and the terms of the Ordinance as amended appear from the judgment of the Judicial Committee.

1931. Feb. 3, 5, 6, 9. *Sir Boyd Merriman K.C., Horace Douglas and Wells Palmer* for the appellant.

Hon. Sir Stafford Cripps S.-G. and S. E. Pocock for the respondent, the Officer Administering the Government and the District Officer of Oyo.

[Reference was made to *Rex v. Governor of Brixton* ([1916] 2 K.B. 742); *Secretary of State for Home Affairs v. O'Brien* ([1923] A.C. 603); *Barnardo v. Ford* ([1892] A.C. 326); *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399, 405, 406); *Adanji v. Hunvoo* ((1908) 1 N.L.R. 74) also to the Supreme Court Ordinance.]

March 24. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decision of the Full Court of the Supreme Court of Nigeria, which dismissed the appellant's appeal from the judgment of Tew J., discharging what by consent of the parties was deemed to be a rule *nisi* for a writ of *habeas corpus* addressed to the respondents.

The case has an unfortunate history. The appellant was ordered into custody on August 8, 1925, and though within a few hours he took every legal step to question the validity of his detention, the matter is still before the Courts, and, as will appear from this judgment, has still to be heard *ab initio* by the Supreme Court of the Colony. The case has already been before this Board on a refusal by one of the judges, affirmed by the Supreme Court, to hear an application for a rule *nisi* for *habeas corpus* on the ground that a similar application had already been heard and determined by another judge. The Board then decided that the well-established rule that applications in *habeas corpus* may be made to successive judges existed in Nigeria, and remitted the case to the Supreme Court. The early history of the applicant's abortive attempts to establish his right to liberty are narrated in the judgment of this Board delivered by Lord Hailsham on June 19, 1928 ([1928] A.C. 459), and need not be repeated. The application so remitted was originally made by notice of motion dated December 8, 1925. In pursuance of the Order in Council it came on for hearing before Tew J. on January 15, 1929, when it was agreed that the motion should be treated as if an order to show cause had been made. Their Lordships have recently had occasion to say in the case of *The Commissioner for Local Government, etc. v. Kaderbhai* (since reported [1931] A.C. 652) that in applications for such writs as *mandamus* and *habeas corpus* it is important that the proper procedure should be maintained, and that the actual rule or order asked for or made should be formulated. The rights of the parties are, however, not affected in any way in this case by the departure from strict form.

It is now necessary to state the nature of the appellant's complaint, and the circumstances in which it arose. He is the successor of Docemo, who was the ruling chief of Lagos in 1861, when he by treaty ceded Lagos to Her Majesty Queen Victoria. His precise position at the time of the order of which he complains in August, 1925, is in dispute: but it is plain that in 1901

the Governor of Lagos recognised him as head of the family of Docemo in succession to one Oyekan, and it is also plain that in 1920 the Governor of Lagos regarded him with less cordiality, and by announcement in the Nigeria Gazette intimated what would be in future the relation of the applicant to the Government.

In 1917 there was passed the Deposed Chiefs Removal Ordinance, which as amended in 1925 is so far as is material in the following terms:

" 1. This Ordinance may be cited as the Deposed Chiefs Removal Ordinance.

2. (1). When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor, whether such deposition or removal shall have been before or after the commencement of this Ordinance, the Governor may:

" (a) If native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office; or

" (b) If the Governor shall be satisfied that it is necessary for the establishment or maintenance of peace, order and good government in such area that the deposed chief or native shall leave such area or any part of Nigeria adjacent thereto,

by an order under his hand direct that such chief or native shall, within such time as shall be specified in the Order, leave the area over which he had exercised jurisdiction or influence and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor.

For the purposes of this section the following parts of Nigeria (and no others) shall be deemed to be adjacent to an area over which a deposed chief or native exercised jurisdiction or influence by virtue of his chieftaincy or office: (I) If the area is situated in the Colony: The Colony and the Provinces of Abeokuta, Ijebu and Ondo. (II) If the area is situated in one of the Provinces of Ilorin, Oyo, Abeokuta, Ijebu and Ondo: The Colony and all provinces next adjacent to the province in which the area is situated. (III) If the area is situated in any other province: All provinces next adjacent to the province in which the area is situated.

" (2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid, as directed by the Governor, or who having left such area or part of Nigeria shall return thereto without the consent of the Governor, shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such order direct.

" (3) An order of deportation under Sub-section (2) may be expressed to be in force for a time to be limited therein or for an unlimited time, and shall have the same force and effect as an order of deportation made under the Criminal Code."

By the Interpretation Ordinance, 1923, s. 3: " In every ordinance, unless, there be something repugnant in any subject or context, . . . (18) ' Chief '

or 'Native Chief' means any native whose authority and control is recognised by a native community."

On August 5, 1925, some of the members of the house of Docemo met together and purported to depose the applicant from his position as head of the house of Docemo, that they were the majority of the house of Docemo or entitled by native law and custom to depose the applicant, or that the meeting was valid, was and apparently is contested by the applicant and other members of his house, as appears by a letter of protest, dated August 14, 1925, purporting to record resolutions adopted at a meeting of 150 members of the house held on August 12. However, the validity of the proceeding does not appear to have been regarded as doubtful by the Government, for on August 6 the following announcement was made in the *Nigeria Gazette*:

"Lagos, Thursday, August 6, 1925.

It is hereby announced for general information that His Excellency the Officer Administering the Government has by the instrument set out below sanctioned the deposition of Eshugbayi from his position as head of the House of Docemo also known as the house of Docemo-Oyekan and has sanctioned his removal from the office of Eleko.

It is further notified that His Excellency the Officer Administering the Government by an order made under s. 2 of the Deposed Chiefs Removal Ordinance has ordered Eshugbayi to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the services of the Order upon him.

His Excellency the Officer Administering the Government has been pleased to direct that a compassionate allowance of 20s. a month be paid to Eshugbayi so long as he be of good behaviour.

T. S. A. THOMAS,

Acting Chief Secretary to the Government.

Chief Secretary's Office, Lagos.

WHEREAS By a notice dated December 8, 1920, and published in an Extraordinary Gazette dated December 8, 1920, His Excellency the Governor announced that as from December 1920, the Government of Nigeria had ceased to recognise Eshugbayi commonly known as 'Eleko,' as head of the house of Docemo or as holding any position which might entitle him to official recognition from the Government or any of its officers.

And whereas on August 5, 1925, a majority of the representative members of the families descended from Addo (hitherto commonly referred to as the house of Docemo or the house of Docemo-Oyekan) deposed Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and removed him from the office of Eleko;

And whereas His Excellency the Officer Administering the Government is satisfied that the persons who have so deposed Eshugbayi and removed him from the office of Eleko are the persons who by native law and custom are entitled so to depose the said Eshugbayi and to remove him from the office of Eleko;

Now therefore His Excellency the Officer Administering the Government hereby sanctions the deposition of Eshugbayi from his

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position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and his removal from the office of Eleko.
By His Excellency's Command,

J. DAVIDSON,
Acting Administrator.

Lagos, August 6, 1925."

On the same day, August 6, the Acting Governor made the order referred to in the above notice:

" WHEREAS Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his Office; AND whereas Native Law and Custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office:

Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of this Order and that he shall not return to any of the said areas without my consent.

Given under my hand August 6, 1925.

(Signed) F. M. BADDELEY,
Officer Administering the Government."

On August 8, as the order had not been obeyed, the Acting Governor made the order of deportation under which applicant is now detained:

" WHEREAS Eshugbayi, a native chief holding the office of ' Eleko ' in the Colony was by an Order made under my hand on August 6, 1925, ordered to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service upon him of the said order; And whereas the said Eshugbayi has refused or neglected to leave the said Colony and the Provinces of Abeokuta, Ijebu and Ondo.

Now therefore I do hereby order that the said Eshugbayi be deported forthwith to Oyo in the Province of Oyo.

Given under my hand and the seal of the Colony and Protectorate of Nigeria at Government House, Lagos, August 8, 1925.

(Signed) F. M. BADDELEY,
Officer Administering the Government."

The applicant contests the validity of both orders though the main attack is necessarily directed to the first. He says: (1) He was not a native chief, and did not hold an office. (2) He was not deposed or removed from his office, and the Governor's sanction was therefore irrelevant. (3) There was no native law and custom which required him, or any chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question. He says that these are three conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the Court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings.

These were in substance the contentions of the applicant's counsel on the hearing of the motion. Counsel for the Government maintained that the Court had no power to enter upon an investigation as to any of these points: The order of the Governor must be taken as equivalent to the order of a court of competent jurisdiction determining within its powers all matters necessary to give jurisdiction; the order was analogous in its independence of the Courts to a committal by the House of Commons for contempt; and in any case the election or deposition of chiefs was an Act of State not recognisable by the Courts.

On these contentions the learned judges in Nigeria have taken a variety of views. Tew J. held that with points (1) and (2) the Court could not deal. He referred to the definition of native chief, and thought it would be absurd for a Court to attempt to decide whether a person came within this definition. It was within the province of the executive alone to decide what measure of authority or control would be necessary to make a person a chief. The question of native law and custom, he thought, was cognisable by the Court and he proceeded at a further hearing to hear evidence and eventually he decided that the custom existed entitling the Governor to make the order of August 6. Their Lordships will revert to this finding. In the result he discharged the rule with costs as from the time the matter was remitted by the Privy Council. On appeal there was a division of opinion. Lloyd J. thought that by the ordinance the Governor, whether technically a court or not, was given power to decide whether the necessary conditions had been fulfilled, and he had so decided, and the Court could not now inquire whether that decision was right. He quite logically thought on this principle that the trial judge should not have investigated the question of native custom. Berkeley J. appears to have thought that the Court could determine at any rate the first two questions, for he proceeded to decide that the applicant was a chief and that he had been deposed. What his opinion was as to native custom does not appear from his judgment, for he does not refer to it. Petrides J. was of opinion that all the questions could be inquired into; but he was satisfied with Tew J.'s finding as to custom. The appeal was therefore in accordance with the judgment of the majority dismissed with costs.

Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in *habeas corpus*, and that it would be the duty of the Courts to investigate the issue of alien or not. The case of *Rex v. Governor of Brixton Prison* ([1916] 2 K.B. 742) turned first on the question whether the regulation under which the order was made was *ultra vires*, which was a question of law. It further turned on the question whether the Secretary of State was abusing the

powers given to him under the order by using them to deport a mere criminal, who it was suggested, was no danger to the State. The Court expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of Lord J. that, had the matter been in dispute, the Court would have had to decide. A suggestion was made by one of the learned judges that the order in this case was an act of State. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive direction to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.

Their Lordships, in view of the importance of the topic, have thought it necessary to call attention to these well-established principles. On the argument of this case they were relieved from a prolonged discussion of them, for the Solicitor-General, on behalf of the respondents, threw over the suggestion that the conditions were not cognisable by the Courts. He admitted that they were, but contended that on the inquiry by the Courts the evidence of the Governor was conclusive that the facts were as stated. Native chiefs were, he said, appointed and deposed by the Crown. Chieftaincy was either a title of dignity or an office, or it might be both. In either case the Crown gave and the Crown took away, and evidence by the representative of the Crown that he had either given or taken away was evidence which the Court was either bound to accept or ought to consider so strong that no other evidence could reasonably displace it. It was true, he said in substance, that the ordinance referred to deposition or removal from office by or with the sanction of the Governor; but those words amounted to the same thing. If to conciliate native prejudices or for other reasons the Government affected, to leave the right of appointment or removal to native custom, subject to the sanction of the Governor, that was mere diplomacy. In fact the Governor appointed and removed in every case, and when he said that he had done so, it was so.

It is obvious that contentions such as these may seriously affect the rights of natives in Nigeria. Their validity depends upon the powers of the Crown and the Governor and upon constitutional usage in Nigeria and possibly other African colonies, which have never been investigated in this case in the appropriate original tribunal, the courts of the Colony. Their Lordships have a difficulty in finding in the Letters Patent or the Instructions to the Governor any express authority given to the Governor to act on his own initiative as to the appointment or deposition of chiefs, and they see the necessity of reconciling the existence of the suggested powers with the rights of the native communities laid down by Lord Haldane in giving the judgment of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399). *Prima facie* deposition with the sanction of the Governor would appear to point to deposition by some authority other than the Governor which would only become effective when sanctioned by the Governor; in which case it would appear that a valid deposition by the appropriate authority would be necessary as well as the sanction by the approving authority. And this appears to be the view adopted by the Crown advisers in the Colony so far as one may judge from the affidavits filed by

them. It may be, however, that the contention made by the Solicitor-General before their Lordships, if adopted by the Crown advisers in the Colony, will on investigation by the Courts be found to be correct. It is only necessary for this Board to decide that it is the duty of the Courts to investigate the whole of the question of fact upon which statements made by the executive are by no means conclusive. In particular, their Lordships cannot accept the opinion that the Courts of Nigeria are incapable of deciding the question whether the authority or control of a native is recognised by a native community. Compared with many judiciable issues with which Courts of the Empire are from time to time faced, the question appears simple. The questions whether an office or a dignity exists, whether a person has been appointed to it or removed from it are all issues which the Courts will have to decide after hearing the relevant evidence tendered by either side.

It is necessary to include in the further hearing the question raised as to native custom. It seems obvious that it is difficult to ascertain whether there is a native custom applicable to a chief deposed without taking into consideration the manner of the deposition. Native custom may require the departure of a chief deposed according to native custom; but conceivably it may not apply to a chief alleged to be deposed, but in violation of native custom or deposed by some external power newly brought into existence and never contemplated by native custom. Since the trial judge thought that the fact of deposition was not cognisable by the Court the application of the native custom to the actual deposition in this case does not appear to have been investigated, and the whole question must be determined anew. An interesting question arose at the hearing as to the modification of an original customs to kill into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influence of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.

One of the contentions of the applicant their Lordships are able to determine. It was said that it was a condition precedent to the power of the Governor to make a deportation order that the native chief alleged to have disobeyed the withdrawal order should first have been charged and convicted before a magistrate. It was said that this was the construction of s. 18, sub-s. (9) (d), of the Criminal Code, and that s. 2, sub-s. (3), of the Deposed Chiefs Removal Ordinance provides that a deportation order is to have the same force and effect as an order of deportation under the Criminal Code. Whether the section in the Criminal Code has the suggested effect or not, their Lordships do not find it necessary to decide. Here the powers are expressly given by s. 2, sub-s. (2), of the Ordinance, and their Lordships entertain no doubt that the powers of deportation given to the Governor are executive powers quite independent of the question whether the native has committed a criminal offence. This contention of the applicant therefore fails.

The matter should be remitted to the Supreme Court to be heard on the motion of December 4, 1925.

Their Lordships think it desirable to indicate the procedure proper now to be adopted. The parties agreed when the case was formerly remitted that it should be heard as though a rule *nisi* had been granted. The rule should be drawn up, and in the circumstances it had better be dated as of January 15, 1929, the day when the agreement was made being the first day of the hearing, and it should be treated as though argument were directed forthwith. The affidavits to be recited as read will be the affidavits filed by the applicant up to August 29, 1928, not including the affidavits of the Crown and those filed by the applicant in reply.

The rule *nisi* will therefore take the following form:

Thursday, the 15th day of January, 1929.

IN THE SUPREME COURT OF NIGERIA

DIVISIONAL COURT NO. 2

Before His Honour Justice M. L. TEW,

Nigeria.

Upon reading the several affidavits of Eshugbayi, Eleko [and others, stating them]

It is ordered that this day, the 15th day of January 1929, be given to the Officer administering the Government of Nigeria and the District Officer of Oyo to show cause why a writ of *habeas corpus* should not issue directed to them to have the body of Eshugbayi, Eleko, immediately before this Court at Lagos to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in this behalf.

Upon the ground that:

1. The said Eshugbayi, Eleko, was not on August 6, 1925, or thereafter a native chief and did not hold any office.
2. That the said Eshugbayi, Eleko, had not on August 6, 1925, or thereafter been deposed or removed from any office.
3. That native law and custom did not require that the said Eshugbayi, Eleko, should leave any area over which he exercised influence by virtue of any office or at all.
4. That by reason of the premises the order under the hand of the Officer Administering the Government, dated the 6th day of August, 1925, and the order under the hand of the said officer and seal of the Colony and Protectorate of Nigeria dated the 8th day of August, 1925, concerning the said Eshugbayi, Eleko, are invalid.

Upon notice of the said order given to the said Officer Administering the Government and the said District Officer by their counsel this day.

Upon the motion of Mr. Wells Palmer.

The rule may be modified if necessary to adjust the former terminology and the applicant is to have liberty to modify or add to the grounds if so advised. Their Lordships gave no directions as to the judge by whom the rule is to be heard; this will be decided by the Supreme Court in accordance with its practice. The affidavits filed are to be treated as in evidence; the Court will give such directions as it thinks fit as to the production of other evidence, whether written or oral, and by cross-examination of deponents or otherwise. The oral evidence already given to the Court will not be available unless and to the extent that both parties consent. It was given originally when the issue as to deposition and the nature of it was not before the Court. On the argument of the rule counsel for the respondents to the

motion should show cause, and counsel for the applicant should then, if required reply in support of the rule.

In the result, therefore, the appeal should be allowed and the judgment of Tew J. of February 5, 1929, and May 9, 1929, and the judgment of the Full Court dated March 3, 1930, should be discharged, and the case remitted for hearing to the Supreme Court, in accordance with the directions given above, and their Lordships will humbly advise His Majesty accordingly. The respondents must pay to the applicant his costs of this appeal and of the appeal to the Full Court. The costs of the hearing before Tew J. will be reserved to the Court which re-hears the rule *nisi*, and, failing such re-hearing, to the Supreme Court.

SARKIS MADI APPELLANT
 AND
 MICHAEL ABDALLAH RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1932) 2 W.A.C.A. 18

1932 Feb. 19 Lords Blanesburgh, Tomlin and Sir George Lowndes

Contract—Consideration—Forgoing appeal.

On June 6, 1925, the respondent obtained in an action in the Supreme Court of the Gambia against the appellant a judgment for the sum of £7,920 9s. and costs and for an account to be taken of any moneys due from the appellant to him in respect of the estate of one Antoine Khoury (deceased) of which the appellant was administrator. The appellant being dissatisfied obtained conditional leave to appeal. Two days after the judgment the respondent sued out a writ of *feri facias* against the appellant in execution of the judgment, and a large quantity of groundnuts in the appellant's possession were seized by the Sheriff. Negotiations between the parties followed, as a result of which the Sheriff was withdrawn and a document was drawn up and signed by both parties. It was agreed that upon the appellant paying £3,500, assigning two sums of money due to him from two persons and executing a deed of transfer of the mortgage of a named property the respondent agreed to forgo and release his right and title and to abandon execution of the judgment and all benefits accruing therefrom.

Held: (1) that the document constituted an offer capable of acceptance within a reasonable time by fulfilment of the conditions mentioned in it, namely: payment to the respondent of £3,500 and assignment and transfer to him of the debts and mortgage, and that these conditions having been in fact fulfilled within a fortnight of the signing of the document, there was a valid contract constituted, binding the respondent and debarring him from proceeding in any respect upon his judgment.

(2) That it is impossible to treat the assignments and transfer as matters that have no relation to the judgment debt and to ignore them so far as that debt is concerned. The obligation of the respondent arose only upon fulfilment of all the conditions and upon such fulfilment there was an obligation on the respondent to release and abandon all his right and title under the judgment and not merely to release his judgment debt.

LORD TOMLIN. In the action instituted in the Supreme Court of the Colony of the Gambia, out of which this appeal arises, the appellant was sued by the respondent for a declaration that an agreement dated the 19th June, 1925, in so far as it affected the appellant's personal liability for the unpaid part of a judgment debt of £7,920 9s., was null and void and for a

further declaration that the appellant was still indebted to the respondent in the sum of £4,420 9s., the amount of such unpaid part.

On the 21st May, 1927, judgment was given in favour of the appellant, the action being dismissed with costs. On a counterclaim, with which this appeal is not concerned, the appellant succeeded.

An appeal was taken by the respondent against the judgment in the action, but not against the judgment on the counterclaim, to the West African Court of Appeal sitting at Sierra Leone.

On the 20th March, 1930, the Court of Appeal set aside the judgment of the Court below and judgment was entered for the respondent for the declarations sought.

On the 6th June, 1930, the appellant obtained leave to appeal to His Majesty in Council.

Both parties to the action are Syrians resident in the Colony of the Gambia, and the action was launched in the circumstances next detailed.

On the 6th June, 1925, the respondent obtained in an action in the Supreme Court of that Colony against the appellant a judgment for the sum of £7,920 9s. and costs and for an account to be taken of any moneys due from the appellant to him in respect of the estate of one Antoine Khoury (deceased), of which the appellant was administrator.

The appellant being dissatisfied with the judgment, obtained conditional leave to appeal.

Two days after the judgment the respondent sued out a writ of *fieri facias* against the appellant in execution of the judgment, and a large quantity of ground nuts in the appellant's possession was seized by the Sheriff.

Negotiations between the parties followed, as the result of which the Sheriff was withdrawn and a document, dated the 19th June, 1925, drawn up by a Mr. Roberts, the respondent's solicitor, was signed by the appellant and respondent.

This document, omitting formal parts, was in the following terms:

"Whereas there is now depending an action in the Supreme Court of the Colony of the Gambia at the suit of Michael Abdallah against Sarkis Madi in which said action judgment was on the 6th day of June, 1925, given against the said Sarkis Madi for the sum of £7,920 9s. and costs and by the said judgment it was ordered that an account be taken of the estate of Antoine Khoury (deceased). And whereas at the request of the said Sarkis Madi to the said Michael Abdallah it has been agreed that upon the said Sarkis Madi paying the said Michael Abdallah the sum of £3,500 and assigning the amount now due from Antoine Blain guaranteed by Palmeine Limited to the said Sarkis Madi as Administrator of the estate of the said Antoine Khoury (deceased) and assigning the amount now due from Mrs. Pierre Vallantine to the said Sarkis Madi as administrator of the estate of the said Antoine Khoury (deceased), and upon the said Sarkis Madi executing a deed of transfer of the mortgage of Gabriel N' Jie's property at Hagan Street to the said Michael Abdallah, the said Abdallah hereby agrees to forgo and hereby releases his right and title and to abandon execution of the said judgment and all benefits accruing therefrom."

After the document had been signed it was retained by Mr. Roberts on behalf of the respondent, apparently upon the footing that it was to be handed over to the appellant when he had complied with the conditions mentioned in the document.

There was some conflict of evidence as to what next occurred, but having

regard to the view which their Lordships take it is unnecessary to go into that matter, and it is enough to state the following facts, which are not in dispute.

On Saturday, the 20th June, 1925, the appellant and the respondent and two relatives of the appellant, namely, John Madi and Samuel Madi and others, met at Mr. Roberts' office. Mr. Roberts was offered and there was left with him (1) a cheque of John Madi's for £1,800, drawn in favour of Mr. Roberts, and certified by the bank as good for that amount; (2) a sum of £1,000, proceeds of a cheque drawn by Samuel Madi on his own banking account and (3) a promissory note of the appellant for £700.

On the same day Mr. Roberts signed and handed to the appellant a receipt in the following terms:

“ Received from Sarkis Madi the sum of £3,500 (Three thousand five hundred pounds) as follows:

Cheque No. 53/01584 for	£1,800	0	0
Notes, Currency	1,000	0	0
Promissory Note due 24.6.25	700	0	0

on account of claim of *Abdallah v. Madi*.

Dated 20th day of June, 1925.”

Mr. Roberts, however, did not hand over to the appellant the document of the 19th June, 1925.

On Monday, the 22nd June, 1925, the parties met again at Mr. Roberts' office, and the appellant, having borrowed £700 elsewhere, paid it to Mr. Roberts in satisfaction of his promissory note for that amount given to Mr. Roberts on the previous Saturday.

In the course of the next few days the appellant executed in favour of the respondent the assignments and transfer referred to in the document of the 19th June, 1925.

On the 20th June, 1925, the sum of £3,500 having been paid in the manner already mentioned and the assignments and transfer having been executed, Mr. Roberts handed over to the appellant the document of the 19th June, 1925.

The writ in this action was issued on the 11th May, 1926.

The statement of claim alleged that the respondent had withdrawn the Sheriff and agreed to accept £3,500 in full settlement of his debt on the faith of representations by the appellant, which were false, and the respondent contended that there had been no accord and satisfaction in law as regards the judgment debt, and that the document of the 19th June, 1925, was voidable on account of misrepresentation.

By the defence the appellant denied the charge of misrepresentation and alleged by an amendment made by leave at the trial after the evidence had been taken, that the terms of agreement between the parties (except a promise by the appellant to abandon the appeal) were embodied in the document of the 19th June, 1925.

The defence also contained a paragraph in the following terms:

“ In pursuance of the said last-mentioned agreement ” (*i.e.*, the one John Madi paid to the plaintiff on behalf of the defendant the sum of £1,800 0s. 0d. by means of a cheque drawn by the said John Madi on his (John Madi's) account with the Colonial Bank at Bathurst, the defendant on the same day paid to the plaintiff defendant's Promissory Notes for £700 0s. 0d., dated the 20th day of June, 1925, and payable on the 24th day of June, 1925. The said Cheque, Currency Notes and

Promissory Note respectively were paid to the plaintiff at the plaintiff's Solicitor's office in Bathurst aforesaid and they were accepted by the plaintiff as the due performance of the said Agreement and in full satisfaction and discharge of the said judgment debt of £7,920 9s. Od. and costs. The plaintiff then withdrew the Sheriff and the defendant abandoned his conditional leave to appeal from the said judgment or any portion thereof."

The learned trial Judge in his judgment said there were two issues, namely, (1) did the appellant make any misrepresentation to the respondent which induced the latter to sign the document of the 19th June, 1925, and (2) was there any consideration moving from the appellant to support that document and render it a valid contract?

On the first question the finding of the trial Judge was in favour of the appellant, and his finding in this respect was affirmed by the Court of Appeal, and no further appeal has been taken on this head of the case.

On the second question the learned Judge, in the course of his judgment, said this:

" I find as a fact, however, that the plaintiff and defendant entered into such agreement " (meaning thereby the document of the 19th June, 1925) " on the understanding that the latter would abandon his appeal, and that the plaintiff would not have accepted the £3,500 in full settlement of the judgment debt except on the footing that the plaintiff [sic] was giving up his right of appeal. The facts that he had taken steps to appeal, and had obtained conditional leave to do so, were perfectly well known to the plaintiff and his legal advisers all the time the negotiations leading up to the signing of the agreement were in progress. I simply do not believe any of them when they severally assert that the pending appeal, and its abandonment, were never once mentioned by the plaintiff [sic] during all the pleading, recrimination, haggling and threatening which precluded the final arrangement. The defendant is a clever man, and his right of appeal was his one trump card; I am very certain indeed that he did not omit to play it for all it was worth. Again, on the question of the Colonial Bank Cheque, No. 53/01584, for £1,800, Mr. Ladepon Thomas and Mr. Roberts have severally had to eat their original and very definite sworn statements and to admit, which they previously so strenuously denied, that the receipt itself (Ex. M.A. 3) is a true and not a false document, and that Cheque No. 53/01584, payable to Mr. Roberts himself " (meaning thereby the cheque for £1,800 provided by John Madi) " was entered and accepted in part payment of the £3,500 due under the agreement. This concludes the matter, at any rate so far as I am concerned. I hold that there was good consideration moving from the defendant to the plaintiff, which supports the latter's promise to forgo the balance of the judgment debt; and the claim therefore fails and must be dismissed with costs."

On the appeal the Chief Justice (in whose judgment the other Judges of the Court concurred) said:

" The grounds of appeal which were eventually argued before this Court were as follows:

1. To say that there was no misrepresentation is in conflict with the pleadings and even with the defendant's evidence.
2. That the Court below was wrong in admitting evidence

extrinsic to the agreement of the 19th June, 1925, and even if such evidence was rightly admitted, the said evidence does not show a good consideration moving from the defendant to the plaintiff."

After affirming the decision of the trial Judge on the issue of misrepresentation the learned Chief Justice held that the document of the 19th June, 1925, did not on the face of it show consideration moving from the appellant. His view was that the provision with reference to the assignment of debts and the transfer of a mortgage had nothing to do with the agreement as to the settlement of the personal debt, and for the purposes of the appeal under consideration could be disregarded, and therefore that the principle of the decision in *Cumber v. Wane*, 1 Strange 426, applied.

The Chief Justice further held that the evidence did not warrant the conclusion of the trial Judge that the appellant undertook to abandon his appeal, and in any case that the deficiency of the document of the 19th June, 1925, could not be supplied by parol evidence. The appeal was therefore allowed.

The appellant before their Lordship's Board contended:

First, that the document of the 19th June, 1925, on the face of it showed consideration sufficient to take the case out of the principle of *Cumber v. Wane* in as much as the release of the debt was only to be given as well upon the appellant assigning the debts and transferring the mortgage respectively mentioned in the documents as upon his paying £3,500.

Secondly, that upon the true construction of the document regarded in the light of the circumstances in which it was signed an obligation on the part of the appellant to abandon his appeal ought to be implied, and accordingly that there was sufficient consideration.

Thirdly, that the certified cheque for £1,800 produced by John Madi was given to the respondent, or alternatively that the amount of that cheque and the money provided by Samuel Madi was lent to the appellant by John Madi and Samuel Madi upon the faith of the respondent's promise to release the whole debt and that the principle of *Cumber v. Wane* had therefore no application. Their Lordships are of opinion that the document of the 19th June, 1925, constituted an offer capable of acceptance within a reasonable time by fulfilment of the conditions mentioned in the document, namely, payment to the respondent of £3,500 and assignment and transfer to him of the debts and mortgage, and that these conditions having been in fact fulfilled within a fortnight of the signing of the document, there was a valid contract constituted binding the respondent and debarring him from proceeding in any respect upon his judgment.

Their Lordships think that it is impossible to treat the assignments and transfer as matters that have no relation to the judgment debt and to ignore them so far as that debt is concerned. The obligation of the respondent arose only upon fulfilment of all the conditions and upon such fulfilment there was an obligation on the respondent to release and abandon all his right and title under the judgment, and not merely to release his judgment debt. Nor, in the absence of any allegation or evidence directed to the point, is it, in their Lordships' opinion, to be inferred that the appellant was an administrator guilty of any impropriety in entering into the arrangement.

This view of the matter renders it unnecessary for their Lordships to pass an opinion upon any of the other matters of law or fact debated before them and entitles the appellant to succeed.

This litigation has been proceeding for an unconscionable time, and their

Lordships have not been afforded any explanation of this fact. They cannot part with the case without calling attention once more to the importance of expedition in the administration of justice and the necessity for eliminating causes of delay.

The appeal must succeed. The order of the Appeal Court should be discharged and the judgment of the trial Judge should be restored, the respondent paying the costs here and below.

Their Lordships will humbly advise His Majesty accordingly.

KOBINA NINSON

APPELLANT

AND

ADJUAH ADUWAH

RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY]

(1932) 2 W.A.C.A. 14

1932 Feb. 19

Lords Blanesburgh, Tomlin and Sir George Lowndes

Damages for trespass—Recovery of possession—Plaintiff in ejectment action must prove title.

On May 11, 1927, the action came on for hearing before the Native Tribunal (composed of the Omahene or Paramount Chief of the District and his Councillors), and the tribunal, after an inspection of the lands, gave judgment for the plaintiff. The defendant appealed to the Provincial Commissioner and he, having heard parties and inspected the lands, treating the cause as one of ejectment, by his judgment dated July 30, 1927, allowed the appeal, reversed the judgment of the Native Tribunal and dismissed the action. On final appeal by the plaintiff to the Full Court, that Court by its judgment of April 15, 1929, restored the judgment of the Native Tribunal.

The following facts (as well as the foregoing summary) are taken from the opinion of the Lords of the Privy Council: The facts as admitted by the respondent, or found by the Provincial Commissioner, may be shortly stated as follows. For many years prior to 1918, the predecessor in interest of the respondent under a title which is in dispute between the parties, had been in occupation of and was working on the land, and the respondent herself and her sons were then in occupation and worked there. In 1918 one of the respondent's sons claimed to be owner of the land. Thereupon one Yaw Kyei, the appellant's predecessor in title asserting the property to belong to himself and his family, ordered the respondent's son off the land, took possession and retained such possession until his death. Neither the respondent nor her family then disputed Yaw Kyei's title to removing their effects which Yaw Kyei gave them leave to do. Indeed, so far from disputing Yaw Kyei's title, the respondent and her family as found by the Provincial Commissioner subsequently approached Yaw Kyei and a meeting was held at which they begged to be allowed to pay pacification money to Yaw Kyei, and offered an annual rent if they were allowed to re-enter the land. But, on the ground that the respondent's son had claimed ownership of the land, Yaw Kyei rejected the offers made and refused to allow the respondent or her sons to re-occupy. Until the present action, over nine years later, neither the respondent nor any of her family took any steps to recover the land, which has since been held first by Yaw Kyei and after his death by the appellant, and has been cultivated and developed by them as their own.

Held: The plaintiff in an action for ejectment must prove her own title. This she has failed to do and on this ground alone the action must fail.

LORD BLANESBURGH. In form the action out of which this appeal arises was one to recover £25 damages for trespass to the plaintiff's land. In truth

It was an action for the recovery of an area of property situate at Agona Abodom in the Central Province of the Gold Coast Colony and at time of action brought, and for over nine years before, in the possession of the defendant and his predecessor in title. Such difficulty as the case now presents seems due to the fact that the Native Tribunal before which it first came, as well as the Full Court of the Gold Coast Colony from which the present appeal is brought, regarded the claim as one of trespass to land of which the plaintiff was to be treated as being in possession and not as an action in ejectment against a defendant who, himself in possession, had put the plaintiff to proof of her title by his plea of not guilty. This misapprehension of the Native Tribunal was apparently due to its acceptance of an answer made in evidence on behalf of the defendant to one of its own questions to the effect that the land in suit had remained in possession of the plaintiff "until now." That answer is referred to in the judgment of which indeed it is the foundation. Yet, inconsistently enough the Tribunal by its order gave leave to the plaintiff "to take possession of the land in dispute as per her boundaries shown." The Provincial Commissioner, to whom an appeal was brought from the judgment of the Native Tribunal, corrected this mistake; but unfortunately the Full Court before which the case finally came reverted to the same answer and also based its judgment in favour of the plaintiff upon it. Their Lordships cannot but regard the result as unfortunate. The answer, if it be correctly transcribed, and upon this their Lordships feel grave doubt, must have been given *per incuriam*. For while there was a conflict upon the point whether the plaintiff and her son, Kofi Tawiah, had nine or more years before action peaceably delivered up possession of the lands to the predecessor of the defendant as true owner, there was no dispute that ever since the plaintiff and her son had been out of possession. Her grievance in evidence, indeed, was that she had not since been allowed with her two feet to enter the property in suit at all. And that this position was the true one is shown in every direction. Their Lordships, for instance, notice that in an affidavit sworn in support of an application for a stay of execution pending this appeal—an application which, on terms, was granted—the defendant says:

"6. That since the year 1918 when Kofi Tawiah, the son of Adjuah Aduwah plaintiff-respondent-appellant herein, was ejected by my elder brother Yaw Chey, the members of my family and I have been solely in occupation of the said land."

Their Lordships cannot doubt that it is on that footing that the respondent's case must stand or fall and it will be found that the final advice of the Board to His Majesty is based upon their Lordships' view that of the three Tribunals below the Provincial Commissioner alone correctly appreciated the true nature of the plaintiff's action and the extent of the burden thereby thrown upon her.

The actual proceedings in the Courts below were as follows: On the 11th May, 1927, the action came on for hearing before the Native Tribunal (composed of the Omanhene or Paramount Chief of the District and his Councillors), and that Tribunal, after an inspection of the lands, gave judgment for the plaintiff. The defendant appealed to the Provincial Commissioner and he, having heard parties and inspected the lands, treating the cause as one of ejectment, by his judgment dated the 30th July, 1927, allowed the appeal, reversed the judgment of the Native Tribunal, and dismissed the action. On final appeal by the plaintiff to the Full Court

of the Gold Coast Colony, that Court by its judgment of the 15th April, 1929, restored the judgment of the Native Tribunal.

The present is the defendant's appeal from that judgment. The facts, as admitted by the respondent, or found by the Provincial Commissioner, may be shortly stated as follows. For many years prior to 1918, the predecessor in interest of the respondent under a title which is in dispute between the parties, had been in occupation of and was working on the land, and the respondent herself and her sons were then in occupation and worked there. In 1918 one of the respondent's sons claimed to be owner of the land. Thereupon Yaw Kyei, the appellant's predecessor in title asserting the property to belong to himself and his family, ordered the respondent's son off the land, took possession and retained such possession until his death. Neither the respondent nor her family then disputed Yaw Kyei's title to removing their effects which Yaw Kyei gave them leave to do. Indeed, so far from disputing Yaw Kyei's title, the respondent and her family as found by the Provincial Commissioner subsequently approached Yaw Kyei and a meeting was held at which they begged to be allowed to pay pacification money to Yaw Kyei, and offered an annual rent if they were allowed to re-enter the land. But, on the ground that the respondent's son had claimed ownership of the land, Yaw Kyei rejected the offers made and refused to allow the respondent or her sons to re-occupy. Until the present action, over nine years later, neither the respondent nor any of her family took any steps to recover the land, which has since been held first by Yaw Kyei and after his death by the appellant, and has been cultivated and developed by them as their own.

These facts, not dealt with in any way by the Native Tribunal, are found by the Provincial Commissioner on the evidence to have been proved and to be true. The only answer by the respondent to the circumstantial story of the appellant's witnesses was that she was not present at any such meeting as they described, although the exclusion of her son from the land she admitted was known to her at the time. Her explanation of her delay in claiming the land was that she had herself been continuously ill for nine years, and that she could not herself induce any member of her family to take action. The learned Commissioner, and on the evidence their Lordships see no reason to doubt the correctness of his finding, rejected the first answer of the respondent as untrue, and the excuse for delay as inadequate.

The origin of the possession of the lands by the respondent and her family has not so far been dealt with. The fact that they were in possession for many years prior to 1918 was not in issue. But the respondent's case on this subject was that many years ago her ancestor Onyina settled the land in question, which was then forest, and that in course of time it descended to her uncle Kwesi Yamoah who gave it to her. The case for the appellant on the other hand was that many years ago his predecessor in title gave to Okomfu Amu, the respondent's grandmother, a portion of his family land to cultivate for the purposes of food only, the oil palms being retained by his predecessors: that Yaw Kyei, the appellant's immediate predecessor, saw Kofi Towiah, the respondent's son, on this land: that subsequently Kofi Towiah claimed the land as his own property: and that the meeting took place with the result already stated.

Now, whether the appellant's account of the respondent's original possession, or the respondent's own account is the correct one, may be doubtful if the substantive evidence in the case alone is regarded. The actual evidence on each side is vague and shadowy. It is, however, true to say that

the respondent's evidence is the less convincing of the two, and her inability to explain her admission of Yaw Kyei's title, nine years before action, and the peaceable possession by the appellant and his family ever since, facts found against the respondent, supply strong confirmation of the case put forward by him. In other words, this plaintiff in ejectment has entirely failed to prove her own title and on that ground alone her action must fail.

The Full Court, strangely enough, seem to have accepted the appellant's version of the history of the land in question, and gave judgment in favour of the respondent solely it would seem by reason of the admission in evidence as to the respondent's possession made on behalf of the appellant as already mentioned. In other words, they seem to have treated the action as an action of trespass by a Plaintiff in long possession or, at all events, as one in which the Plaintiff had never given up possession, and, instead of recognising had consistently disputed the appellant's or maintained her own title: as, in other words, an action commenced under the conditions of 1918, prior to the meeting of that year and not one under those of 1927. Whether, if the appellant's version of the history of the land be accepted, the Court was entitled to decide in favour of the respondent even if she was in possession of the land at the commencement of the action need not concern their Lordships, for at that date she was and for nine years had on her own showing been out of possession altogether.

Their Lordships regret that they have not had the advantage of any argument on behalf of the respondent. But they have been much assisted by Sir Brandford Griffith's impartial presentation of the case on behalf of the appellant. Moreover, they are entirely satisfied with the judgment and reasoning of the Provincial Commissioner.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the Full Court of the 15th April, 1929, be discharged, and the judgment of the Provincial Commissioner of the 30th July, 1927, restored.

The respondent must pay to the appellant his costs in the Full Court and the costs of this appeal.

NANA KWAKU AMOAH, SINCE DECEASED
(NOW REPRESENTED BY YAW EWUAH), AND ANOTHER . APPELLANTS
AND
NANA SIR OFORI ATTA RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1932 Nov. 21 Lords Tomlin, Thankerton and Sir Lancelot Sanderson

Arbitration—Setting aside.

The facts appear in the judgment.

LORD TOMLIN. This is an appeal from a judgment of the West African Court of Appeal, which dismissed an appeal from the Chief Justice of the Gold Coast Colony, who had refused an application to set aside an award in favour of the respondents made by Mr. Justice Hall of the Supreme Court of the Gold Coast, sitting as an arbitrator.

The facts which give rise to this appeal are of this nature: There is a province, or kingdom, in the Gold Coast Colony called Abuakwa. The rule

of that province who holds the title of Omanhene, and who occupies the throne or stool of that province, has under him some fourteen subordinate chiefs, the province being divided into fourteen divisions. Each of those chiefs is the Ohene of his particular division. Some of the divisions have, or, at any rate, one of them has, further sub-divisions, each of which is ruled in its turn by a still more subordinate chief, known as the Odikro.

One of the fourteen divisions of Abuakwa is Asamangkese, and Asamangkese has a sub-division known as Akwatia, and it is the Ohene of Asamangkese, and the Odikro of Akwatia who are the appellants before their Lordships, the respondent being the chief of the whole Province of Abuakwa, the Omanhene of Abuakwa.

The nature of the dispute between the parties which led to the arbitration is that the Omanhene, the respondent, claimed what may be called, for this purpose, by the neutral term of tribute from the appellants, and that that claim was disputed. The particular matter which made the question critical was that in recent years, after the discovery of gold and other minerals, and diamonds, in the territory, the appellants, from time to time, alienated part of the lands of their stools, to concessionnaires who desired to seek for minerals in the territory, and the respondent, as chief of the whole province, claimed a share in the proceeds of such alienation. Eventually a submission was framed upon which the award was made. The parties failed to present to the arbitrator specified issues for him to deal with; each of them put in a number of claims, and the arbitrator dealt with the matter on the basis of those claims. Such claims are all to be found in the Record at pages 6, 7 and 8. The parties also agreed as part of the submission, certain terms as to the procedure by which the arbitrator was to be governed, and those terms included a provision in these words:

"The arbitrator may, moreover, seek, obtain and act upon any information whatsoever in respect of the matters in difference between the parties thereto in relation to the said matters in dispute as he in his respective and unfettered judgment should think most advisable, and should deem best applicable to the nature and circumstances of the case, any rule of law relating to the tendering giving reception or rejection of evidence to the contrary notwithstanding. Provided always that if the arbitrator should at any time in his respective discretion so determine, the evidence to be given before him should be given upon oath or affirmation."

In fact, the evidence before the arbitrator consisted partly of documentary evidence, and partly of oral evidence, and the arbitrator in his award has stated that he regarded the documentary evidence as of more weight than the oral evidence for the purpose of determining the questions which were raised before him.

His award is a document of considerable length, and, in the course of it, he discusses all the material which was placed before him, and sums up his conclusions, which are to be found at page 85 of the Record. There are, in all, fourteen conclusions. The first three deal with the relations between the Stool of Abuakwa and the sub-stools of Asamangkese and Akwatia, and nothing turns on them. They are constitutional points on which no argument is raised before their Lordships. Conclusion 4 deals with the meaning of a phrase describing in part the relations between the rulers, and the arbitrator says that he has not enough material to enable him to come to a decision on its meaning. Then he holds in Conclusion 5: "That the assent of the paramount stool was not according to custom necessary for the valid

alienation of lands held by stools of Asamangkese and Akwatia." In Conclusion 6, which deals with an important matter, he holds:

" That the Paramount Stool was by the custom of Akyem Abuakwa entitled to receive one equal third part share of all rents and profits of lands alienated by the Stools of Asamangkese and Akwatia or either of them." That has to be read with Conclusion 14, where the arbitrator finds: " That the lands attached to the Stools of Ohene of Asamangkese and the Odikro of Akwatia have since the grant of the predecessor of the present Omanhene of Akyem Abuakwa never been so attached to the Stool of the Omanhene of Akyem Abuakwa as to give the Stool of the Omanhene of Akyem Abuakwa the rights of owner but have been so attached as to entitle the Stool of the Omanhene of Akyem Abuakwa to one-third share of ' what ever comes out of the said land.' "

Reading that Conclusion, and Conclusion 6 together, their Lordships take the view that the arbitrator has found that the Omanhene of Abuakwa is not, in the strict sense, the owner of the lands which are attached to the Stool of the Ohene of Asamangkese, or to that of the Odikro of Akwatia, but that he is entitled to a third share of whatever comes out of the lands attached to those stools, and that the phrase: " whatever comes out of the lands attached to those Stools " covers that which is referred to in Conclusion 6 by the words: " all rents and profits of lands alienated by the stools," and that these words mean that where the subordinate stools alienate out of the stool any part of the stool lands, either permanently by sale, or temporarily by lease, then what comes to the stool from that alienation by way of purchase money or rent is, in fact, part of what comes out of the land, and therefore has to bear its one-third contribution to the Omanhene of Abuakwa.

The grounds upon which their Lordships are asked to hold that this award ought to be set aside are four. It is said, first fo all, that there is an error in law on the face of the award, because the arbitrator is said to have held that there is no ownership in the Omanhene of Abuakwa in the lands attached to the stools of the subordinate chiefs, and that by the law of West Africa the tribute, or ebusa, payable to a head chief can only be paid, and is only exigible, in cases where the ownership of the land resides in the head chief, and that therefore there is, on the face of the award, an error in law on the part of the arbitrator. That is a matter upon which their Lordships would hesitate long before they differed from the courts below. Decisions of local courts familer with the laws and customs of the colony are naturally of great weight in any matter of that kind. The Courts below have come to the conclusion that there is no error in law on the face of the award, and their Lordships without some clear authority, would hesitate to differ; in fact, the passage to which their Lordships' attention has been called in the judgment in the *Impatassi* case, referred to in Mr. Casley Hayford's book, page 50, is a passage indicating that such a tribute as the arbitrator has found to be payable in this case is a tribute which may well be possible under the local law.

The second and third points made may be taken together. The second point was that there was no sufficient legal evidence to enable the arbitrator to find the custom which he has found. The third point was that even if there was a custom, there was no evidence upon which the arbitrator could find that it extended to the proceeds of sale of lands. Their Lordships' attention has been directed to the relevant parts of the Record upon this

part of the case, and the evidence is set out at great length in the award. The question must depend upon the evidence as set out in the award. The appellants must show that it is patent upon the face of the award that there was no evidence at all on which the arbitrator could have come to his conclusion.

In approaching these questions regard must be had to the terms of the submission in relation to evidence to which their Lordships have already called attention.

Their Lordships are satisfied that there was ample evidence to enable the learned arbitrator to come to the conclusion that there was a custom for payment of one-third of whatever came out of the land.

Further, having regard to the document which is referred to as document "C-1," and which appears on page 20 of the Record, in which the Omanhene of Abuakwa states what the custom was in these terms:

"It is the fashion and customary from beginning of this Akim Throne that whenever any of the Akims had to make a sale of any land or happened to obtain a rock of gold or any valuable metal from any part or parts of any land the party is bound by our rule to give up one-third of the said product to the stool, but nowadays the people are unwilling to do so as it is customary to be done,"

and having regard to other passages to which attention has been called, the arbitrator was in their Lordships' judgment justified in finding that the custom was wide enough to include the proceeds of land.

There remains only the fourth point, and that rests upon Conclusion 7 of the arbitrator which related to an account and which was: That the party of the first part was entitled to have an account of all lands by sale or demise alienated by the Stools of Asamangese and Akwatia or either of them since and from the period immediately antecedent to and after the date of a Petition of the Asamangese and Akwatia Stools to the Acting Governor, dated 7th October, 1921, for independence, but that he (the arbitrator) himself was unable to take such account in view of the lack of sufficient data.

It is said that inasmuch as the arbitrator has not seen fit to take an account of the proceeds of land sold he has left his award incomplete, that it is not final, that it is unenforceable, and that, therefore, it ought to be set aside.

It has to be borne in mind in connection with this matter that the parties never agreed in terms the points which were to be determined by the arbitrator. They put forward claims. One of the claims by the appellants was a claim to an account, but the arbitrator, in fact, does not appear ever to have called upon them to specify definitely the issues which he was to determine. Their Lordships are of opinion that the proper inference to be drawn from the material before them is that the parties did not invite the arbitrator himself to take the account, but were content that he should declare their right to it, and leave it in that position. It is difficult to see why, that being so, the parties are not entitled to enforce the award, or why the respondent should not go to the court showing that his title has been established by the award of the arbitrator, and asking, if there have been sales, that there may be an inquiry as to what sales have taken place, and an account of the proceeds of such sales. Their Lordships are of opinion that the fourth point also fails.

That being so, the appeal must fail, and their Lordships will accordingly humbly tender to His Majesty the advice that the appeal be dismissed. The costs must be paid by the appellants.

REX v. BASIL RANGER LAWRENCE

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1934) 11 N.L.R. 6

1933 July 20

Lords Atkin, Thankerton, Sir George Lowndes

Criminal trial—Judges direction to jury that accused entitled to benefit of reasonable doubt and that onus of proof on prosecution essential—Alteration of sentence in absence of accused—Shorthand notes of judge's direction referred to.

The accused was charged on an information containing sixteen counts involving charges of stealing and false accounting. The trial was by jury.

He was found guilty on certain charges and sentenced to three years' imprisonment. The jury were discharged and the Assizes closed.

The presiding Judge afterwards in Chambers on the application of the Solicitor-General and in the absence of the accused drew up and recorded an altered sentence.

From shorthand notes of the presiding Judge's summing up it appeared that the jury had not been directed that the onus of proof lay on the prosecution and that the accused must be given the benefit of any reasonable doubt; and that the presiding Judge's recollection to the contrary was mistaken.

Held, that the lack of these directions was fatal to the conviction.

Held further, that the lack of such directions by the presiding Judge could not be remedied by the fact that prosecuting counsel or counsel for the defence had referred to these essential points in addressing the jury.

Held also, that the presiding Judge had no jurisdiction to make the altered sentence in the circumstances.

Held further, that there had been such a disregard of the form of legal justice by which substantial and grave injustice had been done and that conviction and sentences should be set aside.

LORD ATKIN delivered the Reasons for the Report of the Lords of the Judicial Committee of the Privy Council.

After dealing with certain matters of fact in the case the Reasons proceeded as follows:

A more important objection is that throughout the Judge's charge he did not give the jury any direction at all as to the onus of proof, or that the accused was entitled to the benefit of a reasonable doubt. Their Lordships have no doubt that this was due to inadvertence, for when the learned Judge stated a case for the Full Court he states in it that though he has to rely on his memory he is able to say "that the jury were sufficiently instructed by me that the onus of proof rested on the prosecution and that the accused should be given the benefit of the doubt."

Unfortunately the learned Judge's memory failed him, for there is not a word of either topic in the shorthand record of the summing up which was adopted in the Full Court as accurate. Indeed so far as the charge dealt with the matter at all it seems to have suggested to the jury that the accused in two cases had the money, and that if he could not account for it the Crown had made out their case. The true direction would be that the onus was always on the Crown but that if the jury believed that the accused had the money, and were not satisfied that his reason for not accounting for it was true, there was evidence upon which they might if they chose to find him guilty of stealing. Before the Full Court the Crown has to fall back upon the contention that as the defence had laboured the question of onus and counsel for the prosecution had, while dealing with two of the counts, said

that the jury must give the accused the benefit of any reasonable doubt the defect in summing up was cured.

Their Lordships cannot accept this view in this case. It often happens that the issues have been so clearly stated and agreed to by counsel on both sides that the trial judge and a Court of Appeal is satisfied that the jury can have been under no misapprehension on the point of onus, and that further comment by the Judge is unnecessary. But, speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt; and it is essential that the tribunal of fact should understand this. Unless the Judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case unless it can be predicted that properly directed the jury must have returned the same verdict a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence; they look to the Judge for authoritative statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their minds the governing principle of our law as to onus of proof. Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that guilt of the accused was not established beyond a reasonable doubt.

But in addition to this vital defect in the procedure up to verdict there has to be considered the alteration and recording of the sentence in the absence of the accused. It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused, and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself, intended to make trial impossible, renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid. In the present case a double error has been made. In the first place the general sentence of three years' imprisonment is invalid, for it is applicable to each count, and for the offences charged in the counts for false accounting the maximum punishment is two years. If the matter rested here it would appear that upon case stated the Appeal Court under section 171 of the Criminal Procedure Ordinance, would have had power to reverse, affirm or amend the judgment. But unfortunately the learned Judge in Chambers in the absence of the accused and apparently at the request of the Solicitor-General varied the sentence on the record, by substituting on the record a sentence of one year's imprisonment on the third count and two years' imprisonment on the fourth count to run consecutively, and corresponding sentences on the remaining counts for false accounting and larceny all to run concurrently with the sentences on the counts 3 and 4 and with each other. The warrant of commitment recites this sentence as being that which

the Sheriff is directed to carry into execution according to law. This is the sentence which it was necessary to appeal against. Their Lordships cannot agree with the Appeal Court that it was merely an elaboration of a previous sentence. It was a new and different sentence passed in circumstances in which the Judge had no possible jurisdiction to pass any sentence even if, which is doubtful, in point of time his power to pass sentence at all still continued. There appears to have been no sentence at all which could be amended, and their Lordships find themselves in accord with the decision on this point of the Court of Criminal Appeal in *Rex v. Hales* ((1923) 17 Cr.App.R. 193) where a reserved sentence was passed in the absence of the accused convicted in a different county, and the Court quashed the conviction. But without finally deciding whether the case could have been remitted to the Appeal Court for sentence to be amended their Lordships are clearly of opinion that in the circumstances which they have detailed no such order should be made. In their opinion there has been disclosed, in the words of Lord Watson expressing the judgment of the Board *In re Dillet* 12 App.Cas. 459, "a disregard of the form of legal justice by which "substantial and grave injustice has been done," and they therefore, after the hearing, humbly advised His Majesty that the conviction and sentence should be set aside.

IDOWU INASA AND OTHERS * * * * * PLAINTIFFS
 AND
 CHIEF SAKARIYAWO OSHODI * * * * * DEFENDANT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1934) 11 N.L.R. 10; [1934] A.C. 99

1933 Nov. 8 Lords Blanesburgh, Russell of Killowen and Sir Lancelot Sanderson

Land tenure—Native Law and custom—Forfeiture—Breach of tenure by head of family involves whole family—Effect of Crown grants.

This suit was tried in the Divisional Court and the judgment of the Divisional Court for the defendant was upheld on appeal by the Full Court. The case up to that stage is fully reported in 10 N.L.R. 4.

The plaintiff appealed to the Judicial Committee of the Privy Council which dismissed the Appeal.

LORD BLANESBURGH. The action out of which this appeal arises was brought by the appellants in the Supreme Court of Nigeria to recover possession of certain rooms and holdings in Inasa House, Inasa Court, Epetedo, from which, as they allege, they had been forcibly and illegally evicted by the respondent chief. Before the trial Judge—Tew, J.—the action failed. An appeal to the Full Court was no more successful. From its order of dismissal of the 26th February, 1930, appeal has now been taken by the original plaintiffs to His Majesty in Council.

The relation in which the appellants stood to the respondent at the time of their eviction from Inasa House is traceable to a transaction in the year 1862, when an area of land at Epetedo was put by the Government of Lagos into the possession of Chief Oshodi Tappa for the occupation of his family, followers and slaves. Chief Oshodi Tappa was the father and predecessor of the respondent, upon whom his rights as chief have devolved.

Oshodi Tappa divided the area into twenty-one courts or compounds. Inasa Court was one of these. Alfa Iwo Court, the rights in which were considered by the Board in *Sakariyawo Oshodi v. Moriamo Dakolo* ([1930] A.C. 667), was another. The interests of the occupiers in each compound are in principle the same. A compound it seems normally consists of a set of houses round an internal court which forms the access to them. Oshodi Tappa placed a headman in charge of each court. Nassah, a head slave of his, was the headman put in charge of Inasa Court and the other persons assigned to that court were also slaves of Oshodi Tappa. Nassah duly parcelled out the compound among these slaves (including himself), each slave being allotted a portion for the exclusive occupation of himself and his family. Nassah is now dead. The appellants with Amodu, later to be mentioned, are his surviving children and grandchildren, and prior to the eviction of which they here complain they were it seems severally in occupation of separate rooms of the houses originally appropriated by Nassah to himself and his family.

In or about the year 1869 the Governor of Lagos issued Government grants in respect of each of the courts. The different headmen were encouraged to take these grants in their own names. The grant in respect of Inasa Court was dated the 5th May, 1869, and the name inserted in it was that of Nassah. It cannot be doubted that this act of Government was a source of misunderstanding, as each grant, on its face, purported to be a disposition in absolute terms in favour of the grantee. But it was at an early stage settled, although apparently not always accepted, that these grants were only grants in trust, and that they left the interests in the properties, whether those of the occupiers or those of the chief, exactly where they had been. The interests of the occupiers were defined in the following terms by Lord Dunedin, delivering the judgment of the Board in the case already cited: "These various occupiers have the right to remain and to transfer their holdings to their offspring, but in the event of the family of an occupier failing and being extinct the chief has a right of reversion."

Two further matters upon which the Board then pronounced may here be conveniently referred to. Their Lordships accepted as correct the view that the right of the Oshodi family and of the chief on its behalf to control the compounds at Epetedo had always, and rightly, been judicially recognised. They held, however, that the internal court in each compound did not remain, as had been contended by the chief, his property in possession. The court had never been in his actual possession. "It was used in common by all the inhabitants of the houses, and must be considered as being held along with the houses as an undivided share."

It is interesting, and for present purposes helpful, to ascertain what was the question in that case at issue before the Board, and then to note how it was resolved. The Governor of Nigeria had given notice of his intention to acquire for public purposes the Alfa Iwo Court Compound. The problem was to determine who the person were to whom the compensation moneys were to be paid. On the one hand, these moneys were claimed by the respondent Oshodi as paramount chief. On the other hand they were claimed by the various occupants of the houses cited as defendants. In the result their Lordships, after describing the position of the occupants in the terms already stated, held that the compensation must be distributed amongst them subject only to a reservation of some part of it to the chief in respect of his possible right of reversion which was cut off for ever by the compulsory acquisition. The judgment proceeds as follows:

"The plaintiff has not exercised any rights of eviction, if he had any

such, in respect of any of the present, occupants, and counsel for (him) quite properly explained that he did not propose to ask anything in respect of such rights of eviction if they existed, as seems possible, from the history of the various occupants given by the trial Judge.

It is clear that the possible right reversion on the failure of the family of any of the occupants though not actually elusory, must be of small value."

In the result, as has already been indicated, substantially all the compensation money for the land in question went to the occupiers.

Now it is with the chief's eviction rights which in the Alfa Iwo Court case were so lightly regarded that the present litigation is concerned. These rights, whatever they may be, depend entirely on local law and custom and in considering both their range and the question whether they can, to the full extent, be judicially recognised the judgment of the Board in the Alfa Iwo Court case in which the interests of the occupants in their respective holdings were described in terms very extensive must always be borne in mind. Their Lordships think it more than likely that some of the observations of the Full Court in this case would have been qualified had that court had the advantage enjoyed by their Lordships of considering the Board's authoritative exposition of the relative positions of the two parties in the judgment referred to, delivered, in fact, nearly six months later.

As will be seen, however, on the facts of this particular case, upon which there are concurrent findings in the courts below, their Lordships have no difficulty in adhering to the conclusion there actually arrived at.

The facts immediately antecedent to the dispute can now be shortly stated.

In 1918 Amodu (or Aworan) Inasa, already mentioned, the eldest son of Nassah, by this time deceased, purported by an indenture of the 15th November, duly registered in the register of deeds at Lagos, to sell and convey to one Alimotu Orifunke a portion of Inasa Court.

In 1925 chief Oshodi, the present respondent, instituted an action in the Supreme Court of Nigeria in which he sought a declaration that Amodu "has lost his right, title and interest under native law and custom to that piece of land which he now occupies as a descendant of a domestic at Inasa Compound at "Epetedo, Lagos, by selling and/or attempting to sell or otherwise dispose of a piece or parcel of land situate at Glover Street, which forms part of Inasa Compound."

This declaration was sought for on the view that by the relevant native law and custom an occupier in such a compound as Inasa may not sell or otherwise alienate the right of occupancy of any part of the land nor may he wrongfully assert any right inconsistent with those lawfully belonging to the chief, who is entitled as representing the Oshodi family to eject any occupier for breach of such rights and re-allot his holding to others.

Accepting these views as sound, so far as they covered the case before him, Tew, J., granted against Aworan Inasa the declaration craved. No appeal against that declaration was taken and it is relevant to note that its propriety has not since been questioned in these proceedings or at all.

Now Aworan Inasa was the only defendant to the action in which the above declaration was made. No other member of the family was party to the proceedings. The respondent however at once took up the position that the extinction of Aworan's interest in the compound by the decree against him carried with it the forfeiture of all right, title and interest in Inasa House of each and all of his relatives, and on the 21st January, 1926, five

days after the judgment of the court against Aworan, the respondent exhibited in Inasa Court a printed notice in the following terms: "Occupiers of rooms in Inasa House are hereby notified to remove within seven days of the date of this notice to save them being turned out unceremoniously."

A few days later the respondent, accompanied by several of the leading members of the Oshodi family, went to Inasa Court and evicted from their rooms in Inasa House such members of Aworan's family as had not already removed themselves therefrom in compliance with the respondent's notice.

The members of Aworan's family so evicted were brothers, sisters, nephews and nieces.

It has been found, and the position is now accepted, that the removal just referred to was effected without any unnecessary violence, and it was not until the 23rd June, 1928, two years and a half later, that the present action was commenced. Thereby, the appellants, the evicted relatives of Aworan, claimed (1) recovery of possession of their rooms and holdings at Inasa Court; (2) damages for unlawful and forcible ejection and (3) an account of all rents and profits since collected by the respondent therefrom.

The respondent's answer to claims (1) and (3)—claim (2) as has been seen was not pressed—was that the appellants by the native law and custom, as already stated had forfeited all their rights in their respective portions of Nassah's original allotment in Inasa Court. In support of that view, he adduced evidence to the effect that where a chief has ejected a domestic for misconduct he is entitled to eject his relatives also. It is left doubtful, on that evidence, whether the custom involves all relatives in this condemnation, irrespective of whether they approved of or encouraged the misconduct complained of, or were indifferent to it or ignorant of it, or even disapproved of it. The learned trial Judge, however, interprets the evidence as affecting only those relatives of the offender who sympathised with him and, in fact, he finds that the relatives of Aworan including the appellants had taken his side against his chief in a long standing dispute, the claim by the family, based doubtless on the terms of the grant to Nassah, being that the chief had no rights whatever in the Inasa Compound. In this finding, as their Lordships read its judgment, the Full Court agrees, and accepting it as a concurrent finding, as in a case of this kind their Lordships must, all difficulty disappears. When the chief's control over the compound is recalled, to say nothing of his reversionary interest therein, it cannot, they think, be held that a native custom so limited is repugnant to natural justice, equity and good conscience, so that judicial sanction to it must be withheld.

As at present advised, their Lordships, however, are not prepared, without further argument, to uphold any native custom in this matter going beyond that which has now been affirmed.

On one point their Lordships are in full agreement with both courts in Nigeria. In this case the respondent took the law into his own hands, putting forward no justification for his failure or omission to add the appellants as defendants in his original action against Aworan and to claim as against them the same declaration. Such procedure on the part of the respondent is to be deprecated, and it will be checked in future cases if it is made plain, it should be, that when a defendant takes the law into his own hands, a proceeds to eviction he will be required very strictly to justify his conduct when in any subsequent proceeding that conduct is called in question.

In the present case the respondent, on the facts found, has justified his claim and their Lordships will accordingly humbly advise His Majesty that this appeal be dismissed and with costs.

ABOTCHE KPONUGLO AND OTHERS APPELLANTS
AND
ADJA KODADJA RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1933) 2 W.A.C.A. 24

1933 Nov. 21 Lords Thankerton, Alness and Sir Lancelot Sanderson

Claim in trespass and injunction—Title to land in issue—Attitude of Appeal Court to opinion of credibility of witnesses.

Held: (1) The plaintiff's claim being one of damages for trespass, and for an injunction against further trespass, it follows that he has put his title in issue. His claim postulates that he is either the owner of the lands in question, or has had, prior to the trespass complained of, exclusive possession of it.

(2) It is trite law that not possessing the advantages of the Judge of first instance, a Court of Appeal should be chary of overruling his opinion on a pure question of credibility.

LORD ALNESS. This is an appeal by the defendants from a judgment of the West African Court of Appeal, dated 18th May, 1931, reversing a judgment of the learned Chief Justice of the Colony of the Gold Coast, dated 30th September, 1930.

The action with which the appeal is concerned was raised at the instance of the Head Chief of Tafi Atome, and was directed against the Head Chief of Djokpee and certain of his subjects. In his writ of summons the plaintiff claimed damages from the defendants for trespass, and an injunction restraining them from entering on certain lands, or in any wise interfering with the plaintiff's possession of them. The territory in dispute is designated as "Bunya land," and it is delineated by boundary lines marked R.E.H. upon a map (Exhibit B) in the West African Court of Appeal, these boundaries having been so initialled by Hall, Acting Chief Justice.

It is not in dispute between the parties that, in the year 1927, the appellants or their representatives cut down an *odum* tree within Bunya land, and that, accordingly if the title to that land is in the respondent, as he claims, a trespass was committed by the appellants.

The respondent's claim being one of damages for trespass, and for an injunction against further trespass, it follows that he has put his title in issue. His claim postulates, in their Lordships' opinion, that he is either the owner of Bunya land, or has had, prior to the trespass complained of, exclusive possession of it. The principal question to be decided in the appeal would accordingly seem to be—Has the respondent discharged the onus which rests upon him of demonstrating beyond reasonable doubt that the title to the disputed land is in him? The appellants say Nay; the respondent says—Aye.

The learned Chief Justice divided the evidence adduced by the respondent into two classes: (1) Traditional evidence as to how he became possessed of the land in dispute, and (2) evidence of use and occupation of the land. On the first of these topics the learned Judge held that the respondent's case, which was that the land was acquired by him by gift, failed, and that the appellant's case, which was that the land was theirs by conquest, succeeded. As regards the second topic, the learned Chief Justice held that no such use and occupation of the land by the respondent as would displace the title of the appellants had been proved. Indeed, so far as

possession is concerned, the learned Judge stated that the appellants, in his opinion, had the better case for a title by occupation.

In the Court of Appeal Gardiner Smith J., who delivered the judgment of the Court, expressed the view that the learned Chief Justice had paid excessive heed to tradition, and insufficient heed to what he termed the "existing facts." The Court of Appeal gave no considered opinion on the competing contentions of gift and conquest which had been so fully canvassed in the Court below. They based their judgment, reversing that of the Chief Justice, and finding in favour of the respondent, mainly upon the contents of certain German maps, and, to a lesser extent, upon evidence of possession by the respective parties of the land in question. The Court of Appeal also dealt at length with certain evidence relating to an arbitration said by the respondent to have been entered into between him and the appellants, in virtue of which their competing claims to Bunya land were submitted to and decided in favour of the respondent by the Chief Delame V of Vey. While the Court of Appeal dealt with this evidence, they were careful to state that they completely disregarded, in reaching the conclusion which they did, the evidence relating to the arbitration in question.

In their Lordships' opinion, the first question logically and chronologically, to consider in the appeal is the traditional evidence regarding the acquisition of a title to the disputed territory. Behind that question lies another, viz.: What weight is to be attached to that evidence? On the first question, the learned Chief Justice, who had the advantage of seeing and hearing the witnesses, held, as their Lordships have already pointed out, not only that the respondent's case of gift failed, but that the appellants' case of conquest succeeded. The learned Chief Justice, after a careful analysis of the evidence on this topic tendered by the respondent, refused to accept it. On the other hand, he held that the evidence tendered by the appellants was reasonable and consonant with the facts as he found them. The Court of Appeal, while minimising the weight to be attached to such evidence, did not suggest that the learned Chief Justice was wrong in the conclusion which he reached on the evidence, and their Lordships see no reason for thinking that the decision of the learned Chief Justice on the evidence adduced was other than sound. On the question of the weight to be attached to evidence of tradition, their Lordships do not differ from the carefully expressed view of the learned Chief Justice at p. 62, line 29, of the Record regarding the function of traditional evidence in such an inquiry as this. Such evidence, in their Lordships' opinion, falls to be considered and weighed, *quantum valeat*, along with the other evidence in the case.

As, however, the Court of Appeal in effect based its judgment upon certain German maps, it is appropriate *in limine* to advert to them, and to their implications. There are two German maps, the one map marked Exhibit C, and the map marked Exhibit A. The first question which arises is whether these maps, or either of them fall within the provision of Schedule I, Order 6, Rule 14 of the Rules of the Supreme Court. The rule is in these terms: "All maps made under the authority of any Government, or of any public municipal body, and not made for the purpose of any litigated question, shall *prima facie* be deemed to be correct, and shall be admitted in evidence without further proof."

Now, Exhibit A, on which chief reliance was placed by the respondent, purports to have been issued by the German Colonial Office. It was tendered in evidence in the Court of Appeal, and, to say the least, it was not objected to by the appellants. Whether in these circumstances they can now be heard to demur to the Board considering the map may be doubtful

Whether the map may be regarded as falling within the description "made under the authority of any Government"—in this case the German Government—may also be doubtful. Their Lordships do not find it necessary, however, for the purposes of this appeal to determine either of these questions.

For, assuming, while not affirming that the map falls under the Rule, it must be remembered that it only enjoys a presumption of correctness, which may be rebutted by other evidence. Their Lordships are of opinion that, on the assumption stated, there are considerations which neutralise, if they do not outweigh, the benefit conferred upon the map by the Rule. Their Lordships note that the map is on a very small scale: that it is, and must in the circumstances be, doubtful whether it was intended to be used for the purpose for which the respondent seeks to use it; viz., to set out accurately tribal boundaries: and that, moreover, it has been shown to contain inaccuracies, which were pointed out in argument. In short, the map is of such a character that it would not be safe to draw an inference from it regarding the tribal boundaries now in dispute. In these circumstances their Lordships are unable to agree with the Court of Appeal that "if the evidence of the maps is accepted, the title is in the appellant." Their Lordships think that the Court of Appeal attached undue importance to the maps, and that their legal effect has been much exaggerated. They are unable to hold that in the circumstances the maps neutralise the traditional evidence, which is in favour of the appellants.

The Court of Appeal considered with somewhat meticulous care the evidence relating to the award said to have been made by Delame in an arbitration between the parties. The learned Chief Justice excluded evidence regarding the terms of the award when it was tendered by the most appropriate, if not the only appropriate witness, namely, Delame himself. This exclusion, their Lordships think, was unfortunate. They are of opinion that *quantum valeat* Delame should have been allowed to state what his award was. It is, however, enough for the purposes of this appeal to say that there is weighty evidence, which their Lordships are prepared to accept, to the effect that the appellants resiled from the arbitration proceedings before the award was issued. Moreover, it is proved that, though the respondent's evidence is that Delame cut a line as a boundary, when the respondent's surveyor inspected the land, no objective trace of a boundary could be discovered. His evidence is that he found no boundaries. How in these circumstances the so-called award can be of any value in determining the problem before their Lordships they are unable to apprehend. It is not perhaps surprising that, in the circumstances stated, the Court of Appeal abstained in their judgment from treating the award as even an ingredient in the conclusion which they reached.

The Court of Appeal next considered the evidence of "existing facts," and their bearing on the issue between the parties. The first of these facts relates to certain farms said to have been cultivated in Bunya land by the respondent. Now, in the first place, it must be remembered, as the learned Chief Justice points out, that these are not farms in the sense in which the word is understood in England. They are merely small patches of land which yield a catch crop. Their Lordships are unable to hold that, assuming that these small pieces of land were cultivated by the respondent, that fact yields an inference that the whole of Bunya land, in which they are situated, and which was stated by Counsel to measure $1\frac{1}{4}$ miles in length by half a mile in breadth, must also and in consequence be deemed to be in the exclusive ownership or possession of the respondent. Their Lordships

cannot agree with the Court of Appeal in thinking that the evidence of farming in part of Bunya is evidence of title to the whole land.

Next, the respondent relied on the evidence relating to certain roads in or near the disputed area. The Court of Appeal, because one of those roads is not to be found on a small-scale map, held despite evidence to the contrary, that there was no road there. This conclusion appears to be unwarrantable. In any event, their Lordships are unable to apprehend how these roads in themselves can yield any independent inference of possession—far less exclusive possession by the respondent. After all, these so-called roads are mere paths, and there is no evidence that they were used in face of a challenge of right to do so. If, as would appear to be the case, the roads are founded on as leading to the respondent's farms, the inference to be drawn from that fact seems to their Lordships to be negligible.

As regards the evidence relating to fish traps on the Bunya river on which the respondent founded, it seems plain that these fish traps, which were connected with the farms already mentioned, were movable in their character, and that, again, any inference drawn from their existence and position must be of but small importance.

As regards the evidence of timbering, counsel for the respondent described it as a "dead heat." In these circumstances, their Lordships consider themselves absolved from reviewing the evidence relating to that matter in detail.

The evidence relating to fetishes was treated lightly by the Chief Justice, and was treated in the Court of Appeal as irrelevant.

Certain evidence was tendered by the respondent from neighbours of his on the subject of boundaries regarding which it is probably enough to say that the learned Chief Justice refused to accept it as worthy of credence. Indeed, the evidence of the respondent regarding boundaries generally consists of mere association—which is not helpful, and the red lines relied on do not reproduce any physical features which can be found upon the land in dispute.

Finally, the respondent founded on the evidence relating to what was termed the "Mahoon incident." It was argued for the respondent that he had proved that certain members of the appellants' tribe were fined by Mahoon for hunting, and so trespassing, on Bunya land. The respondent's counsel contended that it was a significant fact that, while substantive evidence was given by him to the effect that the first defendant was one of the hunters who was fined by Mahoon, that defendant did not, though he was present in Court, enter the witness box to deny the charge. The comment of the respondent's counsel is *prima facie* just and forcible, and no convincing explanation of the fact defendant's failure to give evidence to the contrary was forthcoming. But their Lordships think it is enough to say regarding the Mahoon incident that the Judge of first instance, who saw and heard the witnesses, and observed their demeanour, did not accept as truth the evidence given on behalf of the respondent regarding this matter. That evidence was given—so he says—"in a parrot-like fashion." Now, while even on questions of fact and credibility, a Court of Appeal must not abdicate its functions, it is nevertheless trite law that, not possessing the advantages of the Judge of first instance, a Court of Appeal should be chary of overruling his opinion on a pure question of credibility. In their Lordships' opinion, no reason for altering the conclusion of the learned Chief Justice on this matter was adduced by the respondent in argument. Their Lordships cannot in these circumstances regard the Mahoon incident as established.

The evidence regarding possession would seem to be, in point of fact, neutral. Both parties can lay claim to certain acts of possession within the disputed territory; many of which were, as the learned Chief Justice says, fleeting in their character. But what seems quite clear—and it is decisive, in their Lordships' view, of this part of the case—is that the respondent has failed to prove exclusive possession by him such as is necessary to instruct a title to claim the remedy which he seeks. Nor must it be forgotten that, in regard to possession, as in regard to tradition, the attitude of the learned Chief Justice to much of the respondent's evidence is one of incredulity, and that, commenting on the demeanour of the witnesses, he regards the respondent's case on this topic as honeycombed with false and even manufactured evidence.

In the circumstances stated, their Lordships are of opinion that the respondent has failed to discharge the onus of establishing beyond reasonable doubt that the title to the disputed area *i.e.* Bunya land, is his, either by gift or by exclusive possession. They are also of opinion that the respondent has failed to prove that the Delame award is binding on the appellants. That being so, the respondent's action for damages, and for an injunction, which postulates a title in him to the land, fails in fact and in law. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal should be set aside, and that the judgment of the Chief Justice should be restored, the appellants to have the costs of this appeal, and their costs in the Court of Appeal.

OMAHENE KOBINA FOLI APPELLANT
AND
CHIEF OBENG AKESSE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1934) 2 W.A.C.A. 46

1934 Feb. 26

Lord Thankerton, Sir Lancelot Sanderson
and Sir Sidney Rowlatt

Arbitration—Setting aside an award—Grounds for—Ownership of land—Possession.

The arbitrator who was appointed by the Court had made an award laying down a new boundary line between the parties, not as a matter of existing title, but as a fair demarcation of boundary as between the parties.

Held: (1) that the arbitrator had misconceived his duty under the reference, in respect that by his award he had laid down a new boundary line, based on consideration of what would be a fair division of the disputed area between the parties. The award should be set aside on the ground that the arbitrator acted *ultra fines compromissi*.

(2) In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. Alternatively, the occupation of a portion may be attributed to a right of ownership in a large area, as for instance, occupation of a portion of a field may be attributed to a right extending over the whole field.

LORD THANKERTON. This is an appeal from a judgment and order of the West African Court of Appeal (Reported in 1 W.A.C.A. 1) dated the 12th

May 1930, dismissing a motion by the present appellant to set aside an award dated the 31st January, 1930, delivered by a Judge of the Supreme Court of the Gold Coast Colony, as arbitrator on a reference ordered by the Full Court of the Supreme Court, sitting as the Appeal Court from the Chief Commissioner's Court of Ashanti, on an appeal from a judgment of the Circuit Judge of Ashanti, dated the 9th May, 1923, in an action in which the present appellant was plaintiff and the respondent and Odikro Asante, since deceased, were defendants.

The appellant not only challenges the award on certain grounds, but also challenges the validity of the order of reference by the Full Court of the Supreme Court, and it is therefore necessary to refer to the proceedings in the action prior to the order of reference.

On the 11th August, 1922, the appellant, who is Omanhene of Adansi in Ashanti, on behalf of this Stool, issued a writ of summons in the Chief Commissioner's Court of Ashanti against Asanti, the Odikro of Edubiase, now deceased, and the respondent, Obeng Akesse, the Chief of Okyereso, who were both under the Omanhene of Akim-Abuakwa, in the Eastern Province of the Gold Coast Colony. The appellant claimed £500 damages against both defendants jointly and severally for certain alleged acts of trespass and he also asked for a declaration as to the boundary between Adansi and Akim.

At the material portion of its course the River Prah forms the political and territorial frontier between Ashanti and the Gold Coast Colony and has a southerly course. The learned Trial Judge describes the questions in issue before him as follows:

"The plaintiff alleged that the first defendant sold a stretch of the river Prah between Ahudwi and Sumuoso, collected tribute at Ahudwi and Nyamibekyere on the right bank of the Prah, and destroyed a fishing weir erected by Akesse, plaintiff's vassal, in the Prah at Sumuoso, and that the second defendant aided and abetted the first defendant in these acts. The plaintiff further alleged that these acts constituted a trespass on the territory of Adansi, and claimed £500 damages against both the defendants jointly and severally. He also asked the Court to declare that the left bank of the Prah, from the Anum to the Offin, was the boundary between Adansi and Akim, and that the river and its right bank belonged to Adansi. The first defendant explained that he did not sell, but only mortgaged the river. Subject to this correction, both the defendants admitted the acts complained of, but said that the river Prah between the Numez (or thereabouts) and Ahudwi, together with a semi-circular tract of land on the right bank, were under Akim-Abuakwa, that the erection of the fishing weir constituted a trespass, and that the acts complained of were lawful and justified. Both the defendants, therefore, pleaded that they were not guilty of trespass, and not liable in damages."

After trial, the learned Circuit Judge issued a judgment, dated the 9th May, 1923, in which he found that, under a grant from the King of Ashanti, the plaintiff's title extended to the Prah and negatived the claim of the defendants to a title to any land on the right or west bank of the Prah; he further stated that he was not satisfied that the ownership of the river was vested in the plaintiff, so as to exclude, if he chose, the defendants from fishing in it, and he therefore found that no other party had proved its claim to the entire water rights; he rejected the claim for damages on account of the sale or mortgage of the river, but he held that the collection of tribute

within the plaintiff's territory and the destruction of the weir were tortious acts and awarded the plaintiff nominal damages of £50. Finally, the learned Judge stated, "I make no declaration that the left bank of the Prah is the boundary of Adansi, and I have not sufficient information—nor, in view of my other findings, do I think it necessary—to make any declaration as to the extent of land owned by plaintiff (apart from the land in dispute)."

On the 12th November, 1927, the defendants obtained leave to appeal to the Supreme Court of the Gold Coast Colony in terms of section 18 of the Ashanti Administration Ordinance (No. 1 of 1902, in the 1920 Revision). The defendant Odikro Asante had died, but it was agreed that the action should proceed against the other defendant. The appeal came on before a Full Court at Accra on the 14th March, 1929, and the Court was of opinion that the true issue between the parties, *viz.*, whether the river Prah was the boundary between the parties or not, could not be satisfactorily determined on the evidence and findings before them, and that a survey was necessary to show exactly the area in dispute. Accordingly, by consent of counsel for both parties, a consent order was made on the 18th March, 1929, (a) setting aside the judgment appealed from, (b) ordering a survey of the disputed area to be made by an officer in the Survey Department, and (c) providing, on completion of the survey, for a further order by a Full Court under Order 52, Schedule 2, Supreme Court Ordinance, referring to Hall J. the matters in difference between the parties.

The survey having been completed and a plan—No. C. 18—having been made in accordance therewith, a Full Court, on the 3rd December, 1929, on the joint motion of parties, made the following order:

"It is hereby ordered that His Honour Mr. Justice Roger Evans Hall, Judge of the Supreme Court of the Colony aforesaid, be appointed as Arbitrator herein and that the matters in difference between the parties herein, namely whether the semi-circular tract of land edged red having as its base the river Prah edged green on the plan No. C. 18, signed by W. F. Mindham, Officer in Charge Cadastral Branch, dated 15th August, 1929, is the property of aforesaid Kobina Foli, Omahene of Adansi, or Obeng Akese, Ohene of Okyereso, be referred to the final decision of the said Arbitrator.

"It is hereby ordered that the said Arbitrator shall deliver his award within three months from date and shall have and exercise all powers given to Arbitrators under 52, Schedule 2, of the Supreme Court Ordinance."

The learned Arbitrator proceeded with the reference, and, after hearing evidence at Accra for some thirteen days and spending a week on inspection of the disputed area and taking evidence there, made his award on the 31st January, 1930, under which he awarded and adjudged that as regards the area in dispute, namely, the semi-circular tract of land edged red having as its base the river Prah, the land to the west of a purple line he had caused to be drawn on the survey plan across the area in dispute was the property of the plaintiff, and the land to the east of the aforesaid purple line was the property of the defendant. The location of the purple line resulted in the plaintiff being awarded about one-fourth of the disputed area, the remaining three-fourths being awarded to the defendant, and the Arbitrator made an award of cost in corresponding proportions.

On the 10th February, 1930, the plaintiff filed an application to the Full Court to set aside the award on a number of grounds. On the coming into force on the 1st March, 1930, of the West African Court of Appeal Order in

Council 1928, the proceedings fell to be continued before the West African Court of Appeal, and on the 12th May, 1930, that Court refused to set aside the award and dismissed the motion. The plaintiff now appeals against that decision.

In the first place the appellant maintains that the order of the Full Court of the Supreme Court dated the 3rd December, 1929, which referred the matter to arbitration, was incompetent and invalid, in respect that the power to order a reference conferred by Order 52, Schedule 2, of the Supreme Court Ordinance, was not available in the case of an appeal from the Chief Commissioner's Court of Ashanti. Their Lordships have no difficulty in rejecting this contention as untenable, as Rule 6, Schedule 3, of the Supreme Court Ordinance provides with regard to appeals from the Chief Commissioner's Court of Ashanti—such as in the present case—"the Appeal Court shall hear, determine and deal with in the same way as if it was an appeal from a judgment of the Supreme Court." This makes available the very wide powers conferred by Rule 26, Order 53, Schedule 2. These provisions clearly warranted the Supreme Court's exercise of the power to order a reference under Order 52. It is hardly surprising that this contention was abandoned by the appellant's counsel in the Court below.

Rule 13 of Order 52 provides that no award shall be liable to be set aside except on the ground of "perverseness or misconduct" of the arbitrator. The appellant's grounds for setting aside the award fell under two heads, namely, (a) excess of jurisdiction appearing on the face of the award, and (b) error in law appearing on the face of the award, and amounting to misconduct or perverseness.

As regards excess of jurisdiction, the appellant maintained, in the first place, that, in view of the terms of the reference, it was only open to the Arbitrator to award one or other of two boundaries, *viz.*, either the boundary line edged red or that edged green. Their Lordships agree with the learned Judges of the Court below in rejecting this contention on the grounds stated by them. These two coloured lines set out the extreme claims of the parties, but the matter in difference between them was as to the exact line of the boundary. In their Lordships' opinion it was open to the Arbitrator: if he found, as matter of title, that the existing boundary lay between these extremes, to make his award in accordance with such boundary.

In the second place, the appellant maintained that it appeared on the face of the award that the Arbitrator had laid down a new boundary line, not as matter of existing title, but as a fair demarcation of boundary as between the parties. If this criticism can be justified, there can be no doubt that the award was beyond the scope of the reference, for the duty of the Arbitrator was to ascertain a boundary existing as matter of title, and not to lay down a new boundary, however fair that might appear to be in light of the circumstances disclosed in the evidence. It is therefore necessary to consider carefully the award, in which the learned Arbitrator has fully set out his views on the evidence and his reasons for his award.

In the first place, it appears from the award that the Arbitrator did not regard any of the traditional or historical evidence as of assistance to him and that he based his award on the evidence as to occupation and possession inside the area in question, as he also rejected the evidence given by the defendant's witnesses from other tribes as to their boundary with the defendant.

The evidence as to occupation and possession within the area related to so-called villages or hamlets or alleged

fetish hill, Onuem Beppo, which is the most distinctive natural feature in the area. The evidence is referred to in considerable detail in the award. As regards 19 out of the 36 places the Arbitrator states that the evidence rendered him no assistance and required no comment. That leaves only 17 of these evidently small places in an area of something like 100 square miles, and 7 out of these 17 places are either on or close to the Prah on the eastern edge of the area in dispute or on the western boundary of the area. Of the remaining 10 places, 3 of them—Adeamra, Asempaneye and Mpasem—are within the area awarded to the respondent, although the only evidence referred to in the award was in favour of the appellant.

In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area. No such conditions exist in the present case. Alternatively, the occupation of a portion may be attributed to a right of ownership in a large area, as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole field. But the larger area must be defined; in other words, it must be attributable to an existing boundary. There is no trace in the award of any such evidence or of any such question being considered by the learned Arbitrator. As regards the fetish on Onuem Beppo, it clearly affords no evidence of an existing boundary on the line laid down by the Arbitrator. On the other hand, it is used by the Arbitrator as the main turning point for the demarcation of a new boundary. It may be added that the evidence as to roads and tolls was found by the Arbitrator to be of assistance.

Their Lordships are therefore of opinion that the learned Arbitrator has misconceived his duty under the reference, in respect that by his award he has laid down a new boundary line, based on consideration of what would be a fair division of the disputed area between the parties. It follows that the award should be set aside on the ground that the Arbitrator has acted *ultra fines compromissi*. It is unnecessary to consider the remaining contentions for the appellant or to express any opinion on them.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal of the 12th May, 1930, should be reversed, that the award of the 31st January, 1930, should be set aside, and that the case should be remitted to the West African Court of Appeal. The appellant will have the costs of this appeal and his costs in the Court below on his motion to set aside the award.

REX v. DAVID EVARISTO AKERELE

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1934) 11 N.L.R. 1

1934 July 3

Lords Tomlin, Russell of Killowen, Macmillan, Alness
and Sir Lancelot Sanderson

Supreme Court Ordinance, s. 46—Order by Chief Justice increasing jurisdiction of police magistrates and station magistrates and others—General order ultra vires.

The accused was charged in the District Court of Lagos (1) with forging a Government tender and (2) with fraudulently uttering the forged tender, contrary to sections 467 and 468 respectively of the Criminal Code.

He was tried summarily before a Police Magistrate who found him guilty on both charges and sentenced him to nine months' imprisonment with hard labour in respect of the first charge and to six months' imprisonment with hard labour in respect of the second charge, the sentences to run concurrently.

The relevant jurisdiction in the Police Magistrate to try criminal cases summarily was by the Supreme Court Ordinance restricted to cases punishable by a fine not exceeding £50 or by imprisonment not exceeding six months or by both. The Police Magistrate proposed to deal with this case under the Order made by the Chief Justice under s. 46 of the Supreme Court Ordinance authorising an increased jurisdiction in criminal matters *in all police magistrates* to inflict punishment up to a fine not exceeding £100 or imprisonment for a term not exceeding twelve months.

The accused appealed against the convictions to the Full Court which upheld them. He then appealed to the Judicial Committee of the Privy Council which upset the order of the Full Court.

Held by the Privy Council that the order of the Chief Justice was *ultra vires*; that the Police Magistrate was therefore unjustified in trying this case; and that the convictions must both be quashed.

LORD MACMILLAN. At the conclusion of the hearing of this appeal their Lordships intimated that they would humbly advise His Majesty that the appeal should be allowed and that the convictions and sentences appealed from should be set aside. Their Lordships now state their reasons for so advising.

The appellant was charged in the District Court of Lagos (1) with forging a Government tender and (2) with fraudulently uttering the forged tender, contrary to sections 467 and 468 respectively of the Criminal Code. He was tried summarily before a Police Magistrate, who on 20th March, 1933, found him guilty on both charges and sentenced him to nine months' imprisonment with hard labour in respect of the first charge, and to six months' imprisonment with hard labour in respect of the second charge, the sentences to run concurrently.

The only question with which their Lordships are concerned is whether the Police Magistrate had jurisdiction to try the case summarily and pronounce the sentences which he did.

The Police Magistrate was *ex officio* a commissioner of the court and the jurisdiction of commissioners in criminal matters is defined by section 45 of the Supreme Court Ordinance as follows:

"45. In criminal matters, every commissioner shall have jurisdiction for the summary trial and determination of criminal cases, that is to say, Where any person is charged with any offence or act punishable either by fine not exceeding fifty pounds or by imprisonment not exceeding six months or by both;

Where any person is charged with any offence or act punishable or in respect of which any penalty may be recovered, or order made for the payment of money according to law upon summary convictions;

Where any person is charged with any offence appearing to be of such nature that if proved it would be adequately punished with any one or other of the following punishments, *viz.*: imprisonment for not more than six months, or fine not exceeding fifty pounds, such fine in default of payment to be enforced by distress or by imprisonment for not more than six months . . ."

The next section of the Ordinance reads as follows:

“ 46. The Chief Justice may, by special order under his hand and the seal of the Court, authorise an increased jurisdiction in civil or criminal matters, or in both, to be exercised by a commissioner to the extent specified in the said order. Such special order may at any time be revoked by the Chief Justice by an instrument under his hand and the seal of the Court, but no such revocation shall prejudice the issue of a new special order in the same or in different terms to the same commissioner or to the person acting temporarily as his substitute.”

By an Order dated 24th February, 1928, purporting to be made under the provisions of section 46 of the Supreme Court Ordinance, the then Chief Justice (Sir Ralph Combe) ordered, *inter alia*, as follows: –

“ I hereby authorise an increased jurisdiction, viz: –

- (a) In criminal matters, jurisdiction to inflict punishment up to a fine not exceeding £100 or imprisonment for a term not exceeding twelve months or both to be exercised by all Police Magistrates and Acting Police Magistrates, by all Station Magistrates and Acting Station Magistrates, by the District Officer for the Colony and by the Commissioners of the Supreme Courts at Epe, Badagry and Kaduna.”

On his conviction, the appellant asked for and obtained a stated case to the Appeal Court on the grounds, *inter alia*, that the Magistrate was wrong in law in trying the appellant summarily and in sentencing the appellant to nine months' imprisonment with hard labour on the first count. The appeal was heard by Sir Donald Kingdon, C.J., sitting as Divisional Court, and was dismissed on the 15th April, 1933. The learned Chief Justice held that upon the correct interpretation of sections 45 and 46 of the Supreme Court Ordinance and the order of Chief Justice Combe of the 24th February, 1928, the Magistrate had jurisdiction to try the case summarily and that the Magistrate was empowered by the provisions of these sections and the order of the 24th February, 1928, to inflict the punishment of nine months' imprisonment on the first count.

The judgment of the learned Chief Justice does not deal with the question which became the main topic of argument before their Lordships, namely, whether the order of the 24th February, 1928, had been competently made. The appellant, however, in his case to this Board expressly states that the point was argued at the hearing before the Divisional Court.

The Magistrate, in deciding to try the case summarily, did so because, in the exercise of the discretion conferred upon him by the third paragraph of section 45, the offences with which the appellant was charged appeared to him to be of such a nature that if proved they would be adequately punished by a punishment within his competence, which he conceived to extend, in virtue of the order of 24th February, 1928, to a fine of £100 or imprisonment for twelve months. The sentence of nine months' imprisonment which he pronounced in respect of the first charge was, of course, also dependent for its justification on the validity of the order of the 24th February, 1928. In their Lordships' opinion, section 46 of the Supreme Court Ordinance did not empower the Chief Justice to make a general order in the terms of the order of 24th February, 1928, increasing the criminal jurisdiction of all Police Magistrates indiscriminately. The power conferred on the Chief Justice by section 46 is to make a “ special order ” increasing

the jurisdiction to be exercised, not by commissioners generally, but "by a commissioner." That the special order is intended to be applicable to an individual and not to a class is put beyond doubt by the second sentence of section 46, which provides that where a special order is revoked, this is not to prejudice "the issue of a new special order . . . to the same commissioner." The power conferred on the Chief Justice is plainly one intended to meet cases of special urgency or emergency and enables him to issue to an individual commissioner a special order increasing his civil or criminal jurisdiction to any extent specified in the order. It would certainly have been remarkable if the Ordinance had given the Chief Justice an unlimited power to increase at his own hand the jurisdiction, civil and criminal, of all commissioners to any extent and presumably to confer on all commissioners the power to try summarily cases which might be punished by such penalties however extended. The order of the 24th February, 1928, was thus in their Lordships' opinion, *ultra vires* of the Chief Justice who made it. Consequently, the decision of the Police Magistrate to try the present case summarily and the sentence of nine months' imprisonment, which he passed on the appellant in respect of the first charge, which decision and sentence both proceeded on the assumption of the validity of the order of the 24th February, 1928, were unjustified.

Their Lordships find it unnecessary to express any opinion on the question of the interpretation of the terms of the order, and have proceeded on the assumption that if it had been *intra vires* it would have effectively extended the jurisdiction of the Police Magistrate, so as to justify him in trying the case summarily and pronouncing the sentence on the first court, which he did.

Counsel for the Crown sought to find an alternative justification in section 71 of the Criminal Procedure Ordinance, which provides that "if it shall appear to the Court in the course of a preliminary investigation that the offence is of such a nature that it can be suitably dealt with under the powers in criminal cases possessed by the Court, the Court may . . . hear and finally determine the matter and either convict the accused or dismiss the charge." But this section merely empowers the Court which is conducting a preliminary investigation to proceed to dispose of the charge then and there if it appears to the Court that the offence is of such a nature that it can be suitably dealt with under the powers possessed by the Court conducting the preliminary investigation. The section does not enlarge these powers and is consequently of no avail to the Crown for the present purpose.

Their Lordships at the hearing were accordingly of opinion that they should humbly advise His Majesty that the appeal should be disposed of as above stated.

OHENE MOORE	APPELLANT
AND	
AKESSEH TAYEE	RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1934) 2 W.A.C.A. 43

Appeal—Conditions of appeal not complied with—Defect goes to jurisdiction.

(1) All appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled, no jurisdiction is given to any court of justice to entertain them.

(2) Powers which are given to an Appellate Court to adopt certain procedure, to waive rules and to try and do substantial justice, though very important, can only be brought into play when an Appeal Court is seised of the appeal and has jurisdiction to entertain it.

LORD ATKIN. This is an appeal from the judgment of the West African Court of Appeal, Gold Coast Session (Reported in 1 W.A.C.A. 242) reversing a judgment of the Provincial Commissioner of the Western Province who had reversed a judgment of the Native Tribunal of the Omanhene of Beyin, and the question in the case is whether or not the Provincial Commissioner had jurisdiction to entertain at all the appeal from the Native Tribunal. The action was brought by the plaintiff for damages for trespass on his land and for unlawfully arresting the plaintiff's men. The Native Tribunal had given judgment for the defendant.

Now the rules regulating appeals from the Paramount Chief's Tribunal (which this was) are laid down by the Native Administration Ordinance, which is now Chapter 111 of the Laws of the Gold Coast Colony, 1928. By section 77, subsection (1):

“ A party desiring to appeal from a paramount Chief's Tribunal shall first obtain the leave of such Tribunal so to do; provided that, if the said Tribunal shall have refused such leave, the Provincial Commissioner's Court or the District Commissioner's Court may nevertheless grant leave to appeal.”

Then by subsection (2) it is provided:

“ Leave to appeal from the Paramount Chief's Tribunal shall not be granted unless and until the Appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs; and such Court shall not grant a stay of execution with respect to the said costs.”

An application was made to the Native Tribunal Court for leave to appeal and the Native Tribunal granted conditional leave to appeal on the following conditions. The respondent was “ to deposit £10 into Tribunal against cost of making up and transmission of appeal record; (2) to enter into bond in sum of £21 2s. 6d. in two sureties of £25 each to be justified against costs in Appeal Court; (3) to give notice of the appeal to all parties affected by the appeal; (4) conditions to be fulfilled within one month from date.” On an affidavit by the respondent that those conditions had been fulfilled final leave to appeal was eventually given. Two bonds were entered into. One was a bond in the sum of £21 2s. 6d. and the other was in the sum of £50, each given by two sureties and each was conditional for the payment of costs in the Appeal Tribunal. So that in fact no provision was made for the costs in the first Court at all.

Now the unfortunate thing is that that order so made by the Court of first instance did not comply with the provisions of the statute which provides that “ Leave to appeal from Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs.” To begin

with, a bond is not payment of money and in the second place, if it had been payment of money, these particular bonds are not conditioned for payment of the costs in the Native Tribunal but were conditioned for payment of costs in the Appellate Court, though the amount of money £21 2s. 6d., appears to be the amount of the taxed costs in the Native Tribunal Court. It is sufficient to say that the statutory condition upon which alone leave to appeal could be given was not fulfilled. When the appeal came before the Provincial Commissioner this point was taken, and he perhaps not unnaturally treated it as a technicality which he could sweep aside, and ordered that the costs incurred by the respondent, £21 2s. 6d., in the Court of first instance should be at once paid to his Court and that was eventually done. He then proceeded to allow the appeal.

Unfortunately, as was found by the majority of the Court of Appeal and as their Lordships think, the Provincial Commissioner had no jurisdiction to make any order at all, because no appeal was properly before him. After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled no jurisdiction is given to any Court of Justice to entertain them.

It is not unnatural that Mr. Justice Howes, dissenting in the full Court, did his utmost to try and uphold this order; but their Lordships find themselves unable to accept his reasoning. In the first place, he came to the conclusion that the costs referred to were only the costs in the Native Tribunal so far as they related to preparing and getting ready the appeal. That, in their Lordships' view, is not the meaning of the section which applies to the respondent's taxed costs of the hearing in the original Court. The other grounds which are referred to by the learned Judge relate to powers which are given to an Appellate Court to adopt certain procedure, to waive rules and to try and do substantial justice—all very important powers, but which can only be brought into play once the Appellate Court is seised of the appeal and has jurisdiction to entertain it.

But the objection lies *in limine*, in that the Provincial Commissioner had no jurisdiction at all; and therefore the reference to these powers unfortunately is irrelevant to the question of the Provincial Commissioner being able to give relief. It is quite true that their Lordships, as every other Court, attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other Court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other Court to have jurisdiction.

For these reasons their Lordships have come to the conclusion that the judgment given by the learned Chief Justice in the Court of Appeal is correct and they adopt his reasoning, and will therefore humbly advise His Majesty that this appeal should be dismissed.

CHIEF AZERE OF AYON (DECEASED, NOW
REPRESENTED BY CHIEF CHARLIE ELEGOM
OF AYON) PLAINTIFF
AND
CHIEF OKIA OLUMODE DEFENDANT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1934) 11 N.L.R. 16

Lords Blanesburgh and Wright, Sir Lancelot Sanderson

*Practice and Procedure—Evidence to be taken at locus in quo by referee.
Referee should be instructed to report his views as to credibility where evidence
conflicting.*

This suit dealt with rights to land in the Eastern Provinces of Nigeria. It was tried in the Divisional Court. There was an appeal to the Full Court which ordered a re-trial in the Divisional Court with a recommendation that all questions of fact should be referred to a Political Officer who could view the land and take evidence there.

This was done; the Divisional Court gave judgment in favour of the plaintiff, and the defendant appealed to the Full Court which reversed the Divisional Court judgment. The plaintiff then appealed to the Privy Council which reversed the judgment of the Full Court.

The appeal turned upon a complicated question of facts and *res judicata* but the only point of general importance was the comment of the Privy Council in regard to procedure where evidence is taken by a Referee.

LORD BLANESBURGH delivered the judgment of the Lords of the Judicial Committee of the Privy Council. The material portion of the judgment delivered by Lord Blanesburgh is as follows: " It is with great reluctance that I send this case back to the Divisional Court to try issues which can only be tried satisfactorily by a court which can try the case on the land in dispute. This case should not have been transferred to the Supreme Court, and I would suggest for the consideration of the Judge of the Divisional Court before whom the case comes for trial that he should refer all questions of fact to a Political Officer who can view the land and take the evidence of the persons living on the land.

In deference to that recommendation, the trial Judge, Mr. Justice Webber, by an order of the 25th May, 1926, which recited it, directed that Mr. Henry Maddocks, the District Officer of Brass, should undertake the duty indicated. It is to be regretted that, while Mr. Maddocks was instructed to view the land, he was not directed to report upon the evidence tendered. That evidence he was only to take and record. This he did with skill, but the result must have been as disappointing to the two tribunals already called upon to deal with the depositions as it has been to their Lordships. For they find themselves confronted with a mass of vague and largely contradictory statements set forth, in print, but with no guidance from Mr. Maddocks, who saw the deponents, as to the degree of reliance which, as a result of his observation of their demeanour and intelligence was, in his opinion, to be attached to their statements. In other words, Mr. Maddock's limited powers made his intervention a very poor substitute for a trial before a Provincial Judge on the spot.

OMETA PLAINTIFF
AND
CHIEF DORE NUMA DEFENDANT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1934) 11 N.L.R. 18

Lords Atkin and Alness, Sir Sidney Rowlatt

Appeal—Question of fact—Concurrent findings of two lower courts—Attitude of appeal court.

The plaintiff in this suit claimed the overlordship of a large tract of land. The trial Judge decided against him on the facts. The Full Court upheld the decision of the trial Judge. The plaintiff appealed to the Judicial Committee of the Privy Council.

Held by the Privy Council, that the question raised on appeal was purely one of fact; and that there being concurrent findings of fact by the trial Judge and the Full Court, their Lordships would apply their general rule in such cases and not interfere with the findings on fact.

LORD ATKIN delivered the judgment of the Lords of the Judicial Committee of the Privy Council.

This is an appeal from the Full Court of the Supreme Court of Nigeria who dismissed the present appellant's appeal from a judgment of Mr. Justice Webber in an action in which the appellant was plaintiff and the respondents were defendants. It was an action brought by the plaintiff on behalf of a tribe or subtribe in that district of the Agbasa people claiming the territorial rights over land known as the Agbasa land in the Warri district of the Southern Province of Nigeria. The dispute was between the plaintiff representing the Agbasa people and the defendants representing another tribe or sub-tribe of the Jekri people claiming to be the overlords of this territory.

The question was, as it appears to their Lordships, entirely a question of fact and a question depending upon the knowledge of tribal tenures and of the habits and customs of native people in relation to dealings with land. It was decided by both courts in favour of the defendants, and it appears to be a case peculiarly within the principle of the rule that their Lordships have laid down themselves, that as a general rule they will not interfere with concurrent findings of fact in cases of this description. There obviously was ample evidence upon which the learned Judge was entitled to find that the plaintiff people came into this country which originally belonged to the Jekris some hundred years or so ago, and they throughout recognised the overlordship of the defendants, and that on the other hand the defendants throughout this period have exercised rights of ownership over the land and in particular from time to time have leased land to the Government. In pursuance of those leases buildings have been erected on the land which could not possibly have escaped the notice of the plaintiff and his people, which leases have not in any way been complained of by the plaintiff people.

In these circumstances, there being concurrent findings of fact and there being in addition ample evidence to support them, it is quite impossible for their Lordships to interfere with the decisions which have been arrived at by both courts; and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The respondents must have the costs of the appeal.

KWEKU BAA SINCE DECEASED
(KWEKSI DONKOR SUBSTITUTED) AND ANOTHER . APPELLANTS
AND
NYARKU KWEKU IV RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1935) 2 W.A.C.A. 40

1935 July 22

Lords Atkin, Tomlin and Russell of Killowen

Chieftaincy matter - Jurisdiction of courts ousted - Native Administration Ordinance, s.26 - Election and installation of Paramount Chief.

On April 2, 1932 the Governor notified that Nyarku Kweku IV, Ohene of Nyarkrome, had been elected and installed as Omanehene of Agona with effect from January 30, 1930. The plaintiffs thereupon claimed against the defendant as occupant of the Stool of Nyarkrome a perpetual injunction restraining the defendant and/or anybody acting or purporting to act on his behalf as occupant of the Stool of Nyarkrome from exercising any authority under the Native Administration Ordinance etc. Now section 26 of the Native Administration Ordinance provides:

“ The Court shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for the trial of any question relating to the election, installation, deposition or abdication of a Paramount Chief or Divisional Chief.”

Held: The words of the Ordinance cover the dispute in this case. It is a question relating to the election and installation of a Paramount Chief which the plaintiffs seek to dispute and which the Ordinance forbids. The Court had no jurisdiction to entertain the action.

LORD ATKIN. This is an appeal from a judgment of the West African Court of Appeal which dismissed the appellants' appeal from the decision of Yates J. in the Divisional Court for the Central Province of the Supreme Court of the Gold Coast Colony.

The title of the action is “ Kweku Baa of Nsaba, Head of the Stool Family of Agoma, for and on behalf of The Stool of Nsaba (he has died since the action was begun and another man, Kwesi Donkor, has been substituted), and Abontendomhene Kofi Atta, also of Nsaba, for and on behalf of the Oman of Nsaba.” Their Lordships are told he represents the municipality of Nsaba. The action is against “ Nyarku Kweku IV, Ohene of Nyarkrome, officially known as Omanehene of Agona, for and on behalf of the Stool of Nyarkrome.”

The endorsement on the writ was:

“The Plaintiffs for and on behalf of the Stool of Nsaba and the Oman of Nsaba respectively jointly and severally claim against the defendant as occupant of the stool of Nyarkrome a perpetual injunction restraining the defendant and/or anybody acting or purporting to act on behalf of the Defendant as occupant of the stool of Nyarkrome and acting for or on behalf of the said stool from exercising any authoris under the Native Administration Ordinance as Omanehene of aagona over any person or persons stool or stools subject to and owing allegiance to the said stool of Nsaba.”

Their Lordships express no opinion as to whether such an action as that would lie. It sounds as though it was a rather remarkable action on the part of subjects disclaiming the authority of the Sovereign. But that is not a matter which arises on this hearing.

By the procedure on the Gold Coast it apparently is not necessary to have pleadings. Pleadings were not asked for.

The action came on for hearing before the Court and thereupon it was objected to by Counsel for the defence on the ground that it was in violation of certain sections of the Native Administration Ordinance, Chapter III of the Laws of the Gold Coast, which deal with the jurisdiction of the Civil Courts in such matters.

As there are no pleadings, and the learned Judge gave effect to that contention, and he delivered a short judgment, and the Court of Appeal apparently delivered a still shorter judgment their Lordships have not many facts before them in order to ascertain what the point at issue is, and rely upon the useful assistance which Mr. Minty, Counsel for the appellants, has given them in respect of the matter.

On those materials the case appears to be of this nature. In the State of Agona there was a Paramount Chief, Omanhene whose Stool was at Nsaba. There was also a Subordinate Chief at Nyarkrome, Ohene of Nyarkrome. In 1930 the Paramount Chief of Nsaba was destooled. Apparently there was for a time a vacancy in the position of Paramount Chief of that State. In 1932, the Governor, purporting to act under section 121, making an amendment of schedule I of the Native Administration Ordinance, substituted for "Nsaba" in that schedule the word "Nyarkrome," which was intended to have the effect of proving that the Chief at Nyarkrome should thereafter be the Paramount Chief for the whole District of Agona. Whether he had authority to do that or not their Lordships do not know, and they express no opinion about it. It is one of the matters which would have been apparently disputed if there had been jurisdiction in the Court to determine the question. But the matter did not rest there. On the 2nd April, 1932, the Governor notified that Nyarku Kweku IV, Ohene of Nyarkrome, had been elected and installed as Omanhene of Agona with effect as from the 30th January, 1930. So there can be no question that in the opinion of the Governor the Ohene of Nyarkrome was elected and installed as Paramount Chief of the State.

The action is undoubtedly brought to dispute his position as Paramount Chief of the State. It is said that at Nsaba they do not recognise him and they wish an injunction to restrain him from exercising the functions of Paramount Chief at Nsaba.

The plaintiffs are met by what appear to their Lordships to be the plain terms of section 26 of the Native Administration Ordinance: "The Court shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for the trial of any question relating to the election, installation," and it goes on "deposition or abdication of any Paramount Chief or Divisional Chief."

There is a proviso which does not apply. Those words appear quite plain to cover the dispute in this case. It is a question relating to the election and installation of a Paramount Chief. It is the election and installation which the plaintiffs seek to dispute. It is that election and installation which the Ordinance says the Court shall not have jurisdiction to entertain. That is the ground taken by the Court of Appeal in West Africa.

It appears to their Lordships that it is impossible to say that that decision is wrong. It appears on the materials before their Lordships to be right and in accordance with the meaning of the words of the section, and, therefore, their Lordships will humbly advise His Majesty that the appeal should be dismissed. As the respondent does not appear there will be no order as to costs.

BICKERSTETH (SINCE DECEASED)

AND ANOTHER APPELLANTS

AND

SHANU RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

[1936] A.C. 290

1936 Jan. 13, 30

Lords Alness and Maugham and Sir Sidney Rowlett

A testor by his will, drawn up in clauses in English form, appointed the appellants to be his executors and trustees, and by cl. 6 devised to his son certain real property consisting of a number of plots of land and the buildings thereon situated at Lagos. A separate clause at the end of cl. 6 stated that: "These devises shall take effect upon my said son attaining the age of twenty-five years." The testator died in 1918, and the son, on attaining the age of twenty-five years in 1930, brought an action against the appellants claiming an account as from the date of the testator's death of the rents of the properties devised to him by cl. 6 of the will.

Held, first, that the established rule for construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

Principle stated by Best C. J. in *Duffield v. Duffield* (1829) 3 Bligh N.S. 260, at p. 331; and by Warrington L.J. in *In re Blackwell, Blackwell v. Blackwell* [1926] 1 Ch. 223, at pp. 233-234, approved and applied.

Held, secondly, that on a consideration of the whole of the will and of the circumstances in which it was made, and applying the above-stated rule or principle the words "shall take effect" related to the devise taking effect in possession, and were not intended to impose a condition precedent on the devise, which, therefore, was to be construed as vesting at the death of the testor, subject to divestment if the son should fail to attain the age of twenty-five years, and was not contingent on his attaining that age. The son was accordingly entitled to the rents claimed.

Judgment of the Supreme Court of Nigeria affirmed.

APPEAL (No. 97 of 1933) from a judgment of the Full Court of the Supreme Court of Nigeria (March 13, 1932).

The appellants, Gabriel Togonu Bickersteth (since deceased) and Phillip Henryson Williams, were executors and trustees of the will of Joseph Robertson Shanu, who died on May 21, 1918, and by his will, dated November 2, 1917, devised by cl. 6 certain real estate to his son, Evan Adeleye Shanu, the respondent. At the end of cl. 6 was a separate clause providing that: "These devises shall take effect upon my said son attaining the age of twenty-five years." On his attaining twenty-five years of age, in March, 1930, the respondent brought an action against the appellants claiming an account of the rents of the properties devised to him from the date of the testator's death in May, 1918.

The question for determination was whether the devise vested at the death of the testator, subject to being divested if the respondent did not attain the age of twenty-five, or was contingent on the respondent attaining that age.

The facts, and the terms of cl. 6 of the will, appear from the judgment of the Judicial Committee.

The Divisional Court (Webber J.), after observing that "in cases of doubt there is always a presumption in favour of early vesting," held that the devise was vested at the death of the testator, subject to divestment, and that possession was deferred until the plaintiff (respondent) attained the age of twenty-five years.

An appeal to the Full Court of the Supreme Court of Nigeria (Kingdon C.J., Berkeley and Lloyd J.J.) was dismissed. Kingdon C.J. delivering the judgment, was of opinion that Webber J. had correctly stated that there was a presumption in favour of early vesting when, as in this case, there was a doubt as to the intention of the testator.

1936. Jan. 13. *Henry Johnston* for the appellants. On the true construction of the will the devise was contingent on the respondent attaining the age of twenty-five years.

[LORD ALNESS. The real question is, what is the true meaning and effect of the words " shall take effect " ?]

[SIR SIDNEY ROWLATT: If the testator had been asked: " Do you want to be intestate until your son attains twenty-five? " what would he have said?]

He would have said " No "; but the words in the will that the devise is to take effect on the respondent attaining the age of twenty-five are perfectly unambiguous.

[LORD ALNESS. I can understand that the words " take effect " postulate a gift already given.]

[LORD MAUGHAM. Where, for example, a gift is made to take effect at thirty, the notion is that the time is introduced simply for the purpose of postponing enjoyment.]

In *In re Wrightson, Battie-Wrightson v. Thomas* ([1904] 2 Ch. 95), which is an authority for the proposition that a devisee of real property under a devise which has vested, but which is liable to be divested, is entitled to possession of the rents, reference is made to *Duffield v. Duffield* (3 Bligh N.S. 260, 331), which lays down the general principles applicable. It is there stated that all estates are to be held to be vested except those which the Court cannot treat as vested " without deciding in direct opposition to the terms of the will." There is that " direct opposition to the terms of the will " in this case. If the judgments below are right, the devisee would be entitled to possession immediately on the testator's death, and that is in direct opposition to the wording of the will. [Reference was made to *Hawkins on Wills*, 3rd ed., p. 282.] In *Phipps v. Ackers* ((1842) 9 Cl. & F. 583, 590-591), Tindal C.J. said: " In such a case Mr. Fearne may be right in the opinion found among his posthumous works that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands." In *re Blackwell, Blackwell v. Blackwell* ([1926] 1 Ch. 223, 233, 231) does not bring the present case within the rule in *Boraston's case* ([1587] 3 Rep. 19a). If the words " take effect " were omitted, the devise would be, " to my son upon his attaining the age of twenty-five years," and that would clearly be contingent on his attaining that age: the inclusion of the words " take effect " cannot have a different effect.

Topham K.C. and *Horace Freeman* for the respondent. Looking at the will apart from technical rules, what the testator was endeavouring to say was: " I am devising certain property to my son, but he is not to have it in possession until a certain time." The rule on which the appellants rely, as stated by Best C.J. in *Duffield v. Duffield* (3 Bligh N.S. 260, 331), is a very strong one in favour of early vesting rather than a contingent gift. The tendency of the Courts today is not to pay quite so much attention to strict rules of construction, but first to determine what the will really means. Warrington L.J. in *In re Blackwell* said: " . . . the Court is inclined rather to hold an estate to be vested than contingent if the words of the will will allow it to do so." There is no gift over here, so the principle in *Phipps v. Ackers* does not apply.

[LORD ALNESS. In *Carlton v. Thompson* ([1867] L.R. 1 H.L.Sc. 232) the headnote states that "The leaning of the law is towards vesting."]

The latest authority is *In re Blackwell*, where Pollock M.R., referring to the rule as stated in *Hawkins on Wills*, 3rd ed., p. 282, said ([1926] Ch. 231) "If that rule is followed there is a leaning towards a construction of a will as giving a vested rather than a contingent interest." Lord Hanworth appears there to accept the general rule as stated in *Hawkins on Wills*. The judgments in the Courts below proceed solely on the ground that there is a doubt as to the intention of the testator. If there be a doubt, then the rule is that the Court leans in favour of vesting rather than otherwise.

The fact that the condition as to attaining twenty-five is contained in a separate direction is an indication in favour of early vesting. The cases referred to in the 8th ed. of *Theobald on Wills*, under "Vesting of Real Estate," at p. 643, bear out this proposition: perhaps the clearest is *Attwater v. Attwater* ((1853) 18 Beav. 330), where *Snow v. Poulden* ((1836) 1 Keen, 186) was followed, and it was held that the devisee took a vested interest in the land devised, subject to divestment in the case of death under the age of twenty-five years. The rule in *Boraston's Case* ((1587) 3 Rep. 19A) also applies to a part of this will: that rule is stated at p. 282 of the 3rd ed. of *Hawkins on Wills*. In support of the proposition that the interest is vested see also the observations of Lord Mansfield in *Goodtitle v. Whitby* ((1757) 1 Burr. 229). [Reference was also made to *Doe v. Lea* ((1789) 3 T.R. 41) and *Peard v. Kekewich* ((1852) 15 Beav. 166)]. Returning to the terms of the will, the testator gives a devise in terms absolute and then says when it is to take effect—at the age of twenty-five: he did not mean that there should be an intestacy in the interval. He intended that the gift should be vested.

Henry Johnston replied.

Jan. 30. The judgment of their Lordships was delivered by LORD MAUGHAM. This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria in an action in which the appellants were the defendants and the respondent was the plaintiff. One of the appellants is now dead, and the appeal has been prosecuted by the surviving defendant. The action was brought by the respondent, as devisee of certain properties, for an account of the rents collected by the appellants in respect of these properties from the death of the testator until the date when the respondent attained the age of twenty-five years. The question for the determination of this Board is whether the devise to the respondent by the testator's will vested at the death of the testator, subject to being divested if the respondent did not attain twenty-five, or was contingent on the respondent attaining the age of twenty-five. The Full Court, following the judgment of the learned judge in the Supreme Court of Nigeria, has decided in favour of the former view, and it is not in dispute that, if that decision was correct, the order for an account of rents collected by the appellants in respect of the real properties in question must stand.

The will is dated November 2, 1917. The testator desired, as appears from the instrument, to provide for his wife, a number of collateral relatives, and, in particular, for a son, the respondent, and a daughter, Phyllis Alaba Shanu. The two children on that date were infants. The respondent was aged twelve, and did not attain the age of twenty-five until 1930. The testator possessed a considerable number of freehold pieces of land and houses situate in or near Lagos, in the Colony of Nigeria, where he had carried on business as a trader, and he appears also to have possessed personal estate of substantial value. By his will, which is drawn up in clauses

in English form, after revoking all previous wills and declaring that to be his last will, he appointed the appellant and one Foresythe (since deceased) to be his executors and trustees. By cl. 2 of the will he gave and bequeathed some twenty-one legacies, and it should be noted that a pecuniary legacy of £400 bequeathed to his daughter Phyllis was to be deposited for her in a Lagos bank, and that the rent of a house known as 65 Campbell Street, Lagos, was to be paid to her during the period of two years immediately following her marriage as pocket money. To his son, the respondent, the testator gave a legacy of £1,000, to be deposited for him in the same bank "until he attains the age of twenty-five years." It may be observed that this gift was beyond doubt a vested gift though the testator attempted to postpone the enjoyment of it until the respondent should attain the age of twenty-five. By cl. 3 the testator devised certain land and houses in trust for his wife for the term of her natural life, and from and after her death in trust for his son, the respondent, and his heirs. By cl. 5 he devised another piece of land to his daughter Phyllis and her heirs, and there follows the sentence "this devise shall take effect two years after the marriage of my said daughter." Clause 6 which is the clause raising the present question, is in these terms:

"6. I devise unto my son Evan Adeleye Shanu and his heirs (A) all that piece of land situate at Oil Mill Street aforesaid together with the house, buildings, and premises erected thereon and known as 'Shanuville,' 5 Oil Mill Street; and also (B) all that piece of land situate at Campbell Street aforesaid together with the house buildings and premises erected thereon being a portion of the property known as 'Shanu Terrace' 61 and 63 Campbell Street, aforesaid; and also (C) all that piece of land situate at Massey Street in the town of Lagos aforesaid together with the house buildings and premises erected thereon and known as my business place, 39 Massey Street aforesaid; and also (D) all those three pieces of land situate at Massey Street aforesaid opposite to my said business place together with the house buildings and premises erected thereon and known as 22 Massey Street; and also (E) my piece of land situate at Ebute Metta a suburb of the town of Lagos aforesaid together with the house buildings and premises erected thereon."

"These devises shall take effect upon my said son attaining the age of twenty-five years."

By cl. 8 the testator disposes of the residue of his personal estate. The trustees are to stand possessed thereof upon trust to defray the cost of the maintenance and education and of the marriage of his daughter Phyllis, and the cost of the maintenance and education of his son, the respondent. By cl. 9 he directs that his son shall attend at a certain grammar school till he attains the highest form therein, after which his trustees are to give him a four years course of further education, and every facility to qualify in such trade or profession as his son may show an aptitude for. By cl. 10 the testator directs that a cousin, Emmanuel Agemo Olajonlu, shall occupy and reside in his house at 39 Massey Street, rent free until his son, the respondent, shall attain the age of twenty-five years, and that his trustees shall let the shop attached to the said 39 Massey Street, at such rent and subject to such covenants as they shall think fit. The house, 39 Massey Street, is one of the parcels of real estate devised to the testator's son. The will contains no gift of residue of real estate.

The testator died at Lagos on May 21, 1918. His will was proved in the Supreme Court of Nigeria on July 11, 1918. The respondent attained the age of twenty-five years in March, 1930, and thereupon claimed to be

entitled to the rents of the properties devised to him from the date of the testator's death. The action was tried on May 11, 1932, before Webber J. The learned judge on May 16, 1932, delivered a reserved judgment in favour of the respondent. In his reasons he stated that he had had some difficulty in coming to a conclusion, and he relied on the proposition that in cases of doubt there is always a presumption in favour of early vesting, and that it would be presumed that the testator intended the gift to be vested, subject to being divested rather than to remain in suspense. From this judgment the appellants appealed. The appeal was heard in the Full Court on March 13, 1933, before Kingdon C.J., Berkeley and Lloyd JJ. The judgment of the Court was delivered by the Chief Justice, who said that there was a doubt as to the intention of the testator as to the date of the vesting of the property demised. He thought, however, that the learned judge in the Court below correctly stated that there was a presumption in favour of the early vesting in a case of doubt, and the appeal was accordingly dismissed.

Their Lordship's attention has been called to a passage in *Theobald on Wills*, 8th ed., p. 642, in which the author states that the Court (in this country) does not now lean in favour of early vesting of real estate in considering the true construction of a will, and that the Court now "gives effect to the intention expressed (in the will) without any preconception as to what the testator ought to have or has intended, subject only to this, that it may be bound by rules established by the early authorities, though it might not now adopt such rules, if the matter were at large." It seems to their Lordships to be desirable to determine in the first instance whether the passage above cited is or is not correct. It is contrary to the opinions expressed in *Jarman on Wills*, 7th ed., vol. 2, p. 1330, in *Hawkins on Wills*, 2nd ed., p. 283, 3rd ed., p. 282, and in *Halsbury's Laws of England*, Vol. 28, p. 798. The passage generally relied upon for the principle in question is taken from the unanimous opinion of the judges delivered by Best C.J. in the case of *Duffield v. Duffield* (3 Bligh N.S. 260, 331). In the construction of devises of real estate he said:

"The judges from the earliest times were always inclined to decide, that the estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

In delivering the opinion Best C.J. stated (3 Bligh N.S. 330) some of the reasons which had induced the judges to adopt the rule, and it may be observed that Lord Eldon, who was presiding, expressed his concurrence with the opinion of the judges. Their Lordships have not been referred to any judgment throwing doubt upon the general validity of the rule, if it may be so described, although in subsequent statements of the Court, the doctrine has been laid down in somewhat less emphatic terms, and it may well be that the present view is more accurately expressed in the language used by Lord Warrington, as Warrington L.J., in the case of *In re Blackwell, Blackwell v. Blackwell* ([1926] Ch. 223, 233-234). It should be observed that a similar principle has been formulated in a number of cases

in connection with the very similar, if not identical, question whether a condition affecting an estate is to be construed as a precedent or as a subsequent. The authorities will be found referred to in the case of *In re Greenwood, Goodhard v. Woodhead* ([1903] 1 Ch. 749). On the whole their Lordships see no reason for doubting that the established rule for the guidance of the Court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

In the present will the question may be said to depend upon the meaning of the words "shall take effect upon my son attaining the age of twenty-five years." The words "take effect" in this connection have not apparently been made use of in any will which has come before the Courts, and their meaning is untouched by authority. In this case several considerations may help in their construction. It is not immaterial to note that the devise to the son in cl. 6 begins in the form of an absolute gift, and that the sentence which occasions the difficulty follows in the form of a separate clause, which, if the appellant's view is correct, must be treated, though it certainly is not wholly free from ambiguity, as cutting down the prior devise. Again, the legacy to the son is to be deposited in a bank until the son attains the age of twenty-five years; and this may be thought to suggest that the object of the testator with regard to his son was not to prevent him having any estate in the real property unless and until he should attain the age of twenty-five years, but rather to postpone his enjoyment, and if possible to prevent him from misapplying the property before he was twenty-five. Further, some weight may properly be attached to the consideration that if the appellant is correct, and the devise is contingent, the rents and profits of the properties in question until the son attained the age of twenty-five would pass as on an intestacy, with the result that neither the testator's son nor daughter would in any circumstances derive any benefit from such rents and profits, a singular result having regard to the fact that the testator has actually directed his trustees to let the shop attached to 39 Massey Street premises, at such rent and subject to such covenants as they should think fit. On the other hand, no weight can properly be attached to the direction that the cousin, Emmanuel, shall occupy and reside in the house at 39 Massey Street, since this appears to be merely a personal right of occupation and not the gift of an estate.

On a consideration of the whole of the will and of the circumstances in which it was made, and applying the rule or principle above referred to in relation to vesting, their Lordships are of opinion that the true construction of the words "shall take effect" is that they relate to the devise taking effect in possession, and are not intended to impose a condition precedent on the devise contained in cl. 6 of the will. The devise must therefore be construed as vesting at the death of the testator, subject to divestment if the respondent should fail to attain the age of twenty-five.

They will accordingly humbly advise His Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

EFFUAH AMISSAH APPELLANT
AND
EFFUAH KRABAH (IN PLACE OF ARABAH
ARADZIWAH) AND OTHERS RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY (FULL COURT)]

(1936) 2 W.A.C.A. 30

1936 Mar. 3

Lords Atkin, Alness and Maugham

Stool land—Ownership—Paraphernalia—Status of occupant of stool in relation to property attached to stool—Res judicata.

Fanti customary law generally—Native law and custom; proof.

(1) It is part of Fanti customary law that lands may be attached to the stool of an Ohene, or the stool of a family; there may also be privately owned lands. A Fanti family consists, subject to immaterial exceptions, of persons lineally descended through females from a common ancestress. A stool is not only a Chattel, but it also connotes an institution with a religious significance. Certain paraphernalia or regalia e.g. messenger sticks, state umbrellas and state drums go with the state stool and play an important part in a number of ceremonies.

(2) The occupant of a stool is not regarded as the owner of lands attached to it, but as being in some sense a trustee for the clan, tribe or family subject to the stool. He may be destooled, and if he is destooled the lands and regalia will remain with the stool. The Ohene as occupant of a state stool and an Odikro as occupant of a subordinate stool have certain judicial and administrative powers.

(3) An action by or on behalf of a family may result in a *res judicata* (see: *Lingandowda v. Basangowda*, L.R. 54 Ind.App. 122); but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court.

(4) Native law and custom material to a case must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them (*Kobina Angu v. Cudjoe Attah* unreported Privy Council Appeal No. 78 of 1915 followed).

LORD MAUGHAM. The claim of the appellant in this case for herself and as representing the members of the family of Awooh Alookoo was in effect for a declaration that the members of the family of Awooh Alookoo are the owners of a number of specified lands and villages and of the lands and town of Dutch Secondee, a town in the Western province of the Gold Coast colony, and for an account of all monies and profits received by the defendants on account of, or out of, the said lands, villages and town from the 1st January, 1918, and also for an order upon the defendants to deliver up a stool described in the statement of claim as "the native state stool" and certain paraphernalia in the possession or custody of the defendants. The defendants (thirty-two in number) included the defendant Segu Winwah II, the Ohene or chief of Dutch Secondee, who was admittedly in actual possession of the state or town stool of Dutch Secondee together with the paraphernalia thereof and in possession in a certain limited sense of the lands of Dutch Secondee district, claimed by the defendants to be attached to the state stool. The other defendants were Odikroes or headmen under the stool of Dutch Secondee or elders and councillors of that stool. Such of defendants as are Odikroes were respectively in immediate possession of the named villages claimed by the plaintiffs all of which villages are in Dutch Secondee district. The plaintiffs named in the writ

claimed to be acting for themselves and also on behalf of the members of the family of Awooh Alookoo who is said to have founded Dutch Secondee more than 200 years ago. There were three other persons who joined in the action with Effuah Amissah, but these persons are now dead and Effuah Amissah was the only surviving appellant before their Lordships. Dutch Secondee (or Sekondi) is now a town of some importance situate in Ashanti, a sea coast state of the Gold Coast. The natives are Fantis and speak a dialect of the Fanti language. The land law in the Colony is based upon native customs, and as pointed out in a judgment of this Board delivered by Sir Arthur Channell in the case of *Kobina Angu v. Cudjoe Attah* (unreported: P.C. Appeal No. 78 of 1915), the material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them. Their Lordships have not been informed of any customary law so established, and they may observe that it would be very convenient if the Courts in West Africa in suitable cases would rule as to the native customs of which they think it proper to take judicial notice specifying, of course, the tribes (or districts) concerned and taking steps to see that these rulings are reported in readily accessible form. In the present case, however, it is common ground that it is part of the Fanti customary law that lands may be attached to the stool of an Ohene, or to the stool of a family; and no doubt (as appears from other cases) there may be privately owned lands. Further, a Fanti family consists, subject to immaterial exceptions, of persons lineally descended through females from a common ancestress. A stool is not only a chattel, but it also connotes an institution with a religious significance. Certain paraphernalia or regalia, e.g. messenger sticks, state umbrellas and state drums go with the state stool and play an important part in a number of native ceremonies. The occupant of a stool is not regarded as the owner of the lands attached to it, but as being in some sense a trustee for the clan, tribe or family subject to the stool. He may be destooled, and if he is destooled, the lands and regalia will remain with the stool. The Ohene as occupant of a state stool and an Odikro as occupant of a subordinate stool have certain judicial and administrative powers. Some monies or profits accrue to the occupant of a stool, but in the present case their nature was left undefined. They seem to arise mainly in connection with sales or leases of stool lands, which take place in the case of a state or town stool with the consent of the Ohene, the elders and the councillors. The evidence as to the consents necessary in the case of a family stool was left in some uncertainty. If the state stool incurs a debt all the subsidiary stools are bound to contribute their share in payment. If it is the debt of a family stool, only the family is liable. The distinction, if any, between a state stool and a town stool was not dealt with in the evidence. At the trial native witnesses for the defendants described the stool in question as "the big stool," or the "town stool." Nothing turns in this case on the name. So much was proved or admitted or was common ground in the present case. One other admitted fact is of importance, namely, that the Ohene of Dutch Secondee district must be a member of the Abraham Abradzie family.

The trial took place before Dalton J. at a Divisional Court held at Secondee as long ago as the year 1923. The learned Judge dismissed the action on two grounds, first, that the plaintiffs were estopped by a judgment of Gough J. in 1909, which operated as *res judicata*, and secondly, that on the evidence they had failed to prove their case. There was an appeal to the Supreme Court of the Gold Coast Colony, Eastern

Province; and at the Full Court held at Accra on the 6th June, 1929, the appeal was dismissed on the ground of *res judicata*. Final leave to appeal to His Majesty in Council was granted on the 20th June, 1931, but owing it is said to delays on the part of the appellant the appeal was not heard before their Lordships till the month of January, 1936. Without attempting to apportion the blame for these extraordinary delays, their Lordships must express their regret that the action was too long ago and finally disposed of.

At the trial before the learned Judge the plaintiffs' case was that there were two separate and distinct stools, the stool, of Awooh Alookoo and the stool of Dutch Secondee, and they alleged that the family of Awooh Alookoo was a branch of a larger family called the Abraham Abradzie family. The lands they claimed—practically all the lands in the Dutch Secondee district which had not become private property—were they asserted attached to the stool of Awooh Alookoo and not to the state or town stool of Dutch Secondee, of which the defendant, Segu Winwah II, was the occupant. They also contended that this person was not the lawful Ohene, as he was not a blood member of the Abraham Abradzie family but the descendant of a domestic of that house.

The two questions of pedigree occasioned no difficulty. The learned Judge held that the alleged two families were one and the same, both being descended from Awooh Alookoo, the founder of the family, and that there was no evidence that the Abradzie family was a wider group than the family of Awooh Alookoo. He also held it to be clearly proved that Segu Winwah II and his predecessor on the stool, Annessie II, were blood descendants of the Abraham Abradzie family. Evidence as to the election and installation of Segu Winwah II as Ohene of Dutch Secondee was given by the production of a statement dated the 12th January, 1922, under Section 7 of the Chief Ordinance, 1904, signed by the Secretary for Native Affairs.

There remained the question whether the lands in question were attached to the town or state stool of that place or to the family stool, if any, of Awooh Alookoo. The first defence was that the appellant and other plaintiffs were estopped from alleging that the lands were attached to the family stool by a judgment of Gough J. dated the 18th October, 1909, and were estopped by proceedings before District Commissioner White in 1905, from disputing the title of the Ohene to the stool of Dutch Secondee and the lands attached to it. Dalton J. acceded to the view that the judgment of Gough J. effected an estoppel. On the appeal to the Full Court the same view prevailed. The appellant has contended before their Lordships that there was in the circumstances no *res judicata*. This therefore is the first point to be considered.

The decision of Gough J. which was dated the 18th October, 1909, was given in three actions which by consent were heard together. In the first action the plaintiffs, three persons Kweku Enoo, Kobina Tsia Effuah and T. E. Jobson claiming to be members of the Abraham Abradzie family, sought on behalf of that family against the defendants, who included Anesi II the Ohene then occupying the state stool of Dutch Secondee and certain headmen, a declaration that they were entitled to a one-third share of the rents and profits of the lands of the stool and they claimed an account. The two other actions were brought against the defendant Kuma alone in respect of two small pieces of land which were also claimed to be lands attached to the Abraham Abradzie stool. The plaintiffs contended that the lands attached or supposed to be attached to the stool of Dutch Secondee were the property of the Abraham Abradzie family and that by

the native law the said family were entitled to one-third of the revenues arising from the leasing or sale of the stool lands and accordingly that they were entitled to call upon the Ohene and his counsellors for an account of the said revenues. They alleged that they as plaintiffs were members of the Abraham Abradzie family and were authorised by the family to bring the actions. The defendants on the other hand contended, as the respondents have contended on the present appeal, that the lands attached to the stool of Dutch Secondee were not the property of the Abraham Abradzie family and that the stool of Dutch Secondee was a town stool, not a family stool. They further contended that the plaintiffs did not represent the Abraham Abradzie family and were not authorised by the family to bring the actions. It should be added that there were no pleadings in the actions and their Lordships have taken the issues which were involved from the judgment of Gough J. It will be noted that the questions involved, though not identical, were in some respects similar to the questions involved in the action now the subject of appeal. The three actions were dismissed. The lands in question were held to be attached to the town stool of Dutch Secondee. The alleged native custom was not proved. The land occupied by Kuma was held to be attached to the town stool. On the other hand apart from the lands held by Kuma there was no finding as to what lands were attached to the town stool and what lands to the family stool. The claim purported to be made on behalf of the Abraham Abradzie family and not on behalf of the Awooh Alookoo family, but as above stated this is a distinction without a difference. One of the original plaintiffs in the present proceedings Kobina Tsia Effuah was also a plaintiff in the proceedings before Gough J. It is, however, unnecessary to consider the effect which the judgment in the original action would have had either as a judgment *in rem* or as a judgment *inter partes* if it had been properly brought on behalf of the Abraham Abradzie family, because that question was clearly put in issue, and Gough J. in his judgment stated that he was not satisfied that the claims asserted in the name of the three plaintiffs were genuinely pressed by the Abraham Abradzie family collectively, or that the family had authorised the three plaintiffs to bring the actions. This point seems to have escaped the notice of Dalton J. and of the Full Court. In these circumstances it seems to their Lordships that it is impossible to hold as a matter of *res judicata* that the present members of the Awooh Alookoo or Abraham Abradzie family are estopped from asserting the claim which they have now made. Their Lordships do not doubt that an action by or on behalf of a family may result in a *res judicata* (see *Lingandowda v. Basangowda*, L.R. Ind.App. 344); but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court.

On appeal to the Full Court the learned Judges agreed with the trial Judge on the question of estoppel and on that ground dismissed the appeal. They stated however that although this decision made it unnecessary to go into the evidence it was not to be supposed that they did not agree with the findings of the Court below on the facts.

It therefore becomes the duty of their Lordships to consider whether the further decision of Dalton J. on the questions of fact which he carefully considered and dealt with is correct. They have been referred in a fair and candid argument on behalf of the appellant to the whole of the evidence, and they have no hesitation in arriving at the same conclusion as the learned Judge. He had the advantage of seeing the witnesses most of whom were

examined through an interpreter, and their Lordships would be slow to differ from his view as to the effect of such evidence in a case where the language used often has a local significance by no means identical with the English words into which the native words are translated. Moreover, he has stated quite clearly that the evidence given for the defendants taken generally was far more satisfactory and convincing than that laid for the plaintiffs. Their Lordships observe that there were a number of defendants who stated positively that the lands in their possession as Odikroes were lands attached to the state or big stool, and that if they desired to deal with such lands they had to consult the Ohene of Dutch Secondee and had never consulted with Effuah Amissah. On the other hand there was no evidence on behalf of the plaintiffs of any active assertion out of Court of a right to the lands in question. There were indeed some judgments, including that of Gough J. above referred to, which, though not conclusive, were admissible in evidence as determining a question of public right and as evidence of reputation; but these so far as relevant were uniformly unfavourable to the plaintiffs' claim. It was in these circumstances inevitable that the claim by Effuah Amissah and her co-plaintiffs that the lands were attached to the family stool must fail. The final conclusions of the learned judge were as follows:—

“ To recapitulate, the stool of Dutch Secondee I find to be a town stool, upon which, however, only blood members of the family of Abraham Abradzie can sit, that the lands claimed by the plaintiffs are attached to that stool. If there is any stool of Awooh Alookoo, and the plaintiffs have not satisfied me there is any such stool, apart from the stool upon which Segu Winwah II sits, the lands claimed by plaintiffs are clearly not attached to it. They have failed to show that the defendants have wrongly dealt with the lands they (plaintiffs) claim, they have failed to show that their consent and concurrence to such dealings with the land is necessary, or that they have any rights to the lands, or that the stool of Awooh Alookoo owned the lands for two hundred years or at all. It has in my opinion been satisfactorily proved that the defendant Segu Winwah II is in possession of the stool of Dutch Secondee as Ohene of Dutch Secondee, and that the lands claimed are attached to that stool. The other defendants who are Odikroes are in possession of the lands of their respective villages which are claimed by plaintiffs under the Stool of Dutch Secondee. The lands are not family lands but town lands and are not attached to the stool of Awooh Alookoo, if there is such a stool apart and distinct from the stool of Dutch Secondee.”

These conclusions were fully justified by the evidence, and their Lordships will accordingly humbly advise His Majesty that the appeal fails and should be dismissed with costs.

SAKARIYAWO OSHODI, SINCE DECEASED
(NOW REPRESENTED BY DISU AKINYEMI
OSHODI)

APPELLANT

AND

BRIMAH BALOGUN AND OTHERS RESPONDENTS

[ON APPEAL FROM THE SUPREME COURT OF NIGERIA]

(1936) 4 W.A.C.A. 1

1936 July 16

Lords Blanesburgh, Maugham and Roche

Native law and custom—Alienation of land in Lagos—Consent of family—Nature of tenure of arotas (domestics)—Acquiescence—Effect of Crown grant of Epetedo lands.

The territory of Lagos was ceded to the British Crown in 1861, but the cession did not affect the character of the private native rights over land, which remained as they were before the cession. Oshodi Tappa, the then head of Oshodi family, had been exiled from Lagos. In 1862 he and other exiles were allowed the return and certain vacant lands at Epetedo including that now in dispute were granted to him as family lands. He divided the lands into 21 compounds, appointed a head (who was at that date a slave and who became, when slavery was abolished, an *arota* or domestic) to each compound, reserving a compound for his personal use. In 1869 the Government issued a series of Crown grants absolute to the various heads of the compounds so appointed by Oshodi Tappa. These compounds had been the subject of litigation in Lagos and two had been taken to the Privy Council. In the first: *Sakariyawo Oshodi v. Moriamo Dakolo* [1930] A.C. 6 he nature and legal effects of the Crown grants were considered. In the second: *Idewu Inasa v. Sakariyawo Oshodi* [1934] A.C. 99, the compounds and the status and position of their occupants were more fully described.

Held: (1) that a headman to whom a Crown grant has been made has only a grant in trust, his descendants have a right on his death to occupy his particular allotment in the compound; and in the event of his family failing and being extinct (and in general not till then) the chief of the family has a right of reversion on behalf of the family.

(2) In olden days it was probable that family lands were never alienated; but since the arrival of Europeans in Lagos a custom had grown up of permitting alienation of family lands with the general consent of the family, and a large number of premises at Lagos on which substantial buildings have been erected for the purposes of trade or permanent occupation have been so acquired.

(3) The alienations in the great majority of cases have been to persons not members of the family and the title so acquired by the purchasers was an absolute one there being no reversion retained in favour of the chief.

(4) An *Arota* as headman owed certain services to the Chief, but no rent was payable and he could be evicted by the chief for certain acts considered according to native law and custom to be improper in a tenant. He had no right by himself to alienate the land, but he could alienate with the consent of the Oshodi family.

(5) Evidence of an acquiescence in an alienation of lands in the other compounds is of very slight (if any), weight since the circumstances as regards the respective families might be very different.

(6) An acquiescence in alienation by a few individual members of the family will not justify a finding that the family in general had acquiesced in a sale.

LORD MAUGHAM. In this case the plaintiffs (the respondents) by an action commenced on the 16th August, 1927, sought against the defendant Sakariyawo, Chief Oshodi, as head and representative of the family of Chief Oshodi Tappa, deceased, a declaration that the plaintiffs are owners in fee simple of the property lying and being at No. 16, Ajia Ijesha Court,

Oshodi Street, Lagos, Nigeria. There was no counter-claim and the defendant was content to admit that he claimed the property on behalf of himself and as head and representative of the said family and to deny the title of the plaintiffs on whom the onus of establishing the alleged title must rest. The original defendant is now dead and the family is represented by Disu Akinyemi Oshodi the present appellant.

The main facts are not in dispute and may be shortly stated. The territory of Lagos was ceded to the British Crown in 1861; but the cession did not affect the character of the private native rights over the land which remained as they were before the cession. Oshodi Tappa, the then head of the Oshodi family, had been exiled from Lagos. In 1862 he and other exiles were allowed to return, and it appears that certain vacant lands at Epetedo, including that now in dispute, were granted to him as family lands. He divided the lands at Epetedo into 21 compounds, appointed a head (who was at that date a slave and who became when slavery was abolished an *arota* or domestic) to each compound, reserving a compound for his personal use. In 1869 the Government issued a series of Crown grants absolute in form to the various heads of the compounds so appointed by Oshodi Tappa. These compounds have been the subject of litigation in Courts of Lagos only too frequently, and two of the cases have come before this Board. In the first (*Sakariyawo Oshodi v. Moriamo Dakolo* [1930] A.C. 667) the nature and legal effects of the Crown grants are considered: in the second (*Idewu Inasa v. Sakariyawo Oshodi* [1934] A.C. 99) the compounds and the status and position of their occupants are more fully described. No useful purpose would be served by repeating what was said by Lord Dunedin or by Lord Blanesburgh in delivering the judgments of their Lordships in these cases, and in stating in general terms the position and title according to native law and custom of their occupants. It is sufficient for the present purpose to say that a headman with such a grant has only a grant in trust, that his descendants have a right on his death to occupy his particular allotment in the compound, and that in the event of his family failing and being extinct (and in general not till then) the chief of the family has a right of reversion on behalf of the family.

In the present case the trouble arises from the circumstance that a headman (an *arota*) in 1913, purported of himself and without reference to the Oshodi family to convey or transfer an absolute or fee simple interest in No. 16, Ajia Ijesha Court, part of that compound. His assignees or transferees claim to be entitled to the fee simple as the result of a subsequent acquiescence by the family which the transferees attempted to prove at the trial.

The *Dakolo* case was not concerned with any question as to the alienation of family lands. There is, however, no dispute on this matter. In olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago a custom has grown up of permitting the alienation of family lands with the general consent of the family; and a large number of the premises at Lagos on which substantial buildings have been erected for the purposes of trade or permanent occupation have been so acquired. These alienations in the great majority of cases have been to persons not members of the family to whom the lands have been allotted, and their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in favour of the chief was retained. In recent times the title deeds have been made out in English form and duly registered according to law, and their Lordships do not intend to express any doubt as to the validity of these titles. The

respondents, indeed, do not question this view of the native law; but, as already indicated, they contend that the facts subsequent to the grants to the first respondent and his predecessors in title justify the conclusion that the family tacitly consented to the grant, and that native law and custom cannot now be invoked to defeat the title of the respondents. The trial Judge was unable to find that the Oshodi family knowingly acquiesced in the alienation of the land. In the Full Court the Chief Justice agreed with this view. Mr. Justice Berkeley and Mr. Justice Webber, however, came to a contrary conclusion; and in the result the Appellate Court granted the declaration which the plaintiffs claimed. On this appeal their Lordships' main duty is to determine which of these views on the question of fact is to prevail.

Before detailing and commenting on the evidence relevant to the question it is necessary to point out the special position of the Oshodi family as regards No. 16, Ajia Ijesha Court. As above stated the allotment of these premises and the subsequent Crown grant in 1869 relating to, and including, them was in favour of an *arota* (domestic), at that time, at least in some sense, a slave. As headman he owed certain services to the chief, but no rent was payable and he could be evicted by the chief for certain acts considered according to native law and custom to be improper in a tenant. The allotment belonged in effect to the family of the headman whilst any of them were alive. He himself had no more than a right of occupancy and on his death it passed to his descendants. Upon failure of his offspring the land reverted to the Oshodi family. It is beyond doubt that the headman by himself had no right of alienation, but it seems now to be well settled in Lagos that the land could be alienated even by a domestic with the consent of the Oshodi family. It is plain that without such consent, whatever might be the position while descendants of the headman were alive, a matter on which their Lordships express no opinion, the reverter (so to describe it) to the Oshodi family could not be got rid of without their consent.

Two circumstances must then be borne in mind in considering whether the Oshodi family can be held to have acquiesced in the permanent alienation to a stranger of the premises in question. The first is that the chief and the elders of the family might well think whilst a number of children or other issue of the headman were alive that it was not worthwhile to object to an alienation, since if it were prevented or declared void, the reverter to the family would still be very far distant. The second is that evidence of an acquiescence in an alienation of lands in the other compounds must be regarded as evidence of very slight, if any, weight, since the circumstances as regards the respective families entitled to occupy the other premises might be very different. Nor is it easy to see why the family as a whole was not at full liberty to acquiesce in some cases and to abstain from an acquiescence in others.

In the present case the evidence of acquiescence by the family in the alienation to a stranger is, to say the least, singularly scanty. The relevant deeds are as follows:

The Crown grant is dated the 5th May, 1869, and is duly registered. The next deed is an indenture of conveyance on sale dated the 20th March, 1912, made between Momodu Awo and Abudu Karimu Damola who was a son of one Fayiba, a domestic of Oshodi Tappa. There follows a conveyance dated the 5th October, 1912, and made between Abudu Karimu Damola and Lawani Folami described as a trader. This purports to be a sale in consideration of the sum of £25. Then there is a conveyance dated the 21st March, 1914, between Lawani Folami and the respondent Brimah Balogun

also described as a trader. This was a sale in consideration of £66. Finally there is an indenture of mortgage dated the 15th October, 1924, and made between the respondent Balogun and the second respondent in consideration of a loan of £320 at 15 per cent. All these conveyances purported to deal with fee simple estates. The Oshodi family is not mentioned in any way, and it would seem that the purchase-money on each sale was taken by the person who purported to sell the property. It was the mortgage to the second respondent that led to the present proceedings. The mortgagees instructed an auctioneer to sell No. 16, Ajia Ijesha Court. The chief, Sakariyawo Oshodi; attended the sale and claimed the property. A brief correspondence in August, 1927, was followed on the 16th August by the present action.

The parol evidence at the trial so far as it related to No. 16 may now be briefly summarised. Lawani Folami deposed that he was a nephew of Ajia Ijesha, a slave of Oshodi Tappa, and that he came to the compound with his father, who was not connected with the Oshodi family. He occupied two properties in the compound. He bought No. 16, the premises in question, for £25, and as above stated obtained the conveyance of the 5th October, 1912. He sold the premises to the respondent Balogun for £66 on the 21st March, 1914. He made, he said, no secret of the sale; but he obtained no consent and he gave no evidence that any members of the family other than *arotas* (domestics) knew of the respondent Balogun and anyone who came to the compound could see it. For some 20 years (roughly from 1905 to 1925) there was no installed chief of the Oshodi family, though during this period there were recognised heads of the family.

The respondent Balogun was called. The "storey house" which he built on the site cost him £1,053. When he bought the land there was only a shed on it. When he was building his house one, Rabiú Oshodi, living in the same compound, told him he ought to know that the land belonged to Oshodi, Rabiú's father. The witness, however, went on building. Whatever one may infer from this evidence it obviously does not tend to prove acquiescence by the family.

The evidence given on behalf of the defendants corroborated the fact that for about 20 years after the death of Oshodi Tappa there had been no installed "Chief Oshodi". The original defendant Sakariyawo Oshodi, who was called as a witness, was the son of Oshodi Tappa. He had been the chief for about five years when he gave his evidence in May, 1929. He said that as chief his principal business was to manage affairs at Epetedo and to control the 21 compounds which were occupied by "slaves" of his father and their descendants. So far from consenting to any sale by any of these persons he had on divers occasions warned domestics not to deal in land in the compounds, and no actual sale or mortgage of any of such land had come to his knowledge. (This man, it must be remembered, was a party to both the cases before this Board above referred to.) A member of the family, one Alfred Ade Oshodi, was also called by the defendant. He was a moneylender and contractor, and he stated that he had lent money on mortgages of Epetedo land without consulting anyone. He said he took mortgages of Epetedo land "in ignorance," but this was probably untrue. He also asserted that when there was no chief there was no rule against selling or mortgaging Oshodi land. To their Lordships this seems to be an impossible view of native law, for there must always be some interval, sometimes a long one, between the death of a chief and the installation of his successor, and if the statement were true it would mean that when a chief dies the *arotas* (or in older days the slaves) in mere occupation of land could

sell such land to strangers for money and leave numbers of persons, *arotas* of the family, unprovided with homes. The witness seems to have been more concerned to protect the security for his loans on mortgage than to support the claims of the Oshodi family or the chief who had called him as a witness. Other members of the family were called to deny that they had acquiesced in sales of land in the compounds. In the view of their Lordships it is a fact of some importance in the present case that there was no established chief during the period which included the dates of the two conveyances and the mortgage, and also the time of the erection of the substantial house by the respondent Balogun, and that as soon as there was an effective head of the family he at once objected to alienations and mortgages of lands in the compounds by the *arotas* in occupation without the consent of the family. The inference would seem to be that the native rights of the family were being very imperfectly protected during this species of interregnum, not that they were being given up.

On a careful consideration of the evidence as a whole, and there is really nothing of weight beyond what is above stated, their Lordships are forced to the conclusion that it is quite insufficient to justify the finding (contrary to the view of the learned trial Judge) that the Oshodi family acquiesced after the event in the sale in question. There is, moreover, great weight in the observation of the Chief Justice that he found it impossible to believe that the members of the Oshodi family, knowing that they possessed what he described as a dormant fee simple over a large area, deliberately agreed to the family's ex-slaves selling it and pocketing the proceeds. An acquiescence in such an alienation *ex post facto* by a few individual members of the family would clearly not justify a finding that the family in general had acquiesced in a sale to a stranger of a fee simple: their inaction in the matter would not, for reasons already given, necessarily indicate anything more than that little or no benefit was likely to be derived by raising the matter and possibly involving the family in an expensive litigation. On the whole their Lordships have come to the conclusion that the finding of the trial Judge was right and that the plaintiffs in the action failed to establish that by the tacit consent of the Oshodi family as a whole, the fee simple or the absolute title to No. 16, Ajia Ijesha Court had passed to the plaintiffs.

In coming to this conclusion on the facts proved in the present case their Lordships do not desire to throw any doubt on the decision of the Full Court in the case of *Akpan Awo v. Cookey Gam*, 2 Nig.Rep. 67, and other decisions of that character. In such a place as Lagos, where the native law is in some respects in a fluid state as the result of the pressure of the necessities of trade and of European laws and customs it may well be just and equitable, in the absence of a statute of limitation, to hold it inequitable to deprive persons of property of which they have held undisputed possession for many years, and to decide that the knowledge and acquiescence of the native family who originally owned the land may fairly be presumed, and that even though the rights of the family may appear to be remote. All that their Lordships are now deciding is that in the circumstances of the present case, and not forgetting the exceptional circumstances in relation to the chief, the plaintiffs have failed to establish a knowledge and a long continued acquiescence by responsible members of the Oshodi family sufficient to justify the decision that the plaintiffs have acquired an absolute title or in English terms a fee simple in the property. The question whether the defendants may not have some title to the property or some rights to remain in occupation of it, although they have failed in their wider claim,

has not been raised in the action and their Lordships express no opinion upon it.

To prevent misconception it seems desirable to state that the present decision is not based on any doubt as to the possibility of a title equivalent to a fee simple being obtained as the result of a sale of family lands with the general consent of the family. Lord Dunedin in delivering the judgment of the Board in the *Dakolo* case did not say anything inconsistent with this. The phrase "the paramount chief is the owner of the lands, but he is not the owner in the sense in which owner is understood in this country. He has no fee simple, but only a usufructuary title" must be read in the light of the original claim of the chief which was that he was entitled beneficially to the whole of the compensation payable to the Government in respect of family lands. The last sentence above quoted means only that the chief as contrasted with the family as a whole has no fee simple. The dispute was in fact between the chief as plaintiff and the occupants as a body as defendants. No question as to the extent of the family title arose.

Their Lordships think it right to express the opinion that the wide differences of opinion of learned Judges as to the titles to lands in Lagos disclosed in the present case and in a number of cases to which reference has been made, and the frequent actions in the Courts to which these doubts give rise, make it very desirable to deal with these questions by legislation.

In their Lordships' view and on the grounds above stated the present appeal must succeed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

C. M. APEATU, W. E. APEATU,
AND KATE GYAKYIWAH APPELLANTS
AND
OHENE KOJO SINTIM (FOR HIMSELF
AND ON BEHALF OF HIS SUBJECTS) RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1936) 2 W.A.C.A. 201

1936 July 29

Lords Blanesburgh, Maugham, Roche

Claim to set aside sale of land and for perpetual injunction to restrain interference with possession and occupation—By native law and custom a sub-Chief cannot alienate land under his control without consent of his overlord—Onus of proof on purchaser and not on overlord.

LORD MAUGHAM. This is an appeal by the defendants against a judgment of the West African Court of Appeal, dated the 24th November, 1934, restoring a judgment, dated 9th August, 1933, of the Superior Native Tribunal of Akim Kotoku-Oda in the Central Province of the Gold Coast Colony, in favour of the respondent, and reversing the judgment of the Provincial Commissioner's Court (Central Province) of the Supreme Court of the Gold Coast Colony. The Provincial Commissioner had reversed the judgment of the Native Tribunal, and had given judgment in favour of the appellants in this appeal.

The action was commenced on the 3rd October, 1932, by the respondent,

the Ohene Kojo Sintim for himself and on behalf of his subject against C. M. Apeatu and W. E. Apeatu (appellants) and one Yaw Mensah (since deceased). The claim was made by the plaintiff as Ohene (or Chief) of Mansu for himself and on behalf of his subjects and the Mansu Stool, and by it he sought an order setting aside the alleged sale in 1920 of a tract of land (called the "Kyeramase-Kohye lands") to the defendants and an injunction restraining the defendants, their agents, servants, and workmen from interfering with the possession and occupation of the land by the plaintiff, his subjects, tenants, and workmen. The trial of the action occupied some eight days. The Native Tribunal consisted of some 26 native chiefs and others of whom seven were "linguists." On the 9th August, 1933, the Tribunal delivered its findings which were in favour of the plaintiff and on the following day there was a formal order in these terms: "the Tribunal orders that the land which is the subject matter of this case reverts to the plaintiff's Stool and that the defendants and all people occupying the land on their behalf remove therefrom."

The appellants (who include Kate Gyakyiwah whose name was substituted for that of Yaw Mensah deceased) raised only one question on the appeal to His Majesty in Council, namely, the question whether the consent of the respondent and his Stool that is the Stool of Mansu, to the sale of lands in question had not (contrary to the finding of the native Tribunal) been duly given. The respondent was in fact the Ohene of Mansu at the time of the alleged sale, though he was destooled about a fortnight later, and was not reinstated on the Stool till the autumn of 1932. There was a subordinate Stool known as the Stool of Akroso, to which certain lands (including the Kyeramase-Kohye lands) were attached; but that these lands remained, in a sense, lands belonging to the Stool of Mansu and in certain events would revert for all purposes to that Stool. It is not in dispute and indeed was clearly admitted by the appellants that the consent or concurrence of the occupant for the time being of the paramount Stool of Mansu was an essential condition of the validity of a sale of the lands in question.

Apart from this question of consent and one or two allied matters, certain important facts are not in serious dispute. In 1920, one Kobina Ofori was the occupant of the subordinate Stool of Akroso. In circumstances to be mentioned later he undoubtedly contracted to sell the lands in question to C.M. Apeatu, W. E. Apeatu (Appellants) and Yaw Mensah for the sum of £3,000. Their Lordships were informed that the lands amounted in area to between one and two square miles. The would be purchasers were apparently speculators who were not possessed at the time of any large means. They paid the sum of £200 towards "cutting fees" and they paid some £350 a fortnight later to Kobina Ofori as Odikro of Akroso. They did not seek to obtain possession. They apparently paid altogether to Kobina Ofori sums amounting to £1,000, though this is not clearly proved. The matter seems then to have gone to sleep for at least ten years. No conveyance has ever been executed, and it is not suggested that any sum has ever been paid to or for the Stool of Mansu.

The respondent, in his evidence denied having known of or consented to the sale and he supported this denial by certain Great Oaths of Akim Kotoku, the precise force of which was a matter on which the opinion of the Native Tribunal is more valuable than that of an appellate Court. He admitted that at the time in 1920, when he was on the Stool of Mansu, he was informed that two persons, named Peter Botwe and Kwa Baah, desired to purchase certain lands attached to the Akroso Stool (not the subject of

dispute) and that he sent two messengers to assist the Odikro of Akroso to effect the sale; but he swore that he did not know the appellants and gave no consent to any sale to them, and did not know that such a sale was even proposed.

According to the appellant William Edward Apeatu, the principal witness on behalf of the defendants, they were informed at the time that the Odikro of Akroso wanted some people to buy some forest lands, and they met the Odikro and his Councillors at Akroso, and said they wanted to purchase lands to the value of £3,000. The Odikro and Councillors said "that they had no idea about sale of land, but from the sale they had made to Peter Botwe and Kwa Baah." They also said that the "cutting fee" for the labour would be the large sum of £900, and they claimed certain customary presents, including some bottles of gin, of which the whole was drunk. The defendants were told to wait, and they waited for about two weeks at Akroso. The Odikro then introduced them to some men who were stated to be the representatives of the respondent, who had come to assist him in selling the land, namely one Kwame Amanano (the respondent's brother) and four other persons. The appellants paid £200, part of the £900 payable for the cutting fee, and Kwame Amanano and another man performed the ceremony of cutting the "Guaha," a very important ceremony which, according to the evidence would have the result of transferring the property in the land to the purchasers, providing that the persons who performed the ceremony were properly authorised so to do on behalf of the Ohene of Mansu as well as the Odikro of Akroso. The appellants were, however, told by the Odikro to return after two weeks to pay part of the alienation money, namely part of the £3,000, and according to the witness, at the expiration of the fortnight the appellants did pay the sum of £350 to the Ofori of Akroso, and subsequently paid some other sums to him. Their Lordships pause to observe that the respondent on behalf of his Stool was interested in the purchase money, of which his Stool would be entitled to a share. The transaction of sale was a large one, and it is not easy to see that the respondent would have been justified in consenting on behalf of his Stool to transfer the property without some definite arrangement as to the payment of the Mansu share (one-third) of the purchase money, and some reason for thinking that it would be paid. If valuable land is transferred to speculators who cannot themselves provide the purchase money, the position plainly is that if the value appreciates they claim to enforce the sale and thus get the benefit of the increased value, whilst if it depreciates they do not complete; and a right of action against natives of no great substance is generally useless.

As already stated, the respondent strongly denied the suggestion that he had given any consent to the sale, or that he had received any sum whatever in connection with the land in dispute. Moreover, there has not been, at any time, any conveyance of the land, though such a conveyance was to be expected in connection with so large a sale, and (subject to what is stated later) there was no receipt obtained from the respondent or any other person connected with the Stool of Mansu nor indeed any other record of the sale whatsoever. The respondent swore that if he had heard of the sale he would have refused his consent.

The plaintiff thought it necessary to call as his witness the principal

representative (as alleged) of the respondent, namely Kwame Amanano, and it may be said at once that he was a very unsatisfactory witness. He swore, however, that he never told the respondent anything about the sale of land to the appellants. On the other hand he performed the "Guaha" custom in respect of the land, though he said that he performed it on behalf of the Ofori of Akroso and not on behalf of the Stool of Mansu, since he had no instructions whatever from that Stool. It would not seem to be an unfair conjecture that the Odikro of Akroso and Amanano were joining together in 1920 to defeat the rights, if they could, of the Stool of Mansu, and their Lordships think that no great weight can be attached in the circumstances to the evidence of Amanano. No direct evidence was given by the defendants of the consent on behalf of the Stool of Mansu.

The appellants, however, relied on two subsequent episodes as sufficiently establishing that there had been, in the year 1920, authority given by the respondent to his representatives in the other two transactions to assent to the sale in question. These episodes may be referred to as: first, the Oaths case, and secondly, the visit to Accra. Unless the appellants can establish that an admission by the respondent, that he consented to the sale or gave authority to effect it, can properly be derived from the disputed facts involved in these two matters it is plain, as Mr. Asquith pointed out in his clear and succinct argument for the respondent, that the appellants must fail.

It is not altogether easy for the Board to appreciate the weight which should be given to the conflicting statements of the witnesses in relation to these two matters. In each case, however, the Native Tribunal, after a prolonged hearing, came to a conclusion adverse to the defendants and the learned Judges in the West African Court of Appeal found no difficulty in coming to the same conclusion. Their Lordships have carefully considered the whole of the evidence in relation to these two episodes and they have found themselves unable to differ from that conclusion. The decision of the Native Tribunal on a question of fact in a case where the circumstances are not very complex and where there is no reason to suppose that the tribunal is unduly swayed by a bias in favour of or a prejudice against either party, is necessarily entitled to considerable respect; and this is all the more so where native customs are involved (as is the case in both the episodes above referred to) where the language used by the witnesses may involve meanings which it is difficult for the translator to render in English and where the weight to be attributed to the various statements and even the acts of the parties may depend in part on native habits and ideas. This consideration was plainly stated in the Court of Appeal; but it is not clear to their Lordships that the Acting Commissioner in the Provincial Commissioner's Court gave sufficient weight to it; and he seems to have taken the mistaken view that, notwithstanding the absolute denial of consent by the respondent, the onus was upon him to prove and to establish the negative fact that he did not consent to the sale. In the opinion of the Board the decision of Acting Chief Justice Yates, and of Paul J. and Kingdon C.J. was correct. It should be added that the defendants' conduct is at least as much open to adverse criticism as that of the witness Amanano. In an action by them claiming the lands in question against Chief Yaw Darkwa and Kwasi Saakwa (to be referred to later) they tendered a forged receipt for £2,825 alleged to be signed (by mark) by Kobina Ofori and they endeavoured to prove it by calling a witness, one Aparkwa, a letter writer

who was forced to admit that his evidence was false and to ask for mercy. It would seem, in view of this fact, that no great reliance can be placed on the honesty of the appellants C. M. Apeatu and W. E. Apeatu.

Before parting with the case their Lordships must express their regret that so much litigation has taken place between the natives concerned over the alleged contract of sale. Their attention was called to the action (already mentioned) by appellants C. M. and W. E. Apeatu and Yaw Mensah against Chief Yaw Darkwa and Kwasi Saakwa relating to the same land commenced on the 15 May, 1930, to which, however, the Ohene of Mansu was not a party and by the result of which he was not bound. The decision of the Native Tribunal was reversed on appeal by the Acting Commissioner but there was not any finding as regards the consent to the sale on the part of the Stool of Mansu. There was a second action begun on the 23rd May, 1933, by the present respondent against the ex-Chief Kobina Ofori, perhaps a collusive action, in which the defendant Kobina Ofori admitted that in 1920 he made a wrongful alienation of the lands in question and submitted to a declaration to that effect. To that action the present appellants were not parties. Finally, the present proceedings were commenced and have resulted in hearings before three tribunals besides that before the Board. There has not only been much conflict as to the facts but there seems also to be doubt as to the effect of the ceremony of Guaha in cases where the purchase money for lands has not been paid. The ceremony, as the law stands, does not require any permanent record whatever and it is evident that after the lapse of years it may be almost impossible to prove that the ceremony has been performed. In small cases where the purchase money is paid and possession is taken by the purchaser this leads to little trouble; but it seems to their Lordships to deserve consideration whether in cases of magnitude, and especially if all or some of the purchase money remains unpaid, a written contract should not be made essential in the interests of the natives and with a view of preventing useless litigation.

In the present case the appeal should be dismissed, with costs. The order of the Native Tribunal must, however, be varied. The present Odikro of Akroso is not a party to the proceedings and in his absence it cannot be right to declare that the lands in question revert to the Stool of Mansu. The order allowing the appeal should declare that the alleged sale of the lands mentioned in the claim was not binding on the plaintiff as Ohene of Mansu and the Mansu Stool, and there should be liberty to apply. Their Lordships will humbly advise His Majesty accordingly.

JAMES EGGAY TAYLOR APPELLANT
AND
UNITED AFRICA CO. LTD. RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1936] 2 W.A.C.A. 70

1936 Oct. 16

Lords Maugham, Salvesen and Sir Lancelot Sanderson

Practice and Procedure—Pleadings—Charges of felony not alleged in pleadings should not be made at hearing.

Charges of criminal malversation or felony against a defendant ought not to be made at the hearing of an action unless, in the case where there are pleadings, those charges have been definitely and clearly alleged, so that the defendant comes into court prepared to meet them.

LORD MAUGHAM. This appeal has taken a somewhat unfortunate course. It is an appeal from a judgment of the West African Court of Appeal setting aside a judgment of the Divisional Court sitting at Cape Coast Castle. The action was one by the United African Company, Limited, the respondents in the appeal, against a person who had been employed as agent for them for some years, based upon his negligence in carrying out his duties under a written contract, dated 30th July, 1933, that is, his breach of his contractual liabilities under that contract, and it also was based to some extent upon the fact that under clause 3 of the written contract he was responsible for any deficiency as regards goods and moneys received at the factory of which he was in charge, due directly or indirectly to his act, neglect, or default. There is absolutely nothing in the statement of claim, which was amended in due course on an application by the defendant, which suggested any sort of fraud on the part of the agent, the defendant: *a fortiori* there was no suggestion that the moneys which the plaintiffs alleged had been lost, amounting to the sum of £7,816, had been lost owing to the circumstance that the defendant had feloniously taken it or any part of it, or that he had embezzled the money in any way. When the case came on for trial before the learned judge of first instance, two persons were called who had been servants of the branch of which the defendant was in charge, one of them being Henry Reginald Horner Acquah and the other Thomas Akyiremansa Carr; the first was the cashier, and the second was the book-keeper employed at the branch in question. Both these men were brought up in custody. They were serving terms of imprisonment, having been convicted ultimately on their own confession of falsifying the books of the branch and of other wrongful acts in connection with their duties. When they were in the box, they having been called on behalf of the plaintiffs in order to establish the case of negligence against the defendant, it appeared that each of them was desirous of testifying that the moneys, or the greater part of the moneys in question, had been taken by the defendant himself or had been given to him by the witness Acquah. Part of their evidence was proper and relevant evidence led to justify the charge of negligence, but that part of their evidence which suggested that the defendant had himself taken the money was in support of a charge which it was not open to the plaintiffs to establish on the pleadings, and indeed it amounted to a complete change of the nature of the cause of action which was open to the plaintiffs. In the opinion of their Lordships there is no rule which is less subject to exception than the rule that charges of fraud, and *a fortiori* charges of criminal malversation or felony, against a defendant ought not to be made at the hearing of an action unless, in a case where there are pleadings, those charges have been definitely and clearly alleged, so that the defendant comes into Court prepared to meet them. Their Lordships must express the opinion that the learned judge was wrong in allowing Acquah and Carr to state in evidence that Taylor had received these moneys or was responsible for the disappearance of the moneys by way of fraud. So far as their Lordships can gather from the materials before them, the counsel for the plaintiffs was not responsible for the case diverging in the way it did from the case set out in the pleadings, and it is very noticeable that when the defendant himself was called into the box, although he naturally was asked whether the statements made by the two persons who had given evidence

against him, Acquah and Carr, were true, and although he flatly denied their charges, there was no endeavour on behalf of the plaintiffs in any way to cross-examine him with a view to showing that he was guilty of either fraud or felony or any other criminal conduct whatsoever. As far as their Lordships can understand, the Court was addressed on both sides on the footing that a case of negligence in the wide sense was being made and that there was no other case before the Court. It is true that the manager for the plaintiffs, Mr. Bray, was recalled at the end of the evidence by the judge himself, and was asked by the judge whether he believed the evidence that Acquah and Carr had given, and he said he did and went on to say that the plaintiffs asked the Court to believe that evidence. In the opinion of their Lordships it was an error of judgment to have asked Mr. Bray these questions and to have attached any weight to the answers to them. The belief of Mr. Bray was irrelevant from any point of view; but apart from that no case of fraud or felony was, properly speaking, before the Court. All that had happened was that two witnesses, both serving terms of imprisonment for crime, had for some reason which it is not necessary to go into thought fit to say that their crimes had been instigated by the defendant in the action. The learned judge, having come to the conclusion that the two witnesses, Acquah and Carr, were telling the truth, thought it was right to take the view that the action was an abuse of the process of the Court and that the alleged negligence was nothing more than camouflage, to use his phrase, and, accordingly, he held that the defendant was guilty of a felony. He went on to say that the charge had been concealed under a cloak of negligence and that, according to a well-known rule which was laid down in the Court of Appeal in the case of *Smith v. Selwyn* [1914] 3 K.B. 98, it was not open to the plaintiffs to make the felony of the defendant the foundation of the civil action until the defendant had been prosecuted or a reasonable excuse shown for his non-prosecution. The learned judge continued that as it was impossible to stay the civil action, as had been done in certain cases of that character, and inasmuch as no reasonable excuse had been shown for the non-prosecution of the defendant, he had no alternative but to non-suit the plaintiffs as regards that portion of the claim which dealt with £7,816 and he non-suited the plaintiffs with costs. Another small sum which was in issue at the trial need not be dealt with, because that has not been brought before their Lordships.

In fact, however, the plaintiffs in the action had a very good ground for not prosecuting the defendant, though the learned judge was not aware of it for the reason that he had made no inquiry upon the matter whatever. The plaintiffs, having brought an action based on the civil liability of the defendant apparently thought, and in their Lordships' view rightly, that there was no question as regards felony open to either side, certainly not open to the plaintiffs. The position with regard to it was this: the plaintiffs had placed the matter in the hands of the police and pressed for a prosecution to be instituted, but the police, after having made investigations and after consulting the law officers, had decided that the evidence was not sufficient to justify a prosecution. The plaintiffs' agent made a special journey to Accra to press for a prosecution, but was unsuccessful, as was stated by the Chief Justice when delivering the judgment of the Court of Appeal. He also says:

“ In this country the public very properly look to the police to institute and carry on prosecutions when a public wrong has been committed. The advice of the law officers is the last word as to the propriety of a prosecution. It would, in my view, be wholly

unreasonable to hold that a member of the public had failed in his public duty because he failed to institute a private prosecution after the police, on the advice of the law officers, had refused to prosecute."

Accordingly, if the position before the trial judge had been that a claim on the basis of a criminal taking of the money by the defendant was open to the plaintiffs, there would have been a sufficient ground for holding that a non-suit of the plaintiffs on the ground of the decision in *Smith v. Selwyn* (*supra*) was not the proper course to take, since there was sufficient reason for not prosecuting the defendant. What seems to have escaped the attention of the learned trial judge was that the point was never one which properly speaking arose for his consideration. Had the plaintiffs endeavoured to enforce the charge of felony or endeavoured to support the charge of negligence, if that had been possible, by making the charge of felony a part of their case the learned judge's duty was to have stopped such a course on their part. It is true that there are cases in which a civil claim may obviously be based upon a felonious act, and if the court sees that, although the pleadings attempt to disguise the fact or may not point it out very clearly, it may be right on the grounds of public policy for the judge to say that the defendant, if he is the man who is alleged to have committed the felony, ought to be prosecuted or a reasonable excuse shown for his non-prosecution; but there was nothing of the kind in this case. The action was one which was quite open to the plaintiffs if the defendant was innocent of fraud under the terms of the written agreement between the plaintiffs and the defendant, and in their Lordships' view the question as to the principle of *Smith v. Selwyn* (*supra*) or how far it goes, and what precisely had to be shown in this case, really did not arise for consideration at all.

Then there was an appeal and on the appeal the evidence as to the reasons for non-prosecution was admitted. In their Lordships' view, assuming that the rule of public policy was one that was open for consideration, the evidence was properly admitted, because it cannot be right for a judge to come to a conclusion such as that which the trial judge came to in this case without making inquiry of counsel for the plaintiffs. When the learned Chief Justice, Sir Donald Kingdon, delivered judgment he said that the evidence had satisfied him that the plaintiffs had in fact reasonable excuse for non-prosecution. He proceeded as follows:

"As to whether they (the plaintiffs) have proved their case or not I think it is unnecessary to look further than the following passage in the trial judge's ruling upon the application to review: 'I agree that this finding'—(namely that the loss of £7,816 was sustained by the plaintiffs as the direct result of the 'act' of the defendant)—would have been sufficient to 'entitle the plaintiffs to judgment, had public justice been vindicated.' I also agree and I consider the evidence so overwhelming that no Court could possibly come to any other conclusion. It is abundantly clear that the plaintiffs proved their case and that, but for the point as to non-prosecution being taken by the Court, they would have been given judgment in the Court below. Now that reasonable excuse for non-prosecution has been shown, the plaintiff's are, in my opinion, entitled to judgment."

That statement of the Chief Justice's is consistent with and tends to support the view that he also was considering whether there was not strong evidence to establish a charge of felony against the defendant. That point, as above pointed out, was never open either for the Court of Appeal or for the court of first instance. Their Lordships are unable to find in the

judgment of the Chief Justice any finding as to the amount, if any, for which the defendant is liable on the footing of negligence or breach of contract.

Their Lordships desire to make it quite clear that according to ordinary principles of justice the defendant must be taken in this action to be an innocent man. His position is in effect just the same as if it had been established that he was not guilty of any fraud whatever.

There remains for consideration the somewhat difficult question as to the course which their Lordships should advise His Majesty to take. There was a plain charge of what may be called for shortness negligence against the defendant, and, as far as the materials before their Lordships go, it is plain that some damages had been caused, by the admission of the defendant himself, owing to his negligence. Their Lordships cannot very well in the circumstances say that the matter should be sent back to West Africa for decision. The case was heard to the end before the trial judge and the whole of the evidence seems to be before their Lordships. With some reluctance they have come to the conclusion that they must themselves decide whether the existing evidence in the case is sufficient to justify the finding that a loss of £7,816 has been sustained by the plaintiffs as the direct or indirect result of the act, neglect or default of the defendant, or whether some less, and if so what, loss has been proved to have been so occasioned. Owing to some correspondence which took place between the solicitors for the two parties before the matter was heard, their Lordships are driven to the conclusion that it would not be fair and just to attempt to decide this matter today, because there was language in the correspondence which passed between them which led to the conclusion that the amount due on the footing of negligence alone was not to be gone into. Their Lordships, therefore, think it right in order that they may be in a position to decide the issue as to quantum of damages for negligence, to grant an adjournment to enable any necessary documents to be printed or copied, and to enable counsel to inform themselves as to the relevant points which alone remain for discussion when the matter comes before this Board again. Their Lordships purposely say "printed or copied," because in the circumstances they are desirous that no large amount of cost should be involved in the matter. They think, so far as they can form an opinion, that with regard to a number of documents all that will be necessary will be a sample or example of the document in question. They are quite content that copies should be made and duplicated by one of the duplicating processes, and they think that on that footing the cost involved should not be large. It is their Lordships' suggestion, without making it a part of the order, that the respondents should deliver particulars of the items in respect of which as they allege the evidence adduced at the trial proves that the loss was occasioned by the act, neglect or default of the defendant. If that can be done, it seems to their Lordships that it will very greatly shorten the labours of both sides, and the time that will be occupied in discussing the matter before the Board. Their Lordships have anxiously considered the question as to whether they can in any way interfere with what has been described as the sequestration order made on the application of appellant for leave to appeal. In strictness, it is not a sequestration order, but it has the effect, no doubt, of making it very difficult for the appellant to deal with his properties. Their Lordships are unable to interfere with that order; it is not clear that they would have any right to do so, but at any rate, in the circumstances of the case they do not think it possible to interfere. On the other hand, their Lordships think, having regard to the fact that both sides

are to some extent responsible for the unfortunate position which has arisen, it would be fair to direct that the costs of copying or printing and duplicating any documents which have to be brought to the attention of the Board ought to be equally shared in the first instance by the respondents and the appellant, subject to any order which may be made at a later date.

There is only one other observation which their Lordships desire to make and that is that expedition is very desirable on both sides, as they are desirous of disposing of this matter before the present tribunal while the matter is clear in their minds.

Their Lordships understand that the respondents can give their particulars within seven days, and there will be fourteen days allowed for the next stage. When the documents have been agreed they will be brought in to the Registrar for the purpose of duplication, and special efforts are to be made to expedite the process of copying.

JAMES JACKSON SUBSTITUTED FOR
 CHIEF KWAMINA SAKYIAMA APPELLANT
 AND
 J. M. COOKE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1936) 2 W.A.C.A. 36

1936 Oct. 26

Lords Maugham, Salveson and Sir Lancelot Sanderson

Stay of Proceedings—Action instituted in Native Tribunal—Proceedings pending in Divisional Court—Consent order.

When the appeal from the Native Tribunal came up for hearing in the Divisional Court, counsel for both parties agreed that when the suit was instituted proceedings under the Lands Ordinance in which the defendant Cook was the claimant were pending in the Divisional Court at Cape Coast and had not yet been determined; and that under section 7 of the Public Lands Ordinance writ of summons could not have been instituted in the Native Tribunal until the proceedings under the Public Lands Ordinance had been terminated. The Judge ruled that the action was not properly before the Native Tribunal and that the judgment was a nullity as well as all the subsequent proceedings thereon.

Held: The judgment of the Court of Appeal could not strictly be regarded as a consent judgment. The decision on the construction of the Ordinance was one for which the Court took some responsibility and this is not the less true because the admission of counsel for the appellant seemed to justify the view expressed by the Court.

LORD MAUGHAM. This is an appeal from the decision of the West African Court of Appeal pronounced on the 9th May, 1933 (reported in 1 W.A.C.A., p. 188) deciding that the action, which had been commenced in a Native Tribunal, was not properly before such tribunal and that its judgment and all subsequent proceedings amounted to a nullity but awarding the respondent costs on appeal and in the Courts below. The proceedings were begun by writ of summons dated the 30th January, 1931, in the Native Tribunal of Cape Coast by the appellant as plaintiff against the respondent as defendant and according to the appellant the substantial question was whether the land, the subject of such action, was the property of the family of the plaintiff or the family of the defendant. The writ, however, called upon the defendant to establish his claim to the land.

The Native Tribunal having given judgment on the 31st October, 1931, in favour of the appellant (plaintiff) with costs, the respondent (defendant) appealed to the Provincial Commissioner's Court of the Central Province. The Provincial Commissioner, on the 22nd August, 1932, gave judgment, reversing the decision of the Native Tribunal in favour of the respondent with costs. From the judgment of the Provincial Commissioner's Court the appellant appealed to the West African Court of Appeal and the appeal came up for hearing before that Court on the 4th May, 1933.

On the 9th May, 1933, after Counsel for the appellant had addressed the Court at length, it transpired that in 1926 the Colonial Secretary of the Colony had issued a notice under the Public Lands Ordinance, 1876 (now c. 142 of the Law of the Gold Coast Colony) to the effect that the land, the subject of the action, was required for the use of the public service. What happened then is shown by the following note of the President of the Court:

“ Both Counsel agree that when this suit was instituted, proceedings under the Lands Ordinance in which the defendant Cooke was a claimant, were pending in the Divisional Court at Cape Coast, and had not yet been determined, and are not yet determined.

Both Counsel agree that under section 7 of the Public Lands Ordinance, writ of summons could not have been instituted in the Native Tribunal until the proceedings under the Public Lands Ordinance had been terminated.

The Court adjourns for ten minutes.

On resumption, the Court delivers the following ruling:

BY THE COURT.

Counsel for each side having admitted to the Court that at the time when the writ of summons in respect of which this appeal has been taken, was instituted in the Native Tribunal, proceedings were then pending in the Divisional Court of Cape Coast under section 7 of the Public Lands Ordinance (Cap. 142) as amended by section 2 of Ordinance 17 of 1929 in which the present defendant was a claimant to the identical land described in the writ of summons, it is clear that under the provisions of the latter section, such an action could not be instituted until after the proceedings before the Divisional Court had been terminated.

The action was therefore not properly before the Native Tribunal and any judgment upon such an action was a nullity and all the subsequent proceedings thereon amounted to a nullity.

We consider that the respondent (Cooke) should have his costs, not only in this Court, but in the Court below.

The costs in this Court are assessed at the sum of £33 8s. 6d.

The Court below to carry out.”

From this decision the appellant has brought the present appeal. He has appeared by counsel to argue that notwithstanding the agreement by his counsel before the Court of Appeal that under section 7 of the Public Lands Ordinance the action could not properly have been instituted in the Native Tribunal until the proceedings under the Public Lands Ordinance has been terminated, it was open to him to contend that both the admission and the finding by the Court of Appeal were erroneous and that the appeal should have been decided on the merits. The respondent did not appear on this appeal and their Lordships have not had the advantage of hearing an argument on his behalf.

Their Lordships were not of opinion that the judgment appealed from could be regarded in strictness as a consent judgment. The decision on the construction of the Ordinance appears to be one for which the Court took at least some responsibility, and this is not the less true because the admission of counsel for the appellant seemed to justify the view expressed by the Court. In these circumstances it seemed to their Lordships desirable to hear the question of construction argued by counsel for the appellant.

At the close of this argument it seemed clear to their Lordships on a consideration of the Ordinance as a whole and in particular of sections 6 and 7 that, after notice had been given by the Colonial Secretary of the proposed acquisition of the lands in question as lands required for the service of the Colony to determine the amount of compensation due in respect of the lands and also any case of disputed interest in or title to the lands. Under section 7 this determination (subject to appeal) is to be final and conclusive as respects all persons upon whom notices have been served or who have appeared and claimed. Payment of the compensation to the person appearing by the judgment of the Court to have the best right thereto is a complete discharge to the Colonial Secretary, "but shall not hinder any subsequent proceedings at the instance of any person having or alleging better right thereto as against the person to whom such payment may have been made." It is possible that these sections do not take away the right of the proper Native Tribunal to determine some temporary question of possession or receipt of rent or the like arising prior to the conveyance to the Colonial Secretary; but in the present case it is to be noted that the writ of summons sought to establish the title of the Anona family to the land and that although the endorsement on the writ itself stated that the defendant was "involved in litigation in the Divisional Court, Cape Coast, with the intent of alienating the said land to himself and the family he claims to represent and of divesting the said Anona family and their Stool of their rights in the said land." In their Lordships' view this question was within the jurisdiction of the Divisional Court by the express language of the Ordinance. To the knowledge of the appellant there was a proceeding pending before that Court relating to the matter. If the appellant for some reason was too late to make a claim before that Court he would still under the words quoted be entitled to make a claim against the person to whom the payment of the compensation may have been made. In these circumstances their Lordships think that the proceedings before the Native Tribunal were misconceived and could have served no useful purpose. It does not seem to their Lordships necessary to determine whether the Native Tribunal was entirely divested of jurisdiction in the matter by the proceedings in the Divisional Court since on any view the proceedings in the Native Tribunal should have been stayed and the judgment of that tribunal if not a nullity must have been set aside. Their Lordships do not think they are called upon in the present case to consider the precise form of the judgment under appeal since they are satisfied that in substance it is correct.

As regards the costs awarded to the respondent by the judgment it seems to their Lordships sufficient to say that the costs were in the discretion of the Court of Appeal and their Lordships do not consider that there is any special circumstance here which would justify an appeal to His Majesty in Council in respect of costs alone.

Their Lordships have therefore humbly advised His Majesty that this appeal should be dismissed.

JAMES EGGAY TAYLOR APPELLANT
AND
UNITED AFRICA CO. LTD. RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1937) 2 W.A.C.A. 76

1937 Jan. 26 Lords Maugham, Salvesen, and Sir Lancelot Sanderson

Civil action—Where authorities decline to prosecute—Reasonable grounds for not prosecuting—Negligence—Action founded on negligence—Pleading—Judgment must be based on claim pleaded.

Held: (1) There is no duty upon a private person before bringing a civil action to prosecute for a suspected felony if the police and the law officers after complaint made have declined to prosecute.

(2) Where reasonable ground for not prosecuting for felony is shown, the trial court is not justified in non-suiting the plaintiff in a civil action for not prosecuting for the alleged felony.

(3) In an action in negligence for short accounting against the agent of a limited company, it is not enough for a court to award as damages the whole sum found short without inquiry as to the extent to which the shortage was due to the negligence of the defendant.

(4) Where fraud is not pleaded or is not the basis of plaintiff's action, all evidence tending to prove fraud should be rejected by the court and the decision of the court should be based on the claim—in this case for damages for negligence.

LORD MAUGHAM. Consequent upon the preliminary judgment of their Lordships, it now becomes necessary to decide upon the evidence properly called or put in before the trial Judge whether the respondents are entitled to judgment against the appellant for the sum of £7,816 or for some smaller sum as damages for breach of contract by the appellant of his agency agreement with the respondents dated the 28th February, 1933.

By the agreement the appellant agreed to serve the respondents, a limited company registered in England, as their agent in Cape Coast Castle or elsewhere in the Gold Coast Colony or Ashanti as they might require as from the 1st March, 1930, until the employment should be terminated by three months' notice in writing. Among the usual clauses in such an agreement the most important for the present purpose are clauses 2 and 3, which (so far as material) are in the following terms:

“ 2. The agent shall keep proper books of account containing entries of all moneys received and paid and of all goods received or sold or delivered out by him on account of the Company. . . .

3. The agent shall be responsible for all goods and moneys which shall be received at the factory or factories of which he shall be in charge from time to time and in case of any deficiency which may be due directly or indirectly to his act, neglect, or default shall forthwith pay to the company the selling prices of the goods and/or the amount of the moneys constituting the deficiency.”

It may be added that the remuneration of the appellant was to be £500 per annum and a commission.

At all material times it has been admitted by the appellant that as the result of the frauds of Acquah, the former cashier, and Carr, the former

book-keeper, at the branch under the management of the appellant (commonly called "Swanzys") the respondents had been defrauded of moneys to the amount of £7,816. The question to be determined may be stated as the question whether this loss can be shown to be due directly or indirectly to the appellant's negligence, meaning by that word his breach of duty under the clauses above set forth. Those duties certainly involved some supervision and checking of the acts of the cashier and book-keeper and some examination of the books and papers which they kept or with which they were concerned. In this connection it is desirable to point out that the first fraud was committed on the 3rd November, 1930, some eight months after the appellant took over the Branch, and that the defalcations went on till the 2nd March, 1932, without apparently arousing any feeling of suspicion in the mind of the appellant. The frauds were eventually discovered, not by the diligence of the appellant, but as the result of the head office in London requiring explanations of discrepancies in the accounts sent by the appellant to London. The fact of these discrepancies, as will be explained later, ought certainly to have been observed by the appellant, and when he was urgently and repeatedly required to explain them, he discovered the frauds without difficulty by an examination of the books and the procuring of an interbranch statement from the office of the African and Eastern Trade Corporation, a company which was in effect controlled by the respondents. (See the appellant's letter of the 21st March, 1932, to the respondents.)

Their Lordships in the first place will state some of their general conclusions in relation to the charge of negligence, prefacing them with the remark that they have seen no reason for doubting the evidence given by Alexander Frederick Bray as to the ordinary duties of the agent in charge of a station like Swanzys's in the Cape Coast. Mr. Bray was an independent witness who was at the material time the general manager of the respondents in that part of Africa and he was a person of large experience.

The first point relates to the trial balances sent to London. The appellant admitted in cross-examination at the trial that he signed every month these trial balances and certified them in the following words, "I have checked the balances on the trial balances as they appear in the ledger and have found them in accord. I have also checked and found correct the additions of the trial balances." These certificates were quite untrue. He swore in the course of the trial of Carr and Acquah (referred to in the preliminary judgment) that he considered it his duty to see that the trial balances were correct before he signed them, and further that "in theory every agent is supposed to check the ledger but in practice he only checks those" (*semble*, items) "which are high or suspicious." In cross-examination in this action before the trial Judge he admitted that he had never checked the ledger and that he had never checked the additions on the trial balances, and further, that for four months his branch sent trial balances to London purporting to show that the branch had £4,000 more than in fact they had and that if he had "checked properly" he would have discovered the loss of the £4,000. Their Lordships are clearly of opinion that but for the appellant's negligence this loss would not have occurred.

The second general matter of importance relied on by the respondents is that during the whole of the relevant period the appellant, although he signed the cash book, never properly checked the amount of the cash in the safe to see whether it agreed with the amount shown by the cash book. The branch was a large one. The appellant had between 15 and 20 clerks under him, exclusive of storekeepers. Very large sums were received in cash,

particularly at the end of each month. It was proved by Mr. Bray and by one Hopkins to be the duty of such an agent as the appellant regularly to check the cash in the safe with the cash book on the morning following the closing of the cash book. This indeed is the only practical method of ascertaining that the entries in the cash book are true and genuine. The appellant at the trial of Acquah and Carr said that he had never checked the cash in the safe, and it was proved that he made the same statement to Mr. Bray. At the trial he sought to go back from these statements; but he admitted that he "did not actually count the cash during the relevant period" whatever that may mean. It seems evident, apart from his statement, that in fact he did not regularly count the cash for, if he had, some if not most of the frauds could not have taken place, or if they had been effected would have been discovered and have been followed by the prompt dismissal of Acquah and Carr. The appellant's negligence in this respect seems to their Lordships to have been clearly established.

In the third place it should be added that the abstraction of moneys was greatly facilitated by the default of the appellant in permitting large sums to be or to appear to be in the safe contrary to the express instructions which had been given to him. The proper course was daily to pay into the bank all but a small amount of the cash received.

Another fact of general importance on the issue of negligence should now be mentioned. Counsel for the appellant, in his able argument, relied greatly on the circumstance that the appellant's branch at the relevant dates had no separate account with the bank and therefore no pass book from which the considerable amounts alleged to have been paid into the bank could be checked. The system had been altered shortly before the appellant was appointed, and there was thereafter only one account with the bank, that of the African and Eastern Trade Corporation. It was urged that it was impossible for the appellant to ascertain whether the amounts appearing from counterfoil pay-in slips stamped by the bank to have been paid into the bank had really reached the bank, since these slips had been fraudulently altered. Their Lordships are unable to accept this contention as applying to the whole of the period during which the frauds were being committed. Verbal instructions had apparently been given for the sending monthly of what were called "interbranch statements" which would have shown the amounts paid by a branch to the credit of African and Eastern Trade Corporation. The appellant denied that he had received such instructions though he admitted that the statement should be sent if interbranch cheques were being sent and he said he sent none, and though he received at least a dozen interbranch cheques he received no interbranch statements, nor did he send any. Accepting this statement, it remains the fact that there were other ways of checking the payments into the bank; apart from the counterfoil pay-in slips stamped with a banker's stamp (which will be referred to in detail later) inquiry could have been made either from the bank or from African and Eastern Trade Corporation. The absence of a pass-book made it all the more desirable from time to time to ascertain that the whole of the amounts alleged to have been paid into the bank in cheques and cash were reaching it. This point, like several others, cannot be considered without reference to other circumstances which should have shown the appellant that something was wrong. It is not in dispute that in numerous instances the balances shown on the trial balances certified by the appellant did not accord with those shown in the ledger. Their Lordships plainly cannot accept the suggestion that the certificates signed by the appellant were only formalities and they must come to the

conclusion that if the appellant had regularly carried out his duty and done that which he certified he had done, he would have discovered that actual defalcations had taken place and he would doubtless have taken the steps which he put off in fact till April, 1932.

As appears from the above conclusions their Lordships have no hesitation in finding that the charges of negligence and breach of contract brought against the appellant have in the main been established. The only question that has called for very careful consideration is the question of the date at which the defalcations and forgeries of Acquah and Carr should have been discovered by the exercise of reasonable supervision and scrutiny of relevant documents. The respondents in the particulars delivered on the 30th October, 1936, for the purpose of assisting their Lordships in dealing with the case as to damages relied (*inter alia*) on frauds specified in six items, namely, (1) £600 misappropriated on the 3rd November, 1930 (2) £67 10s. on the 12th November 1930, (3) £32 10s. on the 15th November, 1930, (4) £2,110 shown as paid into the bank on the 3rd and 5th December, 1930, (5) £2,110 shown as paid into the bank on the 2nd January, 1931, (6) £1,208 10s. shown as paid into the bank on the 6th January, 1931. (The total loss was not the whole amount but amounted to £3,300, some sums having been repaid.) Taking the first item, the earliest of all in date, the nature of the fraud was as follows: £1,610 was shown in the cash book as paid by the Swanzy branch to the bank; in fact £1,010 only was so paid. The £600 difference had already been stolen. As regards the second item £67 10s. was shown in the cash book as paid into the bank on the 12th November; in fact nothing was paid in as regards that amount. As regards the third item £90 10s. was shown as paid in; in fact £55 was actually paid in. As regards the fourth item £1,010 was shown by the cash book as paid into the bank on the 3rd December and £1,100 as paid into the bank on the 5th December; in fact nothing was paid in on those dates. These items will serve to test the matter. The appellant's case, as already indicated, was that he could not effectively check the payments-in because he had no pass-book; but he alleged that he did verify the cash book by looking at the counterfoil pay-in slips stamped by the bank. No such pay-in slips were, however, forthcoming in respect of the first six items above mentioned, and their absence was not explained. With respect to other and later items, in reference to which such slips were produced, it is clear that the counterfoil pay-in slips were fraudulently altered to make the slips appear to agree with the cash book. The alterations were not in all cases very skilfully effected, and in some cases the amounts purporting to have been paid in were so much in excess of the true amounts (*e.g.*, £595 instead of £95) that it seems strange that the appellant, if in truth he compared the items in the cash book with the slips, was not rendered suspicious and led to make inquiries at the bank. It is indeed strange that he did not see at once on scrutiny that the counterfoil pay-in slips had in some cases been tampered with. But another and a more serious criticism of the appellant's conduct is that with regard to some of the items (*e.g.*, those numbered 2 and 4 above mentioned) nothing had been paid into the bank and there was therefore no counterfoil pay-in slip available for fraudulent alteration. Taking this fact together with the unexplained absence of the pay-in slips for the first six items, the clumsiness of the forgeries, the fact that none of the usual marks of cancellation were found on the counterfoil pay-in slips which were produced, and the unsatisfactory nature of the evidence given by the appellant on this and other matters their Lordships are driven to the view that the explanation of the whole affair is that there was no proper scrutiny, examination, check or precaution taken by the

appellant, that he trusted implicitly to his subordinates Acquah and Carr, and that they took advantage of his lack of ordinary care to commit all these gross and generally clumsy frauds on the respondents. Their Lordships must come to the conclusion that a reasonable compliance with his duties would have led the appellant to detect the theft of £600 out of cash shortly after the 3rd November, 1930, and that the appellant is responsible for the whole of the subsequent defalcations, namely, £7,816 less this sum of £600, *i.e.*, for the sum of £7,216.

Pursuant to the decision of the West African Court of Appeal the respondents recovered judgment against the appellant for the sum of £7,816 and costs both in that Court and in the Court below. This judgment should be varied by reducing the amount to £7,216. The question of costs has been carefully considered by their Lordships. The final result of the litigation is that the appellant remains liable for a large sum; but he has been wholly relieved by their Lordships from any judgment based on fraud. On the other hand it was not the fault of the respondents that the issue of fraud, with such unfortunate results as to expense, came to be introduced into the case. On the whole their Lordships think that justice will be done by leaving undisturbed the judgment of the Court of Appeal as to costs, and by making no order as to the costs of the appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

OMAHENE KWAMIN BASSAYIN, SINCE DESTOOLED,
AND CHIEF KWEKU ACHAH SUBSTITUTED . . . APPELLANT
AND
OMAHENE BENDENTU II RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1937) 5 W.A.C.A. 1

1937 June 8

Lords Russell of Killowen, Roche,
and Sir Lancelot Sanderson

Illiterate—Execution of document by an illiterate—Evidence—Onus rests on other party to establish that document was read and explained to illiterate.

As the document was in the English language and the appellant knew no English, the *onus* lay upon the respondent to establish that the document had in fact been properly explained and interpreted so as to make the appellant understand its real importance.

LORD RUSSELL OF KILLOWEN. This appeal arises in a litigation between the Stool of Aowin as plaintiff and the Stool of Upper Wassaw as defendant, the main question in the litigation being what is the boundary between Aowin and Upper Wassaw. Aowin says that the boundary throughout is the River Tano. Upper Wassaw, on the other hand says that northward from the point where the River Anwia flows into the River Tano the boundary is the River Anwia up to its source, and thereafter northward from that point along a bush track up to the River Huro and then along the Huro for a short distance of half a mile or a mile. There is also in the action a subsidiary claim to damages for trespass by the defendant, or people claiming under the defendant, upon certain land which is situated within the boundary of Aowin, if the River Tano is the true boundary.

The trial Judge, Mr. Justice Gardiner Smith, has held, upon the oral evidence adduced before him, that Aowin's claim is right; that is to say, that throughout, the boundary between these two territories is the River Tano, and he made a declaration to that effect. He also upon the claim for trespass, awarded damages to the amount of £100. His decision was affirmed unanimously by the Court of Appeal, and it is from that decision that Upper Wassaw now appeals to His Majesty in Council.

The whole case, as their Lordships view it, turned upon two questions of fact. The first question of fact arose in this way: In the year 1925 the Omanhene of Aowin had affixed his mark to a document which purported to be an agreement to refer to arbitration the dispute between Aowin and Upper Wassaw as to their boundaries, and, in pursuance of that agreement, an award had been made which declared that the River Anwia, from its source to its junction with the Tano, was the boundary between those points; but expressly left undecided the further course of the boundary beyond those limits. That award was therefore obviously incomplete, and was open to objection upon that ground. It was, however, relied upon in the present action by Upper Wassaw as being a bar to the present suit, upon the footing of *res judicata*. The plaintiff, Aowin, on the other hand, alleged that the document in question was not binding on Aowin, because it (*i.e.*, the agreement for reference, which purported to confer jurisdiction upon the arbitrator) was in the English language and had not been properly explained and interpreted to the Omanhene of Aowin when he affixed his mark to it; in other words, that it had not been explained and interpreted to him so as to make him understand its true import. There is no doubt that, as the document was in the English language and the Omanhene knew no English, the onus lay upon Upper Wassaw to establish that the document had in fact been properly explained and interpreted so as to make the Omanhene of Aowin understand its real import. That is a pure question of fact on which the trial Judge found in favour of Aowin, and his finding was affirmed on appeal. There are those two concurrent findings of fact, and, although their Lordships, if they were convinced that those findings of fact were erroneous, would have power to reverse them, and although there is evidence in the case upon which the trial Judge might conceivably have come to a different conclusion, nevertheless their Lordships do not in the present case feel in any way disposed to reverse, or indeed feel justified in reversing, those concurrent findings of fact. The award, accordingly, is no bar to the present action, and the question of the true boundary is entirely a question of fact to be determined upon the evidence adduced at the trial of this action and that is the second question of fact found by the trial Judge, whose finding in that respect also was affirmed on appeal.

Their Lordships have had the advantage of a very full and skilful argument by Counsel for the appellant; the evidence was closely and carefully examined and analysed by him, and certain objections were taken to the admission or rejection of evidence, and to the weight attached by the trial Judge and by the members of the Court of Appeal to some of the evidence which had been adduced. Their Lordships having considered the evidence, are not prepared to hold that any evidence was wrongly admitted or wrongly excluded; and in any event they are unable in the present case to find that any undue weight was attached to evidence, or that there was any evidence admitted or excluded which, by its admission or exclusion could have in any way materially altered the trial Judge's findings of fact as to the true boundary. The trial Judge rightly stated at the very commencement of his judgment that the plaintiff could only succeed on proof of his title. He

heard the witnesses, he observed their demeanour in giving evidence, and he formed his conclusion as to the direction in which the balance of the evidence, and the weight of the evidence as a whole told; and he held that the plaintiff's title had been proved to his satisfaction. Here, again, the Court of Appeal affirmed his finding; so here again there are two concurrent findings of fact from which their Lordships from their own appreciation of the evidence, see no reason to differ.

In the result, their Lordships are of the opinion that this appeal should fail and they will humbly advise His Majesty accordingly. The appellant will pay the costs of the appeal.

CHRISTIAN YAO KISIEDU ETC. APPELLANTS
 AND
 DJORBUAH DOMPREH ETC. RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1937) 2 W.A.C.A. 281

1937 June 22

Lords Russell of Killowen, Roche,
 and Sir Lancelot Sanderson

Actions for trespass and injunction consolidated—Weight of evidence—Duty of appeal court.

Held: An appeal in a case tried by a Judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by jury. It is a rehearing. Nevertheless, before the Appellate Court can properly reverse a finding of fact by a trial Judge who has seen and heard the witnesses, and can best judge not merely of their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced.

LORD RUSSELL of KILLOWEN. This is an appeal from a judgment of the West African Court of Appeal (Gold Coast Session) which allowed an appeal from a judgment of the Supreme Court of the Gold Coast Colony (Eastern Province) pronounced in two consolidated actions. Each of these actions was instituted in the tribunal of the Omanhene of the State of Akyem Abuakwa. The first in point of time (the writ being dated the 29th March, 1933) was an action in which one Christian Yao Kisiedu was plaintiff and one Kwao Dompseh was defendant, and in which the plaintiff claimed damages for trespass on the plaintiff's land and an injunction to restrain further trespass. In the second action (in which the writ is dated the 28th April, 1933) the said Dompseh as plaintiff claimed against the said Kisiedu as defendant damages for trespass on his land and an injunction. The two actions were consolidated and by an order of the Supreme Court dated the 22nd June, 1933, were transferred for hearing and determination to the Divisional Court, Accra.

The dispute between Kisiedu and Dompseh was not a dispute as to boundaries between two grantees claiming under the same grantor. Each claimed his land under a different grantor. Kisiedu derived title to his parcel of land by purchase in 1907 from the Stool of Tafo and its subordinate Stool of Adjapoma. Dompseh derived title to his land, which was a portion

of the larger parcel claimed by Kisiedu, by purchase in 1918 from the Stool of Asafo. Obviously the litigation involved bigger questions than the mere questions of damages for trespass between individuals. It involved questions of title as between different Stools. For this reason orders were made joining as parties to the two actions representatives of the Stools concerned. By an order of the said Divisional Court of the 13th March, 1934, it was ordered that a representative of the Stool of Asafo be joined as a co-defendant in the first action and as a co-plaintiff in the second action, and that the necessary amendments in the proceedings be made. By an order of the same Court of the same date it was ordered that representatives of the Stools of Tafo and Adjapoma respectively be joined as co-plaintiffs in the first action and as co-defendants in the second action and that the necessary amendments in the proceedings be made. In consequence of the death of Kwao Dompseh an order was made on the 29th June, 1934, entering the name of his legal representative (Djorbua Dompseh) in the place of Kwao Dompseh as a defendant in the first action and as a plaintiff in the second action.

The consolidated actions were heard by Deane C.J. (Gold Coast Colony), the trial lasting some seven days. He decided in favour of Kisiedu, awarding him £100 damages for trespass and granting an injunction against the defendants in the first action. In the second action he gave judgment for the defendants with costs. In other words the learned Chief Justice held upon the evidence adduced, that the title to the land which had been sold to Dompseh lay not in the Stool of Asafo but in the Stool of Tafo, and had therefore been effectively sold to Kisiedu by the Ohene of Tafo and the Odikro of Adjapoma.

On appeal this decision was held by Kingdon C.J. (Nigeria) and Webber C.J. (Sierra Leone) to be against the weight of evidence. They entered judgment for the defendants in the first action, and in the second action they awarded £10 damages for trespass and an injunction against the defendants in the second action.

From this it will be seen that the findings of fact of the trial judge, based upon his consideration of the evidence given by the witnesses who were called before him, were dissented from and reversed by the Appellate Tribunal. That to do so is within their power cannot be doubted, but in order to ascertain whether they were justified in the present case in reversing the trial judge upon a question of fact largely dependent upon oral evidence, necessitates a consideration of that evidence, of the respective judgments and of the reasons given by the Appellate Tribunal for differing from the trial judge on questions of fact.

One question must be mentioned at the outset. Evidence was given, and was cross-examined to in some detail, as to the exact boundaries of the property which had been purchased by Kisiedu, and suggestions were made that as a result of the evidence he had not proved his parcels with sufficient certainty to that his purchase in fact included any portion of the land purchased by Dompseh. A plan (exhibit A) was put in evidence. This had been prepared as the result of a survey made in 1927 by a licensed surveyor named Kwantreng. It shows the land claimed by Kisiedu surrounded by a yellow edging, and (as part thereof) the land claimed by Dompseh surrounded by a green edging. It will be convenient to refer to the former as the yellow land, and to the latter as the green land.

The trial judge took the view that in the result the question of parcels and boundaries was immaterial to his decision of the case. What he said was this:

“ A lot of evidence has been given in the course of the case as to the boundaries of the land shown to the respective parties when they acquired the lands and what they did subsequent to the purchase. All that evidence in my opinion is beside the point since at the end neither Kisiedu or Dompkeh and Jarkwa seriously contest a *bona fide* purchase by their opponents of the lands claimed by each. It must I think be taken as proved that in the year 1907 Kisiedu acquired from the Ohene of Tafo and the Odikro of Adjapoma all that parcel of land delineated in yellow shown on plan ‘ A ’ and that in the year 1919 Dompkeh and Jarkwa acquired by purchase from the stool of Asafo all that parcel of land delineated in green on the same plan ‘ A ’.”

Their Lordships think that this view of the learned judge was correct. There was really no dispute between the parties as to the fact that two different grantors had purported to grant the green land, and the question for decision was which grantor had the title to grant the green land. That this was so was made abundantly clear by counsel for Dompkeh upon the application which resulted in the orders of the 13th March, 1934. The following is an extract from the judge’s note:

“ Mr. Quist states the question really to be decided is whether the Odikro of Asafo or the Odikro of Adjapoma had the title in the land to sell – the same piece of land has been sold to the respective parties by these 2 stools. It will be therefore necessary to join these stools in order that their title may be investigated.”

The Court of Appeal took a different, and as their Lordships think, a wrong view as to this. They argued from the price paid by Kisiedu, from the fact that the green land remained uncultivated by him, and from the absence of any name plate on a certain tree at the south-eastern corner of the green land, that Kisiedu had only purchased the yellow land which is situate to the north of the green land. They went further and discredited, as their Lordships think, without justification, the evidence of Kwantreng, the licensed surveyor, who was an independent witness, and who testified to the fact that a tree at the south-western corner of the green land had borne one of Kisiedu’s name plates. In view of counsel’s language, already cited, and of the trial judge’s statement set out above, the case must necessarily have proceeded upon the footing that the green land had purported to have been conveyed to both; and in their Lordships’ opinion the question whether the green land was included in the conveyance to Kisiedu was not open to doubt or question in the Court of Appeal.

Nevertheless the learned judges in the Court of Appeal investigated this question, and came to the conclusion that Kisiedu has failed to prove that the land conveyed to him included any of the green land. That in itself, if true, would have been fatal to Kisiedu in the litigation, but it would in no way have affected the larger question as between the rival Stools. As already indicated their Lordships think that the Court of Appeal ought not to have reached that conclusion, and they fear moreover that that Court’s view of the case has been to some extent coloured by its view of this matter.

Although four points were argued in the Court of Appeal as grounds for reversing the decision of the trial judge, only one succeeded, *viz.*, that the judgment was against the weight of evidence; and before their Lordships, counsel for the respondents rightly based his claim to succeed on the appeal upon that point alone.

It is necessary now to explain the point to which the evidence was directed, and the question of fact upon which the case depended. The case turned upon the question whether the lands which the Odikro of Adjapoma held in 1904 (the reason for the selection of that date will appear later) and with which he served the Stool of the Ohene of Asiakwa had originally belonged to the Stool of Tafo or to the Stool of Asafo. This in turn depended upon tradition, as to what had happened in the dim and distant past. Up to a point the traditions deposed to were in agreement. Long ago the Chief of Asiakwa, one of the Ashanti invaders, obtained permission for his servant (one Koyo a hunter) and his wife, Adjapoma, to settle and hunt on lands subsequently and now known as the Adjapoma lands. From this beginning had sprung the Stool and lands of Adjapoma. The point upon which the evidence of tradition, given on behalf of Kisiedu and his side, differs from that given on behalf of Dompseh and his side, is as to the Stool from which the Chief of Asiakwa had sought and obtained the aforesaid permission; in other words to which Stool the Adjapoma lands then belonged. Kisiedu's witnesses said that according to tradition the Stool of Tafo was applied to and gave permission; Tafo supplied the land for Koyo and Adjapoma to occupy; the Adjapoma lands belonged to Tafo. Dompseh's witnesses asserted that according to tradition the Stool of Asafo was applied to and gave permission; the Adjapoma lands belonged to Asafo. If the Adjapoma lands belonged to Tafo, the title in the green land had passed to Kisiedu. If the Adjapoma lands belonged to Asafo the title in the green land has passed to Dompseh.

The trial judge heard the witnesses, and although it is true that the acceptance of one version of the tradition does not necessarily involve that a man who deposed to a different version was testifying to something which he knew to be untrue, it is none the less true that *prima facie* a trial judge who hears and sees how the witnesses give their evidence as to tradition, is better qualified to form an opinion as to which is the accurate version, than those who have not that advantage.

In this case the trial judge after a long trial and a close and careful examination of the evidence, came to the conclusion that the version of the tradition which gave Tafo as the owner of the lands was the correct one and decided accordingly. In reaching this conclusion he based himself on corroborative matters of different kinds. But first and foremost he fastened upon one matter which was undisputed and indisputable, to which their Lordships now refer.

In or about the year 1904 the Odikro of Adjapoma became indebted under a judgment to a neighbouring chief (the Chief of Okoko), in a considerable sum. He applied to his over-chief the Ohene of Asiakwa for assistance to pay the debt. The Ohene of Asiakwa was unable to find the necessary money, and told the Odikro of Adjapoma to apply to the Ohene of Tafo, as the Adjapoma lands had been given by the Ohene of Tafo. That evidence was given by Kofi Peasah who was the Ohene of Tafo at the time of the trial, and the nephew of Kwadjo Peasah, who was on the Stool of Tafo in 1904. His evidence runs thus:

“ The Odikro of Adjapoma owed about £750 expenses in the dispute. The Adjapoma Odikro went to the Ohene of Asiakwa and asked him to help him to pay the debt. The Ohene of Asiakwa refused to pay more than £30 but said that Adjapoma land was given to him by the Ohene of Tafo, so they should go to him to pay. The Odikro came to my uncle and my uncle sent messengers to the Ohene of Asiakwa to

ask him if what the Odikro of Adjapoma said was true. The Chief sent back by the messengers to say yes it was true. Then my uncle paid the debt and the Chief of Adjapoma served him.”

Their Lordships appreciate that this is evidence given by an interested witness, but the truth of it is, they think, established, and the weight of it placed beyond doubt by the undisputed facts that Adjapoma *did* apply to Tafo for the money and obtained it from Tafo, and by the evidence which was given by an import witness called on the other side, *viz.*, Kwesi Kromo the representative of the Ohene of Asiakwa, who made the following statement:

“ The Chief of Asiakwa gave £30 and that was not sufficient so Adjapoma refused to take it. They went to the Ohene of Tafo and obtained the loan. I have not heard if the Ohene of Tafo sent to the Ohene of Asiakwa about the matter. I know since then the Odikro of Adjapoma has served the Ohene of Tafo and not the Ohene of Asiakwa, but I don't know why or of any arrangement. It is the custom if a man gets into debt to go to the man on whose land he is living for help. I can't explain why the Adjapoma people went to Tafo and not to Asafo.”

Here at all events is a solid fact upon which a trial judge might well rely, in arriving at a decision in a case in which vague and uncertain evidence abounds. There were no doubt many other matters deposed to which gave indications pointing some in one direction, some in the other, and from which inferences could be drawn favourable to one view of the facts or the other. Their Lordships do not think it necessary to go through these other matters in detail. Suffice it to say that Deane C.J. considered them, weighed them, and came to the conclusion that the title to the green land was in Tafo, when Tafo and the Odikro of Adjapoma sold it to Kisiedu, with the result that Dompok had acquired no title to the green land and was a trespasser thereon.

Their Lordships find it impossible to say that the Court of Appeal could, on the materials before them, properly be satisfied that this finding of fact by the trial judge must be erroneous. No doubt an appeal, in a case tried by a judge alone, is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is a rehearing. Nevertheless before an Appellate Court can properly reverse a finding of fact by a trial judge, who has seen and heard the witnesses, and can best judge not merely of their intention and desire to speak the truth, but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced. As Lord Esher, M.R. said in *Colonial Securities Trust Co. v. Massey* [1896] 1 Q.B. 38: “ Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on facts was right, and that presumption must be displaced by the appellant.” Their Lordships must, they think, apply the same test, and ask themselves whether in their opinion the presumption in favour of the findings of the trial judge has been displaced; and they feel bound to answer this question in the negative.

In the Appellate Court the importance of Kwesi Kromo's evidence, as bearing on the incident of 1904, appears to have been overlooked. The whole incident is disposed of by Kingdon C.J. with the observation that

“ the explanation given by the appellants that Adjapoma turned to Tafo for financial assistance because Tafo was the wealthy neighbour who was able to give it, is a possible one.” This appears to their Lordships to be an unsatisfactory treatment of a crucial piece of evidence. Webber C.J. does not even refer to it, but devotes the greater part of his judgment to the question whether Kisiedu had proved that his parcels included the green land.

Their Lordships are unable to discern in these judgments any solid grounds for displacing the presumption which properly exists in favour of the correctness of the facts which have been found by the trial judge; and dealing with the matter as though it came before them directly on appeal from his decision, they find no reason either for displacing that presumption, or for disagreeing with the judgment which he pronounced.

Their Lordships are of opinion that the appeal should be allowed and the judgment of Deane C.J. restored, and they will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of the appeal to His Majesty in Council, and to the West African Court of Appeal.

J. A. WILLIAMS APPELLANT
AND
PATIENCE PRATT JOHNSON RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.]

(1937) 2 W.A.C.A. 253

1937 July 9

Lords Russell of Killowen, Roche,
and Sir Lancelot Sanderson

Deed of conveyance in favour of medical adviser—Presumption of undue influence—Rebutting the presumption—Presumption on facts.

The respondent, about 83 years old, was a widow. She was attended on two occasions by the appellant, a medical practitioner, when she was ill. Shortly after the second treatment, (*i.e.*, six months later) she executed a deed by which she purported to convey to the appellant in fee simple, certain land with building thereon. The deed purported to be a conveyance on sale for £1,500, but it was not in dispute that there never was a sale.

Held: (1) There is a presumption that the decision of a Judge on the facts is right and that presumption must be displaced by the person seeking to upset the judgment on the facts.

(2) The question of the validity of the gift made by the respondent must be dealt with upon the footing that the donor and donee stood in the relationship of patient and doctor or had stood in that relationship so recently as to necessitate that the appellant should rebut the presumption of influence arising from that relationship.

(3) Independent legal advice is not the only way in which the presumption can be rebutted. Similarly, legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken.

(4) It is necessary for the donee to prove that the gift was the result of the free exercise of the independent will of the donor. The most obvious way to prove this fact is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing and in many cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption.

SIR LANCELOT SANDERSON. This appeal is brought from a judgment of the West African Court of Appeal which reversed the judgment of the trial judge Webber C.J., who had dismissed the action. The case is a very peculiar one in its facts. It might almost be described as *sui generis*.

The action was brought by an old widow lady, Mrs. Johnson, who at the time of the matters complained of in the action was some eighty-two or eighty-three years of age. The defendant is a medical man, who had on the occasions of two illnesses of the plaintiff (in the years 1928 and 1930) attended her professionally. He was not what she called her "family doctor," but he was an intimate friend of hers. He apparently made no charge for his professional services; he said "I never regarded her as a paying patient. I never charged her for the medicines." The 1930 illness was occasioned by the old lady falling down and it lasted throughout the month of August, 1930; but by the end of the month her cure was complete. On the 4th February, 1931, she executed a deed of that date, by which she purported to convey to the defendant in fee simple, certain land in Charlotte Street, in Freetown, together with the building thereon. The deed purports to be a conveyance on sale for the sum of £1,500, but it is not in dispute that there never was a sale. The conveyance must be treated as a voluntary conveyance.

On the 9th July, 1932, Mrs. Johnson issued her writ, and on the 31st March, 1933, she delivered her statement of claim. By that document she claimed to have the conveyance set aside and a reconveyance of the house and land by the defendant to her. Her claim as appears from the allegations in paragraphs 2, 3 and 4 of the statement of claim was based on two grounds (1) that the deed was executed by her under the influence of the defendant, her medical attendant, without independent advice, and (2) that she executed the conveyance in ignorance of its true nature. This second allegation, which looks like a charge of fraud against the defendant, has in fact disappeared from the case, and may be disregarded. The case was tried and decided on two issues only, viz. (1) were the defendant and plaintiff in the confidential relationship of doctor and patient?, and (2) was the influence which, by reason of the existence of that relationship is presumed to have produced the gift, rebutted by the defendant?

The Chief Justice who tried the case having had the great advantage of hearing the witnesses, held that on the evidence the true relationship was more like that of mother and son, and that it was "difficult to understand how a casual attendance on two occasions . . . can be said to create such a relationship as to make that relationship of a confidential and fiduciary character." He further held that even assuming that such a relationship had been established, the presumption of influence had been rebutted. It had, he said, been proved to his satisfaction, having regard to all the circumstances, "that the gift was the result of the free exercise of independent will."

The Court of Appeal took the contrary view upon both points. They were of opinion (1) that the relation of doctor and patient existed between the parties and (2) that the presumption of influence had not been rebutted by the defendant.

Against this decision of the Court of Appeal the defendant has appealed to His Majesty in Council.

Their Lordships appreciate that the reversal of the findings of fact of a judge who has tried the case without the assistance of a jury is well within the competence of an appellate Court, who are in fact re-hearing the case; but as was well said by Lord Esher M.R., in *Colonial Securities Trust Company v. Massey* [1896] 1 Q.B. 38, the case cited by Brooke J. in his

judgment, the presumption is that the decision of the trial judge on the facts was right and that presumption must be displaced by the appellant. In considering what advice they should tender to His Majesty in the present case, the question for their Lordships to answer is an effect the same. Has the plaintiff displaced to their satisfaction this presumption of the correctness of the view entertained by the trial judge?

As regards the first question, the answer is they think, in the affirmative. The learned Chief Justice seems to have paid insufficient attention to the basis upon which the presumption of influence arising from this intimate relationship rests. He dismisses the question by describing the defendant's attendances as "a casual attendance on two occasions." That conclusion is not, in their Lordships opinion, justified by the evidence. So far from being "casual," the attendances represented attention and care by the defendant to his patient throughout the courses of the two illnesses. The illness of 1930 was clearly no light matter, as the defendant attended the plaintiff during the whole of August, and was one which afforded just such an opportunity for generating those feelings of confidence and gratitude, calculated to produce the influence (no doubt unconsciously operative) which creates a desire to confer benefits on the medical adviser and against which the patient requires protection. Upon this first question, their Lordships agree with the Court of Appeal that in this case, the question of the validity of the gift made by the plaintiff by the conveyance of the 4th February, 1931, must be dealt with upon the footing that the donor and donee stood in the relationship of patient and doctor or had stood in that relationship so recently as to necessitate that the defendant should rebut the presumption of influence arising from that relationship.

The principle which applies to the above-mentioned second issue is to be found in the judgment delivered by the Lord Chancellor in *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127. It may be stated as follows: where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor the Court will set aside the voluntary gift unless it is proved that in fact the spontaneous act of the donor acting under circumstances which enabled the donor to exercise an independent will justifies the Court in holding that the gift was the result of a free exercise of the donor's will.

In the case cited the question was discussed whether the presumption can be rebutted in any other way than by proof of independent legal advice and also as to what constituted sufficient independent legal advice. Their Lordships were not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted: and they were not prepared to affirm that legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. They held that it was necessary for the donee to prove that the gift was the result of the free exercise of the independent will of the donor. It was pointed out that the most obvious way to prove the above-mentioned fact is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing and in many cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. The fact, however, to be established, said their Lordships, was that which has been already stated, and if evidence is given

of circumstances sufficient to establish that fact they saw no reason for disregarding them merely because they do not include the advice from a lawyer. They refused to lay down what advice must be received in order to satisfy the rule where independent legal advice is relied on further than to say that it must be given with a knowledge on the part of the adviser of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interest of the donor.

The learned Chief Justice who tried the case referred to the decision in the above-mentioned case and adopted the principle therein stated. He came to the conclusion that the plaintiff was aware of the true nature of the transaction, that she deliberately chose a conveyance (meaning a document which was in form a conveyance for value) in preference to a deed of gift, that she signed the deed well knowing the contents thereof, that the contents were read out to her and that she understood everything that was said to her at the time.

He recognised that the onus was upon the defendant to prove that the gift was the result of the free exercise of the plaintiff's independent will and as already stated he held that this had been proved to his satisfaction, having regard to the circumstances.

In their Lordships' opinion the question for decision in this appeal is whether there was evidence which justified the Chief Justice in arriving at the above-mentioned findings. The fact that the plaintiff had the benefit of the advice of Mr. Barlatt, the solicitor, of whose independence the Chief Justice was satisfied, and who was selected by the plaintiff herself to prepare the deed, cannot be relied upon as sufficient by itself to rebut the presumption of influence by the defendant, because it was not proved that Mr. Barlatt had a knowledge of all relevant circumstances and it was for the defendant to prove it; in particular it was not proved that Mr. Barlatt knew the total of the plaintiff's property or what proportion the portion conveyed to the defendant bore to the said total.

But it was not upon the advice given by Mr. Barlatt, solicitor, to the plaintiff that the Chief Justice either solely or chiefly relied. It is material, however, to note that the solicitor explained to the plaintiff the other legal forms of carrying out her intention, *viz.*, by a deed of gift or by a will which could be revoked, but that the plaintiff preferred the form of a conveyance for value and that the plaintiff told the solicitor that she had thought it all out and that she knew what she was doing.

The plaintiff's preference for the form of a conveyance for value probably was not uninfluenced by litigation with another claimant to her property.

There were other matters which need not be mentioned in detail, such as the withdrawal of her will, her arrangements as to the interim dealing with the rents of the property, and another gift of property at and about the same time to a Mrs. Williams, which the Chief Justice was entitled to and did take into consideration.

There is, however, one matter which in their Lordships' opinion is of very great importance and which distinguishes this case from other cases in which a question, similar to that now under consideration, has arisen.

In many of such cases, the question came up for consideration after the donor was dead. In this case, however, both the donor and the donee, the plaintiff and the defendant, were available as witnesses and gave evidence at the trial. The Chief Justice, therefore, had the great advantage of seeing both parties in the witness box, and of hearing their evidence.

He came to the conclusion that the plaintiff was well educated and did

not betray any sign of mental weakness and that she had competently administered her son's estate. This finding, in their Lordship's opinion, is supported by the evidence of Mr. Barlatt which goes to show that she was an intelligent, astute and strong-willed woman.

The Chief Justice did not believe the evidence of the plaintiff and he accepted unreservedly the evidence of the defendant.

Their Lordships see no reason to dissent from such finding given as it was by one who was in a much better position to judge of the matter than their Lordships. In view of that finding and the other evidence in the case, it is not surprising that the Chief Justice came to the conclusion that the presumption of influence by the defendant upon the plaintiff had been rebutted and that the transaction was the result of the free exercise of the plaintiff's independent will.

The learned Chief Justice applied the correct principle to the consideration of the matter, and their Lordships are of opinion that there was sufficient evidence to justify him in arriving at the above-mentioned conclusion and consequently that his decision should not have been disturbed. The result is that the appeal must be allowed, the order of the Court of Appeal dated the 16th April, 1935, set aside and the judgment of the Chief Justice of the 1st October, 1934, restored. The plaintiff having died, her legal personal representatives were made respondents to the appeal, and they must pay the defendant's costs in the Court of Appeal and of the appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

KWAMINA KUMA

APPELLANT

AND

KOFI KUMA .

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1938) 5 W.A.C.A. 4

1938 November 15

Lords Atkin, Porter
and Sir Lancelot Sanderson

Native law and custom—Tenure—Occupation of land for cultivation—Declaration of title to land—Does not amount to order for ejectment.

(1) Among natives, occupation of land is frequently allowed for the purpose of cultivation but without the ownership of the land being parted with; the owner of land being willing to allow such occupation so long as no adverse claim is made by the occupier; the occupier knowing that he can use the land so long as he likes provided he recognises the title of the owner.

(2) When a court makes a declaration of title over an area of land, such declaration does not amount to an order for ejectment of the person occupying the same.

SIR LANCELOT SANDERSON. This is an appeal by Kwamina Kuma, who was the plaintiff in the suit, against a judgment of the West African Court of Appeal dated the 20th of November, 1934 (Reported at 2 W.A.C.A. 178), which reversed a judgment dated the 30th of July, 1934, of Mr. Justice Strother-Stewart in the Divisional Court, held at Cape Coast, of the Supreme Court of the Gold Coast Colony.

The suit was brought by the plaintiff to obtain a declaration of his title to certain land lying near Abrobonku and known as Otenkyiren land:

The learned Judge who tried the suit made the declaration in favour of the plaintiff as far as the land claimed by the defendant was concerned.

The Appeal Court allowed the appeal which was brought by the defendant against the judgment of the learned Judge and directed that a non-suit should be entered with costs in that Court and in the Court below. It is against the above-mentioned decision of the Court of Appeal that the plaintiff has appealed to His Majesty in Council.

The plaintiff is the Odikro of Abrobonku in the State of Oguaa or Cape Coast – Abrobonku lies to the south of the land in dispute: The defendant is a farmer living in the village Yowuma, which is situated to the north-east of the said land.

The plaintiff claims a large tract of land which is surrounded by a boundary coloured green on the plan which was exhibited at the trial and marked A. The judgment of the trial Judge however related to a portion only of such land, which on the said plan was encircled by a boundary coloured red – and this appeal is in respect of the said portion only.

The cause of the litigation was that in or about 1928 the defendant Kofi Kuma proposed to sell the land in suit to a certain Mr. Sekyi. The plaintiff gave notice of his objection to the proposed sale, which consequently was not completed. The present defendant then brought a suit against the present plaintiff in the Supreme Court of the Gold Coast Colony which ordered a survey of the land by an independent surveyor. Accordingly a Mr. Hagan made a survey and prepared a plan which is the plan already referred to and marked A; it was proved at the trial of the present suit by Mr. Hagan. The Supreme Court, considering that the matter was more fit for a native tribunal than for that Court, discontinued the suit and referred the parties to a native tribunal. Apparently no further step was taken by the defendant to prosecute his suit.

The plaintiff on the 4th February, 1931, instituted the present suit in the native tribunal of the Paramount Chief of Oguaa: It was transferred by order of the Provincial Commissioner's Court to the Divisional Court sitting at Cape Coast: It may be noted that the suit was heard without pleadings and their Lordships have not had the advantage of hearing Counsel on behalf of the defendant who was not represented in the appeal to His Majesty in Council.

Both parties relied upon traditional history and upon present occupation and cultivation of parts of the land in suit.

The plaintiff relied upon his stool being the owner of the lands within the green verge line.

Both parties agreed that the village of Yowuma where the defendant lives was bounded by one Ampenseni, and that Ampenseni was an Abura.

The defendant claims to derive his title from one Kweku Andoh, a follower of Ampenseni, who it was alleged was the first person to clear the virgin forest by permission of Ampenseni. The plaintiff, however, alleged that Ampenseni and his followers founded Yowuma by permission of one Duku, who was a successor of the plaintiff's ancestress, Acquah Brafu, who was the owner of the land and whose stool the plaintiff now occupies.

There seems to be no doubt that at some time there was a war between the Abura and the Asebu, and it was alleged that the Abura were victorious. There is no evidence, however, to show when the war took place or to prove with any certainty which were the lands if any from which it was alleged the Asebu were ousted.

Their Lordships' attention has been drawn by the learned Counsel who appeared for the plaintiff to the evidence produced at the trial. In a case such as this, where the evidence as to title and boundaries rests to such a large extent upon the witnesses' recollection as to the tradition to which they speak, it cannot be expected to be as precise and specific as in a case where documentary evidence is available.

Certain facts however, in their Lordships' opinion, are made clear by the evidence, and they are material for the consideration of the questions in issue.

The first matter to which reference may be made is that, whether the plaintiff's stool embraces the whole area of land enclosed by the green verge on the plan (as to which their Lordships express no opinion) or not, the evidence goes to show that the plaintiff's stool does appear to comprise lands in the immediate vicinity of the land which is in dispute, on the east, south and west:

There is further the evidence of Amanfi III who is the Omanhene of Asebu whose territory is to the north and east of the alleged boundary of the lands belonging to the plaintiff's stool. His evidence in their Lordships' opinion is important. He is obviously a man of position, and he was speaking about matters which would naturally be of great interest to him viz., the boundaries of his territory and he would know the tradition relating to them; he said that the Asebu lands form boundary with the plaintiff's land which includes Yowuma village, and that the said boundary was demarcated before Yowuma was built.

If the above-mentioned evidence be accepted it appears that the plaintiff's stool comprises some lands on all sides of the portion of land in dispute.

It is further to be noted that the area in dispute consists of farm land only and that there is no village, not even huts, upon it.

In view of the above-mentioned evidence it is difficult to accept the traditional history alleged by the defendant that it was land acquired by an ancestor of the defendant as the result of a war waged by the Abura against the Asebu many years ago.

The Court of Appeal referred to the fact that in 1899 one Chief Coker attempted to purchase the village Yowuma from an ancestor of the defendant called Bekwi, but was stopped. The learned Judges attached no importance to this evidence for the reason that the said village is not situated on the land in dispute. With deference to the learned Judges, their Lordships are of opinion that the said evidence is material to the case of the plaintiff, viz., that the lands of his stool are on all sides of the area in dispute and when taken in connection with the other evidence, it goes to show that the plaintiff's allegation in that respect is correct. As already stated the Court of Appeal held that the plaintiff should be non-suited as there was not sufficient evidence to grant a declaration of title.

Their Lordships do not agree with that conclusion; in their opinion the evidence produced on behalf of the plaintiff, if accepted, was sufficient to establish his title.

The learned Judges, however, further held that the defendant and his ancestors had been in occupation of the land in suit for six generations without let or hindrance by the plaintiff or his ancestors, that they have never paid tribute, performed acts of fealty, or given drink to the plaintiff for permission to farm.

Their Lordships are not prepared to accept without qualification the evidence as to the length or continuance of the occupation by the defendant

and his predecessors, but even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question, for some considerable time without paying tribute to the plaintiff or his predecessors, such possession in their Lordships' opinion is not conclusive evidence of the defendant's title.

It is to be noted that the evidence of the plaintiff was to the effect that he followed the practice of his forebears in not extracting tribute from the persons occupying the land: and that he only objected when the defendant tried to dispose of it. This was confirmed by other evidence which went to show that the plaintiff followed the precedent set by his ancestors, and that the occupiers were allowed to remain on the land as long as they behaved themselves.

It appears that the practice thus adopted by the plaintiff is not by any means exceptional or unusual and in considering this aspect of the case, it is necessary to bear in mind what was said by Lord Haldane in giving the judgment of the Board in *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 A.C. 399, at p. 402, viz.:

“ Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists.”

At page 404 of the said case their Lordships referred to the character of the land among the native communities as described by Rayner C.J. in his report on land tenures in West Africa and they came to the conclusion that the view expressed by him was substantially the true one:

“ The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.”

It appears therefore that among the natives, occupation of land is frequently allowed for the purpose of cultivation but without the ownership of the land being parted with.

The owner of the land being willing to allow such occupation so long as no adverse claim is made by the occupier; the occupier knowing that he can use the land as long as he likes provided he recognises the title of the owner.

If the evidence as to occupation be considered with the caution which has been deemed essential by the Board in such cases as the present, it is in the opinion of their Lordships not inconsistent with the title of the plaintiff and it is by no means conclusive of the defendant's title.

In this connection the fact that in two instances, one in 1899 and the other about 1926, the predecessor of the plaintiff and the plaintiff himself took steps to prevent and did prevent proposed sales of land which were claimed to be included in the plaintiff's stool, is a material and important piece of evidence.

This was a case which depended very largely upon the verbal evidence of the witnesses, and the learned Judge who tried the case had the great advantage of seeing the witnesses and of hearing them give their evidence. He accepted the evidence of the plaintiff's witnesses in respect of the material questions in issue. Their Lordships have considered the evidence which was produced by both sides and they are of opinion that there was sufficient evidence to justify the conclusion at which the learned Judge arrived, and that there is no reason for interfering with his decision.

It should be noted, as already mentioned, that the declaration of title, which the learned Judge made, was limited to the area surrounded by the verge coloured red on the plan A, and that such a declaration does not amount to an order for ejectment of the persons occupying the same.

For these reasons their Lordships are of opinion that the judgment of the Court of Appeal should be set aside and that the judgment of the trial Judge should be restored.

The defendant must pay the plaintiff's costs in the Court of Appeal and of this appeal and their Lordships will humbly advise His Majesty accordingly.

NANA AKPANDJA	* * * * *	APPELLANT
	AND	
FIAGA EGBLOMESSE	* * * * *	RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A. 10

1939 February 14

Lords Romer, Porter, and Sir George Rankin

Evidence—German map not authenticated as official not admissible—unsworn Statements not objected to promptly and not shown to have been relied upon—Privy Council refused to uphold objection.

Held: 1. A German map not proved to have been made under the authority of the German Colonial Office, the accuracy of which was not established, was rejected in evidence by the Privy Council when it was tendered there for the first time.

2. Where in a case in the Native Court relating to the boundaries of land the District Commissioner acted upon things seen by him and also upon matters mentioned to him during an inspection of the land and no objection was taken to the admission of the statements made at the view until the case reached the Privy Council, the Board refused to uphold the objection because (i) the

objection was taken at a late stage and (ii) the Board was uncertain how much assistance the District Commissioner received from his own observation or from the unsworn statements.

LORD PORTER. The appellant and respondent who are concerned in the dispute which their Lordships have to consider are the chiefs of certain districts in Togoland. The appellant is the paramount chief of Buem Borada which is in the part of Togoland under British mandate whilst the respondent is the chief of Akposo Badu which is in the portion of Togoland under French mandate.

The dispute concerns the ownership of certain lands approximately 15 square miles in extent situated on the British side of the international boundary between the French and British mandated territory. The dispute also extends to land on the French side of the boundary, but that portion is not subject to British jurisdiction and is not the subject matter of appeal.

The case has already been the subject of three decisions – firstly, before the Assistant District Commissioner, who found that each party was entitled to about half of the land in dispute; secondly, before the Acting Commissioner of the eastern Provinces who decided in favour of the appellant, and thirdly, before the West African Court of Appeal, who restored the judgment of the Acting District Commissioner.

From that decision the appellant appeals to His Majesty in Council.

Substantially the appellant's case is that the land in dispute was originally his; that many years ago a tribe called the Kwawus applied to his predecessors for leave to settle on it; that they gave permission; that the Kwawus came and increased so much in power that they wished the appellant's subjects the Akpandja to serve them; that two battles took place – in the first the Kwawus were victorious with the help of the Ashanti, that the Akposos gave no help but that both the Akpandja and the Akposos had to pay tribute to the Ashanti as a result of their victory. Later in a second battle the Akpandja were victorious, and having driven out the Kwawus re-took possession of the disputed territory and retained it ever since. The Akposos had once, he said, been subordinate to the Akpandja but had ceased to be so, and had taken no part in either battle, or given any help, or made any payment except through him to the Ashanti by way of tribute.

The respondent also spoke of the fighting with the Kwawus and Ashanti. Both were agreed that it took place before the Germans came, *i.e.*, more than 55 years ago. He also said that the respondent's subjects had been subordinate to the appellant's people but had ceased to be so; that the land was originally theirs: that it was they who granted it to the Kwawus; that the battles with them and the Ashanti did indeed take place, but that the Akposos took part in the struggle and assisted in defeating the enemy. He agreed that, as the Akpandja had joined with his people and helped to reclaim the land, they ought to have received a share of the recovered territory, but said that the appellant's predecessor agreed that it was a long way for him to go and therefore sold the land in exchange for a quantity of men, sheep and cloths. He accordingly claimed the whole.

The respondent who was plaintiff in the original action was represented by his son and the appellant by his second linguist. In addition to the respective representatives the respondent called five witnesses and the appellant four.

After hearing the evidence the Acting District Commissioner proceeded to inspect the land in question, and after doing so gave his judgment,

chief of the Akposso Badu is the owner of that portion of the land in dispute situate in British territory south of the River Ojinji between the path from Kadjebi to Ahmansu and boundary post 78A and that the land in dispute which lies to the north of the Ojinji is the property of the appellant.

Subject to this formal amendment the judgment of the West African Court of Appeal will be affirmed and the appellant must pay the costs of this appeal.

Their Lordships will humbly so advise His Majesty.

ADA BEIGH

APPELLANT

AND

COLIN SHAW SINCE DECEASED

(NOW REPRESENTED BY A. L. SHAW AND OTHERS) . RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1938) 5 W.A.C.A. 16

1939 March 27

Lord Porter, Sir Sidney Rowlett and Sir George Rankin

Executor and trustee—Indemnity of trustees against expenses and improvements properly incurred—Executor charged with interest under testator's mortgage deed—Liability of executor in respect of personality—Pleadings—Charge of wilful default.

(1) Expenditure incurred for a beneficiary and at her request is allowable and an executor is entitled to indemnity from her for the whole of the money properly so expended.

(2) On the contention that because no claim has specifically been made against the executor on the basis of wilful default,

Held: Had there been pleadings they could have been amended in a proper case if amendment had been applied for. Where, however, there are no pleadings, no amendment is possible, but there is no reason why the appellant's case should not be treated as if it had been formally stated on a pleading and formally amended by a plea of wilful default. Nevertheless, unless a claim for wilful default is plainly made, submitted to and dealt with at the hearing, it will be improper to grant any relief based upon a finding of wilful default.

(3) An executor to whom interest is due is chargeable in account with the sum he should have received unless he shows that he was unable to recover it.

LORD PORTER. This appeal concerns the administration of the estate of one Job Beigh, a trader of 17 Picton Street, Bathurst, in the Colony of Gambia, who died on the 19th December, 1927, leaving a will dated the 1st November, 1926, of which probate was granted on the 30th January, 1928.

That will appointed one Colin Shaw and one William Topp to be executors and contained the following provisions which are material to the questions in issue in the present case:

"(1) I give and devise my lot of land No. 10, Leman Street, Bathurst, to my dear wife Ada Beigh for the term of her natural life and after her death to the Father Superior of the R.C. Mission at Bathurst.

(2) I direct that my said dear wife be permitted to reside in my premises No. 17, Picton Street, Bathurst, for 12 months only after my death.

(3) I give and bequeath to my said wife the whole of the amounts due

on the mortgage of 12, Hagan Street, Bathurst, that is to say both the principal and interest on it for her absolute use and benefit.

(4) I give and bequeath unto my said wife all the goods in my shop at 17, Picton Street, Bathurst, and all my stock in trade and other personal effects belonging to me in connection with or used for the purposes of trade and the benefit of all contracts subsisting in relation to my business."

The two executors duly proved the will but William Topp never intermeddled with the assets and the determination of the present appeal is concerned solely with the activities of Colin Shaw in administering the estate. The appellant, Ada Beigh, the deceased man's wife, being, as she stated, dissatisfied with the way in which the property left to her was dealt with, initiated the present action by writ issued on the 19th June, 1934, claiming as legatee under the will against both Colin Shaw and William Topp as executors to have the real and personal estate of her late husband administered and an account rendered of what was due to her under and by virtue of the said will. The defendant Topp (who was then in Europe) was not served in the first instance. On the 21st June, 1934, Colin Shaw submitted to an order that he should render a proper statement of account as executor of the estate of the deceased on or before the 28th July, 1934. During that month certain other beneficiaries under the will were added as plaintiffs in the action, but on accounts being filed expressed themselves as satisfied and the action proceeded between the appellant as plaintiff and the two executors as defendants.

William Topp was duly served and appeared at the trial of the action, but in his case the claim was not pressed. Since none of the assets had come into his hands no order was made against him and the appellant did not appeal against that part of the decision of the learned trial Judge.

After an account had been filed by Shaw three questions alone remained requiring the decision of the Court.

(a) Whether the defendant Shaw had properly accounted for the stock in trade at 17 Picton Street, which had been specifically bequeathed to the appellant?

(b) Whether the defendant Shaw ought to be credited with any and (if any) what expenditure made by him on 10 Lemman Street?

(c) Upon what basis Shaw ought to account for the mortgage debt on 12 Hagan Street?

At the trial of the action the appellant and the two defendants alone gave evidence and as, owing to illness, Topp had taken no serious part in the administration of the estate, his evidence was not very material. The learned trial Judge found the defendant Shaw a most unsatisfactory witness, and though no dishonesty was or is imputed to him, it is plain that in any case of conflict his evidence was rejected and that of the appellant was believed.

In these circumstances their Lordships think that the findings of fact of the learned trial Judge who saw the witnesses must be accepted.

From the appellant's evidence it appears that after her husband's death Shaw told her that the goods belonged to her, but he himself opened the shop and sold in it for two weeks whilst the appellant was in seclusion mourning for her husband. After that time both Shaw and the appellant sold goods in the shop. Shaw, as she said, was helping her but she could not see the use of his helping her. When the appellant sold, she, on the instructions of Shaw, made an entry of whatever she sold on paper provided

by him. When she sold she had the key of the shop, but all the money received was taken by Shaw and locked up in the safe, of which he alone had the key. Indeed this key was in his possession up to the date of the trial. Some serge, forming part of the goods, was distributed as mourning by Shaw without the assent of the appellant and certain goods were taken by him to his shop to be disposed of there and were disposed of by him only a portion being returned. No money came to the appellant's hands direct – all she received was an allowance of £1 per week, together with a bag of rice monthly, both of which Shaw gave her after asking what daily money her husband had allowed.

After April, 1929, when Shaw went to Sierra Leone, he had little more to do with the shop and by that time very few of the goods were left, but up to that date and once afterwards, certain articles were ordered by Shaw and sold with the other goods. The indents for the goods purchased were signed by Shaw for "Ada Beigh" but some were to be marked "J.B." or sent to Colin Shaw in his own name and in one instance where the document was dated 12th September, 1928, the goods were ordered to be forwarded "a/c J.B." directed "c/o Mr. Colin Shaw, Executor." The latest of the indents was dated 12th March, 1930, and contained a note "Mark of parcel J.B." and was signed "Colin Shaw for Mrs. A. Beigh."

Meanwhile in accordance with the terms of the will the appellant had to leave Picton Street in December, 1928. She was, however, tenant for life of No. 10 Leman Street, and with the appellant's consent Shaw appears to have rebuilt the house and constructed a shop on the ground floor. He himself says that the money required for this purpose was taken from the sums received by the sale of the goods.

There is no corroboration of his statement, but the money must have come from some source and their Lordships see no reason for supposing that it was obtained in any other way.

The amount which was spent in this way, however, has not been ascertained because the learned trial Judge held himself unable to deal with the amount chargeable to the appellant in the absence of a representative of the Roman Catholic Mission. That body he held, being remaindermen and liable to bear some portion of the cost of rebuilding as capital expenditure, were interested in the question, and without their presence Shaw's claim to reimbursement for this expenditure could not be considered.

During all this time and indeed at the date of the hearing of the action the mortgage of Hagan Street had never been assigned to the appellant. As this was a specific gift the assignment should have taken place within a year at latest from the testator's will. Shaw was, of course, under no obligation nor would he have been entitled to call in the mortgage, but in fact he took no serious steps either to enforce the security or collect the interest, steps which the appellant could not take, but which he as legal holder of the mortgage could. It is true that Shaw could not find the mortgage deed in the safe, and he appears to have made some application to the mortgagor for payment of interest and repayment of capital with the result that he obtained the sum of £2 5s. 10d., but no further steps were taken in spite of the fact that the appellant had asked Shaw about the mortgage after his return from Sierra Leone in 1929, that in 1933 the appellant's solicitor was pressing for the money and offered to move in conjunction with him in getting in the mortgage, and that the appellant several times complained of the delay to Topp who often went to Shaw to get the matter wound up.

In this state of facts the learned trial Judge held (i) that the goods in the shop had never been transferred to the appellant and that Shaw was liable to

account with compound interest at 5 per cent. on the basis that he had himself made use of them or the money representing them, but was entitled to set off any legitimate expenditure which he could prove as against the sum so calculated, (ii) that he was liable on the basis of wilful default for the interest on the mortgage which had not been collected, (iii) that the expenditure at Lemn Street could not be taken into account, but that if Shaw desired to get credit for the sum paid he must take proceedings impleading the Roman Catholic Mission as well as the appellant. He accordingly directed:

- (i) An inquiry into the value of the mortgaged property,
- (ii) An account of the interest due in respect of it,
- (iii) An account of any money whether capital or interest received thereunder.
- (iv) An inquiry as to the value on the 19th December, 1927, of the goods and other assets at the shop bequeathed to the appellant,
- (v) An account of such part of these goods and assets as had been employed by Shaw in trade together with all profits made by such employment or interest at 5 per cent. per annum with annual rests upon what had been so employed.

After further evidence had been taken the answers to these inquiries were either agreed by the parties as figures or found by the Court. They were:

		£.	s.	d.
(i) Value of Mortgage at 19th December, 1928		130	10	0½
(ii) Interest from testator's death		115	19	5
(iii) Principal repaid	£2 0 0			
Interest	5 10			
		2	5	10
(iv) A sum which is said to be made up of the value of the goods and assets at the shop less all just allowances and proper expenditure		£325	17	10½
(v) Interest on £599 4s. 4d. the sum said to have been employed in trade at 5 per cent. per annum with annual rests, the date to which it is calculated not being specified but apparently being the date of the writ		226	10	7

Having ascertained these figures the trial Judge gave judgment for the appellant for £800 13s. 7d., that is 10s. less than the addition of these five sums. From this judgment Shaw appealed to the West African Court of Appeal, which gave judgment on the 26th May, 1936, allowing the appeal, finding Shaw liable in respect of goods and assets in the shop for £55 4s. only and for £2 5s. in respect of the mortgage, *i.e.*, £57 9s. in all ordering an inquiry as to the amounts expended by Shaw in improvements, alterations and repairs to 10 Lemn Street, and that the amount so found be credited to him, and further ordering that if the amount so to be credited be less than £57 9s. the appellant have judgment for the balance, but if the amount to be credited be equal to or exceed £57 9s. judgment be entered for Shaw.

The Court of Appeal arrived at its conclusion on the following grounds.

- (1) That the whole of Shaw's expenditure at 10 Lemn Street, must be

credited to him in account. In the view of the Court the money used for this property was spent on the instructions of the appellant and Shaw was therefore entitled as of right to a full indemnity for this expenditure though the appellant might as between herself and the remaindermen be entitled to an adjustment of the account and an apportionment of the expense, (2) that as regards the mortgage (a) the specific bequest in the will entitled the legatee to the mortgage debt and mortgage property subject to the executors' assent. "This assent," said Webber C.J., delivering the judgment of the Court of Appeal, "has never been withheld and from the evidence can be implied"; (b) the executor was not liable for a failure to collect the interest—his good faith had never been impugned and he could not be made liable for negligence or wilful default when no such accusation had been made against him; (3) it has been agreed that the defendant was liable for £55 4s. cash balance up to the year 1927, but after this year Shaw had handed over the key of the shop to the appellant and ceased to function as executor with regard to this bequest.

On the first point their Lordships agree with the Court of Appeal. The appellant herself stated in evidence that she wanted to carry on her husband's business. This she could only do if she had a shop in place of 17 Picton Street, which she was obliged to leave within a year of her husband's death. It appears that a shop was provided by Shaw at 10 Lemn Street, when he rebuilt the premises, that the appellant at least knew of and agreed to the rebuilding, that she removed to the new shop from Picton Street in January, 1929, and that she continued to carry on business there.

In these circumstances their Lordships think the true inference to be drawn is that the expenditure was incurred for the appellant and at her request and that the executor is entitled to an indemnity from her for the whole of this money properly so expended. What (if any) rights she may have against the Roman Catholic Mission as remaindermen is not germane to the present inquiry and their Lordships make no pronouncement upon it.

As to the second point. The learned trial Judge presumably gave judgment for £130 on the ground that (i) that was the capital value of the property when it should have been handed over, (ii) that Shaw had in some way made it his own by failing to assign it, (iii) that the personal covenant for repayment of the capital was of no value. He also held (iv) that with diligence the whole of the interest might have been recovered or at any rate Shaw had not discharged the onus cast upon him of showing that it was irrecoverable and (v) that he had been guilty of wilful default.

The Court of Appeal held that this decision could not be supported because no claim had ever been made against the executor on the basis of wilful default. Undoubtedly the original writ was framed only for relief on the basis of a common administration order, and if the action had been brought in England the beneficiary would not have been permitted to allege a breach of trust or wilful default without amending his claim and probably also his writ.

But the procedure in West Africa is more informal. By the rules of the Supreme Court of the Colony of Gambia (1928). O. 23, r. 1, suits are ordinarily to be heard and determined in a summary manner without pleadings, and by O. 16, r. 2, the plaintiff may obtain any such equitable relief as the facts stated and proved entitle him to, though not specifically asked.

The fact therefore that in a case like the present where no pleadings were ordered the writ makes no mention of wilful default, is not fatal to a decree based on such a claim. Had there been pleadings they could have been

amended in a proper case if amendment had been applied for. Where, however, there are no pleadings no amendment is possible, but there is no reason why the plaintiff's case should not be treated as if it had been formally stated on a pleading and formally amended by a plea of wilful default. Their Lordships agree nevertheless that unless such a claim was plainly made, submitted to and dealt with at the hearing, it would not be proper to grant any relief based upon a finding of wilful default.

But in their view in the present instance wilful default was clearly charged in the course of the proceedings. Indeed, much of the cross-examination would be inadmissible on any other ground, and the legal representatives of both parties discussed Shaw's liability on this basis.

It was urged before the Board that the learned trial Judge had made a common form order at the first hearing on the 26th June, 1934, and that all future proceedings were ancillary to this order. Their Lordships do not so understand the sequence of events. In their view Shaw in the first instance merely submitted by consent in the absence of Topp to an order for an account which might or might not satisfy the appellant and the other plaintiffs, leaving such steps to be taken and such remedies given as the disputes which should emerge in the course of taking the account and the evidence might require. They think that Shaw had ample opportunity of meeting a case of wilful default and that no injustice is done in dealing with the case on that basis.

Taking this view as they do, they think that there was ample evidence on which the trial Judge could find Shaw guilty of a breach of trust in not assigning the mortgage to the appellant within a year of the deceased man's death and in not collecting the interest. Nor does his failure to find the mortgage deed affect the matter. The mortgage was still a legal mortgage. In a country where titles are registered there should have been no difficulty in ascertaining the terms (and indeed from the evidence given there seems to have been no such difficulty), or in assigning it to the legatee. But the quantum of loss of capital is more difficult to ascertain. Their Lordships think, however, that the true inference to be drawn from the evidence given was that the mortgage security had deteriorated and that Shaw's failure to assign had deprived the appellant of an opportunity of avoiding such loss, but that the mortgagor either had always been unable to pay anything upon the personal covenant, or at any rate was as much or as little able to pay at the time of the hearing of the action as he had been when the mortgage should have been assigned. If this view be taken the sum which the appellant was entitled to recover was no more. That sum, however, was not the value of the mortgage in 1927, viz., £130, but £130 less its value at the time of the trial. They find evidence in the record that the latter value was £80 and therefore consider the loss should have been assessed at £50. The appellant is, of course, also entitled to have assigned to her the mortgage security and the debt secured thereby. In the absence of knowledge as to whether Topp has or has not survived Shaw, their Lordships find themselves unable to make any order with respect to it. They can only direct an inquiry as to whether Shaw survived Topp and, if he did, direct that the respondents should assign the mortgage security and debt thereby secured to the appellant.

As to the recovery of the interest upon the mortgage, in their Lordships' view the trial Judge was right also. An executor to whom interest is due is, they think, chargeable in account with the sum he should have received unless he shows that he was unable to recover it. The onus is upon him to do so. See *Tebbs v. Carpenter* (1816) 1 Madd. 290 at p. 297, and *Billing v.*

Brogden (1888) 38 Ch.D. 546. In the present case the mortgagor might well have succeeded in paying the interest though unable to find the capital sum. Shaw has not discharged the onus and is liable accordingly.

As to the third point it was contended on behalf of the respondents that Shaw had handed over the goods and assets of the shop to the appellant. He had, it is said, told her that the goods were hers and had handed her the key of the shop. It was however admitted, as has been pointed out, that he had both ordered further goods and kept the proceeds of all sales under lock and key, that on his instructions the appellant furnished sales accounts to him and that he gave her no money except £1 weekly to which he added a bag of rice monthly, though he said these acts were done because she had been his wife's ward before her marriage and he felt responsible for her welfare.

Having regard to the evidence given and the findings of the learned trial Judge, their Lordships are not prepared to accept this explanation. In spite of the inference drawn by the Court of Appeal that Shaw having handed over the key had after the year 1927 assented to the bequest and ceased to function as executor, their Lordships think that Shaw continued to act as executor in respect of the bequest of the assets of the shop just as he did in rebuilding the house at 10 Leman Street, and in keeping the mortgage in his own name and accepting no assistance from the appellant's solicitor to recover the sum due. In a sense it is true that most of his duties as executor in regard to the goods in the shop had been completed early in 1929 since very few of the goods were then undisposed of, but he still required an account from the appellant of the sales she had made, he made at least one purchase in 1930, and even up to the date of the trial he retained the key of the safe and control of any money which was left.

In these circumstances their Lordships think that the trial Judge was right in holding that the executorship continued up to that date and that Shaw was accountable for the value of the goods.

Indeed even if the respondents had not to account for Shaw's actions as executor in this respect they would, in an action brought against them as executors of Shaw have had to account for his acts as agent for the appellant in receiving and expending the appellant's money, although in that case the liability would not have been against Shaw as executor but against him in his personal capacity.

But although their Lordships agree with the trial Judge that the executorships continued, there are two matters on which they are unable to accept his views.

They see no reason for imposing a liability upon Shaw upon the ground that he had used the money which he received for the purposes of his own trade or business. He had indeed continued to act as executor but he used the goods not for his own purposes or for his own trade, but for the appellant's purposes and the appellant's trade. In these circumstances their Lordships do not think he should be mulcted in compound interest upon the sum of £599 4s. 4d. The amount appears to be made up of the total value of the goods and assets at the shop existing at the testator's death together with those purchased afterwards. The true inference appears to be that the goods afterwards purchased were paid for out of the proceeds of goods previously sold, and no valid reason for adding both sums together has been shown.

But apart from this objection Shaw, as their Lordships have indicated, is entitled to be credited with all sums properly expended in rebuilding the house at 10 Leman Street.

The Court should therefore ascertain the value of the assets at the shop received by Shaw from time to time and placed in the safe or elsewhere.

Against this sum Shaw is entitled to be credited with any money properly expended in rebuilding the house at 10 Leman Street, with any money used for the purchase of goods for the appellant, and with the weekly sum of £1 and the value of the monthly bag of rice allowed to the appellant.

The account should begin on the 1st February, 1928, two days after probate was obtained and at that date Shaw should be debited with £339 18s. 6d. the value of the stock in trade and other personal effects belonging to the testator in connection with or used for the purposes of trade, and the benefit of all contracts subsisting in relation to his business at his death. Against this Shaw should be credited with the money spent on 10 Leman Street, as it was paid, with any payment for goods purchased for the business and with the weekly £1 and monthly bag of rice, but he should be debited again with the value of the further purchases as and when they were made.

In some cases their Lordships might be inclined to charge the executor with simple interest on the sums held by him from time to time on the ground that he retained the property of the legatee long after he should have handed it over, but in the present case they think that there was good reason for the retention of the money. Shaw was, as their Lordships have stated, engaged in rebuilding 10 Leman Street, at the appellant's request. For that purpose it was essential that he should have ready to hand sufficient money to pay for the work as and when it was done. The amount required must be to some extent speculative and the moment of its requirement unascertained. In such circumstances their Lordships cannot say that it was unreasonable for Shaw to keep the money in his own hands uninvested instead of handing it to the appellant. No interest, therefore, on the goods and other assets at the shop received by Shaw should be charged against him. The figures supplied to the trial Judge are difficult to follow without seeing an account, but the total sum (if any be due) is not likely to be a large one, and it may be that the parties will be able to agree it without further litigation.

Having regard to the view they have expressed, their Lordships hold that the appellant is entitled to recover:

(1) in respect of the capital sum due on mortgage	£50 0 0
(2) interest on the mortgage debt	£115 19 5
	<u>£165 19 5</u>

The sum of £2 5s. 10d. collected by Shaw is included in these sums and is not separately recoverable.

The appellant is also entitled to an inquiry as to the value of the goods and assets at 17 Picton Street, bequeathed to her, and of the goods afterwards purchased, but against this sum there must be allowed in account all money properly expended by Shaw in respect of the work done at 10 Leman Street, in purchasing goods and in the allowances made to the appellant.

She is also entitled to an inquiry as to whether Shaw survived Topp, and, if he did, to a direction that the respondents do assign to her the mortgage of 12 Hagan Street, Bathurst, together with the sum now secured thereby.

Both parties have partially succeeded and their Lordships think that no costs should be given to either appellant or respondents before their Lordships' Board or in the Court of Appeal.

The costs of the Court of first instance should be left in the discretion of that Court.

As Colin Shaw died during the pendency of the appeal to His Majesty in Council the judgment for the sum of £165 19s. 5d. will be and the judgment for any other sums found due should be against the present respondents (who are his executors) *de bonis testatoris* and not personally.

Their Lordships will humbly advise His Majesty accordingly.

ADABLA (SUBSTITUTED FOR AFIANU, DECEASED)
ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS
OF THE ANYIGBE TRIBE APPELLANT

AND

GBEVLO AGAMA AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A.28

1939 May 15

Lords Russell of Killowen, Romer and Sir George Rankin

Appeal from the judgment of Paramount Chief's Tribunal to Court of Provincial Commissioner without prior application to the Paramount Chief's Tribunal for leave to appeal—Interpretation of proviso added to section 77 (2) of the Native Administration Ordinance (c. 111) by Ordinance No. 18 of 1935 (Gold Coast).

LORD RUSSEL OF KILLOWEN. This appeal is brought from a judgment of the West African Court of Appeal (Gold Coast Session) allowing the appeal of the respondents from a judgment of the Provincial Commissioner's Court (Eastern Province) of the Gold Coast in favour of the plaintiff in the proceedings. That judgment had reversed a judgment of the High Native Tribunal of Ada given in favour of the respondents. The appellant has been substituted in the course of the proceedings for the original plaintiff who had died.

The litigation is between representatives of two tribes, *viz.* the Anyigbe tribe and Fieve tribe, and relates to the ownership of land. The representatives of the Anyigbe tribe are the appellants before the Board; but their Lordships are not, on this appeal, in any way concerned with the merits of the dispute between the litigants.

The appeal relates to the questions whether in the circumstances of the case the judgment of the Provincial Commissioner's Court was pronounced without jurisdiction and if so whether the Court of Appeal (in its discretion) could and should have heard and determined the appeal therefrom.

The answer to these questions depends primarily upon the true construction and effect of the Native Administration Ordinance (No. 18 of 1927) and the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935).

The relevant sections of the first-named Ordinance are sections 75, 76 and 77, which provide:

" 75. In any suit or matter relating to the ownership, possession or occupation of any land an appeal shall lie from the decision of the Paramount Chief's Tribunal to the Provincial Commissioner's Court.

76. No appeal shall lie under section 73, section 74, or section 75 unless the party appealing shall give notice of appeal within the proper periods hereinafter in this section prescribed, reckoning from the date

of the decision appealed against, namely:

(1) From a Divisional Chief's Tribunal to a Paramount Chief's Tribunal, within two months;

(2) From a Paramount Chief's Tribunal to the District Commissioner's Court, within four months;

(3) From a Paramount Chief's Tribunal to the Provincial Commissioner's Court, within six months.

77. (1) A party desiring to appeal from a Paramount Chief's Tribunal shall first obtain the leave of such Tribunal so to do: provided that, if the said Tribunal shall have refused such leave the Provincial Commissioner's Court or the District Commissioner's Court may nevertheless grant leave to appeal.

(2) Leave to appeal from a Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs; and such Court shall not grant a stay of execution with respect to the said costs. The amendment Ordinance contains a section No. 13 which runs thus:

13. Sub-section (2) of section 77 of the Native Administration Ordinance shall be amended by adding at the end thereof the following proviso:

“ Provided that notwithstanding anything in this section contained the West African Court of Appeal may in its discretion, for the purpose of doing substantial justice between the parties, hear and determine any appeal brought before it on such terms and conditions as it may deem just.”

The facts relevant to the present appeal may now be shortly stated.

After the judgment of the High Native Tribunal (which is a Paramount Chief's Tribunal) and within the six months required by section 76 (3) an order was made (dated the 16th April, 1929) by the Provincial Commissioner's Court granting to the plaintiff leave to appeal from the decision of the Paramount Chief's Tribunal on certain conditions. The conditions were duly complied with, and on the 15th May, 1929, the conditional leave was made final. There is at present no material available to show that any application for leave to appeal had been made to the Paramount Chief's Tribunal, or that if made it had been refused. On the one hand their Lordships were told by Counsel for the appellant that the affidavit which was filed in support of the application leading up to the order of the 16th April, 1929, and which was not printed in the record before the Board, had been read by him, and that it contained no reference to any application to the Paramount Chief's Tribunal for leave to appeal. On the other hand their Lordships find it difficult to believe that the Commissioner would act under section 77 (1) without being satisfied that the conditions precedent to his being competent to make any order thereunder which are therein specified had been complied with.

However that may be, the plaintiff's appeal was subsequently heard and adjudicated upon in the Provincial Commissioner's Court, with results favourable to the plaintiff. The defendants thereupon appealed to the West African Court of Appeal. The appeal came on for hearing before Sir Donald Kingdon C.J. (Nigeria), Sir Philip Bertie Petrides C.J. (Gold Coast) and Arthur Webber C.J. (Sierra Leone), on the 28th April, 1936. Counsel for the defendants contended (amongst other grounds of appeal) that the Provincial Commissioner had no jurisdiction to grant leave to appeal and

that consequently his judgment on the hearing of the appeal was without jurisdiction. Counsel for the plaintiffs asked that inquiry be made. The case was accordingly adjourned for a report from the Provincial Commissioner upon two points, viz., (1) whether there were any proceedings in the Native Tribunal by way of application filed for appeal between the date of the original judgment and the date of the order of the Provincial Commissioner's Court giving conditional leave to appeal; and (2) the delay which had apparently occurred in the case. The report of the Commissioner gave an explanation of the delay, but gave no information on the first point.

The adjourned hearing of the defendants' appeal took place on the 16th November, 1936, when the matter was again adjourned in order to get a reply on the first point from the Commissioner. At the further hearing on the 3rd December, 1936, a telegram from the Commissioner was read which stated: "No record can be traced in Ada Manche's Tribunal (*i.e.*, the Native Tribunal in question) of any proceedings by way of application for leave to appeal between 18th January, 1929, and 16th April, 1929." Counsel for the plaintiff desired to read a letter written by direction of the Paramount Chief (who he said was illiterate) indicating that leave must have been granted: but the Court refused to look at it.

Judgment was reserved and was delivered on the 9th December, 1936.

The Chief Justice of the Supreme Court of Sierra Leone was of opinion that the proviso introduced by the Ordinance No. 18 of 1935 qualified only the second sub-section of section 77 of the Ordinance No. 18 of 1927, and that since no record could be traced in the Paramount Chief's Tribunal of any application for leave to appeal the proceedings before the Provincial Commissioner's Court amounted to a nullity. But he was also of opinion that, assuming that the proviso applied also to the first sub-section of section 77, the case was not one for exercising the discretion conferred by the proviso, because the granting of leave by the Paramount Chief's Tribunal was discretionary and might or might not be granted, and in his (The Chief Justice's) view, "an appeal should not be entertained when this essential step has been omitted." The Chief Justice of the Supreme Court of Nigeria concurred in that judgment. The Chief Justice of the Gold Coast concurred with that part of the judgment which dealt with the exercise of discretion under the proviso, but dissented from the construction of section 13 of the Ordinance No. 18 of 1935. He was of opinion that the proviso qualified both subsections of section 77, feeling unable to depart from the ordinary meaning of the word "section" in the proviso.

In the result an order was made allowing the defendants' appeal, setting aside the judgment of the Provincial Commissioner's Court and restoring the judgment of the High Native Tribunal.

The appellant now asks His Majesty in Council to discharge that order and to remit the matter for reconsideration by the West African Court of Appeal on the grounds (1) that the majority misconstrued the proviso in question, (2) that the Court had jurisdiction in the proper exercise of its discretion to hear and determine the defendants' appeal notwithstanding that the provisions of section 77 (1) had not been complied with, (3) that in their hypothetical use of their discretion as stated in the judgments the Judges had proceeded on wrong grounds, and (4) that in any event the Court should have presumed that everything had been duly performed and that the Provincial Commissioner's Order of the 16th April, 1929, had been lawfully made unless and until it had been affirmatively proved that the conditions precedent to the existence of his jurisdiction had not been fulfilled.

The defendants did not appear before their Lordships' Board, so their Lordships did not have the advantage of hearing the questions argued adversely to the appellant; nevertheless they feel no doubt that the matter should not rest where it is.

In their opinion the construction of section 13 of the Ordinance No. 18 of 1935 is from its language reasonably plain. The word " section " admits of no doubt, it does not in its natural signification mean " sub-section," and it certainly cannot mean it in a section which itself uses both words in its opening line. The only possible ground for suggesting the contrary (for the marginal note must be disregarded) is that section 13 enacts that " subsection (2) . . . shall be amended;" but the word " amended " in that context need mean no more than " altered," and is not inconsistent with the alteration introduced into that sub-section operating as a qualification of the whole section. Their Lordships agree with the opinion of the Chief Justice of the Gold Coast.

The Court of Appeal had accordingly jurisdiction to hear and determine the appeal on its merits if in its discretion it thought proper to do so. The Judges have intimated that, upon the hypothesis of jurisdiction, they would not exercise their discretion in favour of hearing the appeal. To that extent they have hypothetically used their discretion; but they have also stated the grounds upon which they would in this case exercise their discretion in the particular way indicated. They say that since the granting of leave under section 77 (1) is discretionary in the Paramount Chief's Tribunal and might be refused there, an appeal should not be entertained (*i.e.*, the discretion given by the proviso should never be exercised) in cases where the essential step of applying to that Tribunal has been omitted. This view, however, would reduce the operation of the proviso on section 77 (1), to which *ex hypothesi* it applies, to a nullity. Their Lordships are accordingly of opinion that the Court of Appeal has, in the present case, exercised the discretion conferred upon it on wrong grounds.

Their Lordships do not feel able in the present case to act upon the presumption that leave to appeal was asked for and was refused by the Paramount Chief's Tribunal; the fact that the affidavit above-mentioned is silent upon the point is an important fact in this connection. On the other hand, it may be doubtful whether the absence of a record on the files of the Tribunal is necessarily conclusive. That is a question which can best be answered by those who are familiar with the degree of care and accuracy with which such records and files are kept. It is, however, a matter into which further inquiry might well be made, and upon which any communication authorised by the Paramount Chief would be of value.

In the result their Lordships are of opinion that the order appealed from should be discharged and the appeal remitted for rehearing to the West African Court of Appeal.

Their Lordships will humbly advise His Majesty accordingly.

On such rehearing, if and when satisfied that the provisions of section 77 (1) have not been observed, the discretion conferred by the proviso in question should be exercised after a consideration of the relevant facts subsequent to the original judgment including, their Lordships would suggest, the question whether the omission to apply to the Paramount Chief's Tribunal for leave to appeal, was deliberate or accidental or the result of a *bona fide* mistake. If the Court decides to exercise the discretion in favour of hearing the appeal, it will do so on such terms and conditions as it may deem just.

The respondents must pay the costs of this appeal.

CHIEF KWEKU SERBEH APPELLANT
 AND
 OHENE KOBINA KARIKARI RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL (not reported)]

(1939) 5 W.A.C.A. 34

1939 June 12

Lords Thankerton, Alness, and Fairfield

Concurrent findings of fact will not be disturbed by the Privy Council.

LORD THANKERTON. In the present suit the appellant seeks to have the boundary determined as between his tribal lands and those of the respondent as regards the part of that boundary that is in dispute. The Chief Commissioner by his judgment of the 27th November, 1936, determined the boundary to be a straight line between the points A and B, which are shown on plans B and D, a boundary for which there was evidence before him, as being the one agreed on at the time that the lands were given by the respondent's predecessor to the appellant's predecessor.

On appeal by the present appellant, the Court of Appeal of West Africa, in an admirably brief judgment, as it appears to their Lordships, covered all the points. They pointed out that the appeal was on a question of fact, the other points having been abandoned: "The trial Court accepted the respondent's evidence and rejected the appellant's. We see no reason to differ."

In their Lordships' view this is one of the clearest cases of the type which justifies their Lordship's practice in not hearing arguments seeking to disturb concurrent judgments in the Court below on pure questions of fact. Accordingly, their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

GEORGE HAGAN AND OTHERS APPELLANTS
 AND
 EFFUAH ADUM AND OTHERS RESPONDENTS
 GEORGE HAGAN AND OTHERS APPELLANTS
 AND
 ARABA TANUAH RESPONDENT
 (Consolidated Appeals)

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A. 35

1939 July 7

Lords Thankerton, Alness and Fairfield

Jurisdiction—Native tribunal—Letters of administration granted in one forum, action in another—Res judicata—Construction of statute.

Section 43 (2) of the Native Administration Ordinance (c. 111) 1928 provided for the exercise of jurisdiction by the Paramount Chief's Tribunal as follows:

" (2) The causes and matters hereinabove in this section referred to are the following:-

(a), (b), (d) and (g) . . . (do not apply)

(c) Suits relating to the ownership, possession, or occupation, of lands situated within the State of such Paramount Chief.

(e) Personal suits in which the debt, damage, or demand does not exceed one hundred pounds.

(f) Suits and matters relating to succession to the property of any deceased native who had at the time of his death a fixed place of abode within the State."

Held: (1) " Suits and matters relating to succession to property " include distribution of estate; and valuation of estate is necessarily incidental to ascertainment of the shares for the purpose of distribution.

(2) There is no reason why letters of administration should not be obtained in one court, and proceedings relating to the distribution of the estate dealt with by another court. Accordingly the application for letters of administration in the Divisional Court cannot preclude any party from instituting proceedings relative to distribution before the Native Tribunal.

(3) While each of the heads (a), to (g) is subject to the provisions of section 43 (1), each head in subsection (2) affords a self-contained subject of jurisdiction, which is independent of the other heads. It is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads.

LORD THANKERTON. These are two appeals, consolidated by order of the Board, against two judgments of the West African Court of Appeal, dated respectively the 19th and the 21st December, 1935, in two suits relating to the estate of the late Thomas Hagan, a native, who died at Winneba in the Central Province of the Gold Coast Colony on the 9th July, 1931.

The appellants are the brothers and sister of the deceased, and they were granted letters of administration of his personal estate by the Divisional Court of the said Province on the 22nd February, 1932. The respondents Effuah Adum and her children claim to be interested in the estate, both real and personal, as the domestic " slave-wife " and children of the deceased. The respondent Araba Tanuah claims to be interested in the estate as the head of the family of the deceased. It is common ground that the succession to the estate falls to be determined according to the native customary law.

The first suit, which may be referred to as suit A, was initiated by the issue of a summons in the Native Tribunal of Winneba on the 21st November, 1933, by the respondent Adum, on behalf of herself and her children, calling on the present appellants to declare the value of the estate of the deceased, and to show cause why her share, and that of her children, in the estate should not be designated.

On the 28th November, 1933, the appellants applied to the Court of the Provincial Commissioner of the Central Province for the transfer of the above suit to the Divisional Court on the ground that the Native Tribunal had no jurisdiction to try it, and the Native Tribunal thereupon suspended the hearing of the suit. On the 2nd February, 1934, the Court of the Provincial Commissioner dismissed the application, finding as a fact that the deceased had lived and died at Winneba and holding that the Native Tribunal had jurisdiction. The appellants appealed therefrom to the Divisional Court of the Province, but they withdrew the appeal by leave of the Court on the 27th October, 1934, with a view to reaching an amicable settlement.

On the 21st December, 1934, hearing notices in suit A were issued, and on the 3rd January, 1935, the Tribunal granted an *ex parte* motion by the

respondent Araba, as head of the family of the deceased, to be joined as co-plaintiff in the suit.

On the 8th January, 1935, the hearing before the Native Tribunal, which had been suspended, was resumed. The appellants again objected to the jurisdiction of the Tribunal, but this objection was over-ruled by the Tribunal, in view of the decision of the Provincial Commissioner's Court on the motion for transfer. The appellants thereafter refused to cross-examine or give any statement before the Tribunal, and, after hearing evidence, the Native Tribunal held that the value of the personal estate had been proved to be about £15,000, and gave judgment in favour of the respondent Adum and her children for one-fourth of the £15,000, which was £3,750, plus one-fourth of the immovable properties, and the remaining three-fourths of the amount of the personal estate and the immovable properties were to be under the control of the respondent Araba Tanuah, the head of the deceased Thomas Hagan's family.

The appellants appealed to the Court of the Provincial Commissioner, but, at the appeal on the 12th July, 1935, the Court sustained an objection by the respondents that the appeal was not competent in that Court, and dismissed the appeal. On an appeal, this decision was affirmed by the West African Court of Appeal on the 19th December, 1935. This judgment is the first of the two judgments against which this appeal is taken.

Turning now to the second suit, which may be called suit B, the writ of summons was issued in the Divisional Court of the Central Province on the 6th February, 1935, by the respondent Araba Tanuah against the appellants, claiming as head of the family for herself and on behalf of other members of the family, of which she stated the appellants were members, that account should be taken of all the personal estate of the deceased, which had come into the possession of and under the control of the appellants prior to and since the grant of letters of administration by the Court to the appellants, and for an administration order to be made in regard to the estate. By judgment dated the 25th March, 1935, the Divisional Court (Strother-Stewart J.) gave judgment for the present appellants. The learned Judge was satisfied that the respondent Araba Tanuah was head of the family, to which the appellants belong, but he held that she had not established such an interest as would entitle her to call the appellants to account, as it had not been proved that she or the members of the family, other than the appellants, were entitled to any portion of it. The learned Judge disregarded the decision of the Native Tribunal in suit A, although it had been submitted to him that that judgment constituted *res judicata*. On an appeal by the respondent Araba Tanuah, the West African Court of Appeal on the 21st December, 1935, set aside the judgment of the Divisional Court, and granted the respondent the relief claimed by her. This judgment is the second judgment here appealed against. The Court of Appeal agreed with the finding of the Divisional Court that the said respondent was head of the family, but they held that the question whether the property was self-acquired or whether the respondent had any interest in it was decided by the Native Tribunal in the respondent's favour and was binding.

In the first place, an attempt by the appellants to found on an alleged arbitration award, prior in date to the decision of the Native Tribunal, may be disposed of. It is perhaps enough to say that the contention that there was a binding award, which precluded the respondent Adum from suing on anything but the award, appeared for the first time in the body of the appellants' case in this appeal, but it does not appear among the reasons of

appeal. Further, although some of the arbitrators gave evidence as to it at the hearing before the Native Tribunal, its date is not proved, and the evidence was quite insufficient to prove that the award was accepted as final and binding by the parties. It is not surprising, therefore, to find the present appellants' pleader, at the hearing before the Divisional Court on the 20th February, 1935, maintaining that the arbitration did not eventuate into an award. Their Lordships, in these circumstances are not prepared to entertain, at this late stage, such a contention, as they are not satisfied that the evidence establishes beyond doubt that the facts, if fully investigated would have supported the new plea, *Connecticut Fire Insurance Company v. Kavanagh* [1892] A.C. 473 at p. 480.

The appellants' main contentions challenge the jurisdiction of the Native Tribunal over the subject matter of suit A. It will be noted that suit A relates to the whole estate of the deceased, both real and personal, while suit B relates only to the personal estate, but the judgment against the appellants in suit B assumes the validity of the judgment of the Native Tribunal. The jurisdiction of a Paramount Chief's Tribunal at the material date, was conferred by section 43 of the Native Administration Ordinance, c. 111, 1928, which provided as follows:

“ 43.—(1) A Paramount Chief's Tribunal shall have and may exercise within the State of such Paramount Chief civil jurisdiction for the hearing and determination of the causes and matters hereinafter mentioned in which all parties are natives and the defendant was at the time when the cause of action arose within such State, or in which any party not being a native consents in writing to his case being tried by such Paramount Chief's Tribunal.

Provided always that a Paramount Chief's Tribunal shall not, unless the parties shall agree thereto, have any jurisdiction in any cause or matter where it appears either from express contract or from the nature of the transactions out of which such cause or matter shall have arisen that the parties expressly or by implication agreed that their obligations in connection with such transactions should be regulated substantially according to the provisions of some law or laws other than native customary law, or where other-wise some other such law or laws as aforesaid is or are properly applicable thereto.

(2) The causes and matters hereinabove in this section referred to are the following:

(a) suits to establish the paternity of children, other than suits in which some question affecting rights arising out of any Christian marriage is or may be involved;

(b) Suits relating to the custody of children, other than suits in which some question affecting rights arising out of any Christian marriage is or may be involved;

(c) Suits relating to the ownership, possession, or occupation, of lands situated within the State of such Paramount Chief;

(d) Suits for divorce and other matrimonial causes between natives married under native customary law;

(e) Personal suits in which the debt, damage, or demand does not exceed one hundred pounds;

(f) Suits and matters relating to the succession to the property of any deceased native who had at the time of his death a fixed place of abode within the State; and

(g) Any other causes and matters by this ordinance expressly

assigned to a Paramount Chief's Tribunal or to a Divisional Chief's Tribunal."

In the first place, the appellants maintained that it had not been established that the appellants were "at the time when the cause of action arose within such State." But this question of fact was decided against the appellants on their motion for transfer of suit A by the judgment of the Provincial Commissioner's Court dated the 2nd February, 1934, the appeal against which was withdrawn by the appellants, and their Lordships are not prepared to entertain this contention now.

In the second place, the appellants submitted that the letters of administration having been granted by the Divisional Court of the Province, suit A should have been instituted in that Court, which, if it had so desired, could have referred any question relating to native customary law to a Native Tribunal under section 59 (1) of the Ordinance. They further suggested that, by her part in suggesting that the appellants should be the parties to apply for the letters of administration, the respondent Araba Tanuah had elected to proceed in that Court; and, lastly, that a writ to have the estate valued and a share declared was not within the head (*f*) of section 43 (2). These points really all turn on the proper construction of head (*f*). Counsel for the appellants submitted that this head only included suits as to the right to succeed, and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships see no reason for such a narrow construction of the words "Suits and matters relating to the succession to the property," as, in their opinion, distribution of the estate naturally comes within the meaning of these words, and valuation of the estate is necessarily incidental to ascertainment of the shares for the purpose of distribution. They agree with the view expressed by both the Courts in suit A that that suit is a suit relating to the succession to the property of the deceased within the meaning of head (*f*) of section 43 (2). If this be so, there can be no reason why letters of administration should not be obtained in one Court, and proceedings relating to the distribution of the estate should be dealt with by another Court. There can be no reason for rendering nugatory the jurisdiction conferred by head (*f*), and none of the Courts below have felt any practical difficulty in the matter. Accordingly the application for letters of administration in the Divisional Court can not preclude any party from instituting proceedings relative to distribution before the Native Tribunal.

The appellants maintained, thirdly, that suit A was a personal suit for more than £100, and that the jurisdiction of the Native Tribunal was excluded by the terms of head (*e*) of section 43 (2), and, fourthly, it being admitted that two houses which formed part of the succession were not situated within the State, that jurisdiction was excluded by the terms of head (*c*) of section 43 (2). Both these contentions are based on a construction of section 43 (2) which their Lordships do not accept. In their opinion, while each of the heads (*a*) to (*g*) is subject to the provisions of sub-section (1) of section 43, each head in sub-section (2) affords a self-contained subject of jurisdiction, which is independent of the other heads, and it is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads. From this it follows that as suit A falls within head (*f*) and satisfies the provisions of sub-section (1), heads (*c*) and (*e*) of sub-section (2) are irrelevant on the question of jurisdiction. Both Courts below took the same view.

Their Lordships are therefore of opinion that the Native Tribunal had jurisdiction to deal with suit A.

Lastly, the appellants sought to have the judgment of the Native Tribunal reviewed on the merits by this Board, but their Lordships agree with the West African Court of Appeal that the judgment of the Native Tribunal is now final and binding on the appellants. The judgment was given on the 8th January, 1935, and the appellants appealed to the Court of the Provincial Commissioner, leave to appeal being granted on the 4th May, 1935. That appeal was dismissed on the ground that suit A was a suit relating to the succession of property, in regard to which the only right of appeal lay to the Court of the District Commissioner under section 74 of the Ordinance, and was not a suit or matter relating to the ownership, possession or occupation of any lands, an appeal in which would lie to the Court of the Provincial Commissioner under section 75 of the Ordinance. As already pointed out, this judgment, the reasons for which are in conformity with the views expressed by their Lordships, is final and binding on the appellants. Under section 76 of the Ordinance, no appeal lies under section 74 unless notice of appeal is given within four months from the date of a decision by a Paramount Chief's Tribunal. The appellants did not give notice of an appeal under section 74 within the period so prescribed, and the fact that under section 29 of the Commissioners Ordinance, c. 23, 1928, every Provincial Commissioner is *ex officio* a District Commissioner cannot avail to remedy this omission on the part of the appellants. The judgment of the Native Tribunal is therefore final and binding on the appellants, and it follows that the Court of Appeal was right in setting aside the judgment of the Divisional Court in suit B, and in holding that the respondent Araba Tanuah had sufficient interest to entitle her to an accounting by the appellants, and in granting her the relief claimed by her.

The appeal, accordingly, fails as regards both suits, and their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the Judgments appealed against should be affirmed. The appellants will pay to the respondents their costs in the appeal.

ARTHUR HANSEN HAMMOND APPELLANT
 AND
 JOHN HENRICK WALMBECK RANDOLF
 AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A. 42

1939 July 17

Lords Thankerton, Fairfield, and Salvesen

Fanti native law and custom—Whether title in family or individual—Gift inter vivos of immovable property under native law and custom—Property coming into the control of head of family by virtue of his office is held for the family as a whole—Witness to a document, effect of signature.

(1) The first important rule which one has to learn and ever bear in mind when dealing with matters of succession is that the right of inheritance is only through the female and pedigree is traced through the female line and that only.

(2) A stranger mortgagee or his representations could not by conveying property mortgaged to them in a particular way affect the character of that property.

(3) It was established that some of the deeds on which the respondents founded their claim were signed by them as witnesses.

Held: that such signature does not imply consent or knowledge of the contents of the deeds.

LORD SALVESEN. This is an appeal from a judgment of the West African Court of Appeal, dated 21st December, 1935 (2 W.A.C.A. 385), which reversed a judgment dated 13th July, 1935, of Sir G. C. Deane, Chief Justice of the Supreme Court of the Gold Coast, sitting as the Divisional Court of such Supreme Court for the Eastern Province of the Gold Coast Colony. The said judgment was in favour of the plaintiff appellant and held that he was the person entitled to sue as head of the Kreshie family, and that the joint property more particularly described in the writ of summons and known as St. Janet's Harbour, High Street, Accra, in the Gold Coast Colony, was the family property of the Kreshie family, and that the title to St. Janet's Harbour was in the plaintiff as head of the Kreshie family.

The plaint which in the original form claimed possession of the said property was subsequently amended and was limited to a claim for a declaration of title in the plaintiff to the property as head of the Kreshie family and it was this claim that the Chief Justice, Sir G. C. Deane, gave effect to in the concluding words of his judgment: "I think the plaintiff, as head of the Kreshie family is entitled to the declaration asked for and I give judgment for him on that point against the defendant Randolph with costs."

On appeal this judgment was reversed and the plaintiff's claim was dismissed. The reason for the decision was that the Appeal Court held that the property in question was not the property of the Kreshie family but was self-acquired by the ancestor of the respondent, J. H. W. Randolph, who thereby acquired the property as a fee simple proprietor with full right of disposal.

Various subsidiary matters were dealt with in the judgment of the Trial Judge which were not raised in the Court of Appeal and which it is therefore not necessary for their Lordships to consider, and the sole issue that was presented for their decision was whether the property known as St. Janet's Harbour was property which had passed by inheritance from Kreshie to the members of her family or had been acquired as a separate estate by the female ancestor of the respondent. The learned Trial Judge held on the evidence that, apart from two small properties with which their Lordships will afterwards deal, the property known as St. Janet's Harbour was gifted to Kreshie by her husband. His reasons for arriving at this decision, which was on a question of fact, were fully stated and it is not necessary to consider these in detail as their Lordships are in entire agreement with them.

In dealing with the question whether there had been a subsequent partition of the property so that that part of it known as St. Janet's Harbour was separated from the family property and became the absolute property of one branch of the family, regard must be had to the peculiar character of the tenure of land in West Africa as described by Rayner C.J. in the report on land tenure in West Africa which that learned Judge made in 1898, and which received the approval of their Lordships of the Privy Council in the case of *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 A.C. at p. 399. The passage is in these terms:

"The next fact which it is important to bear in mind in order to

understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.

This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land become again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of lands."

To this passage may be added that as stated in the Fanti Customary Laws edited by Mr. Sarbah

"The first important rule which one has to learn and ever bear in mind when dealing with matters of succession is that the right of inheritance is only through the female, and pedigree is traced through the female line and that only. (*Abbacan v. Bubuwoni*, 1 F.L.R. 213; *Parker v. Mensah*, 1 F.L.R. 204; *Holdbrook v. Atta*, 1 F.L.R. 211).

There is no such thing as succession, in the proper English meaning, in a family owning ancestral property. The whole family consisting of males and females, constitutes a sort of corporation; some of the members being coparceners, *i.e.*, persons entitled to a portion of the property on partition (cutting Ekar), and others who are dependents, and are entitled to reside in the dwelling house for life, such as sons and daughters, subject to good conduct and not disputing right of the family. Partition being extremely rare, the idea of heirship scarcely presents itself to the mind of any member of the family. The members are entitled to reside in the ancestral house, and to enjoy that amount of affluence and consideration which springs from their belonging to a family possessed of greater or less wealth."

These being the principles which their Lordships have to apply in the present case, it is necessary now to consider the facts as they have been established in the evidence. On Kreshie's death she was succeeded by two daughters, Janet Plange, who married C. A. Randolph, the grandfather of the respondent and Na Momo, who married W. Q. Papafio. The issue of the latter marriage was three sons and one daughter from whom the present appellant is descended. Janet Plange as the senior daughter became the head of the family and held that position until 1895 when she died, whereupon

Na Momo, her younger sister, became head of the family. On her death in 1910 the respondents' father was appointed the head of the family and held that position until 1933 when he died at the advanced age of 88. His son, as regards succession to the landed property, is, therefore, not a member of the Kreshie family but of his own mother's family who was also named Janet Plange. On the other hand the plaintiff being descended from the only female offspring of Na Momo is now head of the Kreshie family and entitled to vindicate the family property and to administer the same.

It is not disputed that both Janet Plange and Na Momo erected buildings upon the family land: Momo built Momo Hall and Janet Plange built on St. Janet's Harbour. In accordance with native law, Janet being the head of the family was entitled to lease the property and she exercised that power. In order to obtain money to build upon it she borrowed from a certain J. J. Fischer on 3rd November, 1875, a sum of £510 7s. 2d. with which the building of suitable premises was proceeded with. In the certificate of survey, the land is described as the property of Miss Janet Plange, but no significance attaches to this as it cannot reasonably be doubted that it was inherited by her from her mother Kreshie, and as the senior female child had, on Kreshie's death, become head of the family. There is no suggestion that there were other lands except that parcel on which Na Momo also built which became known as Momo Hall. The money obtained from Fischer was called up and Janet Plange thereupon borrowed from William Papafio, the husband of Momo, a sum of £697 18s. 8d. to secure which a mortgage was granted on 13th July, 1877. This mortgage bears to have been granted by Janet Plange, Momo Papafio and Phillip Carl Randolph and Alice Randolph, the children of Janet Plange. As the Court of Appeal has pointed out, there is an error in the Trial Judge's description of this document, in so far as it appears to have inadvertently described Phillip Carl Randolph and Alice Randolph as the children of Momo Papafio. But the fact remains that Momo Papafio was a party to this document which without her consent would not have been binding on the family, and their Lordships are of opinion that it has not been established that there was any other reason why she should have been made a party to the mortgage, although it was natural enough from the mortgagees' point of view that the children of Janet Plange to whom the loan was made should be parties to it along with their mother.

The next important document is dated 12th November, 1913, and is a reconveyance from E. W. Papafio and Botchway, to Phillip Carl Randolph of the property of St. Janet's Harbour on repayment of the loan obtained from Papafio. E. W. Papafio and Botchway were executors of the former's father, the mortgagee, and therefore in right of the mortgage in question, but it is to be noted that the conveyance is made to Phillip Carl Randolph in his capacity as native administrator of the estate of his mother, although he is in the document elsewhere described as "the son and heir of the said Janet Plange and joint proprietor of the said house." As Janet Plange had inherited the property from her mother Kreshie, it is difficult to understand this description except on the footing that it was the first step in an attempt on the part of P. C. Randolph to obtain for himself and his descendants what he knew to be a part of the family estate.

Eleven years later P. C. Randolph appears to have realised that this reconveyance did not serve his purpose, and on the 19th July, 1924, his law agent Mr. J. T. Coussey, on his behalf, claimed that the conveyance should have been to himself and not in the representative capacity expressed in the deed. We have not got the reply, if any, which was sent to Mr. Coussey, but

the recipient wrote to his brother a letter dated 21st January, 1924, in which he stated what in their Lordships' view was the true position, namely, that when Janet Plange died, Momo succeeded to the property according to native law and custom and that on her death the property, being of the female side, the plaintiff's mother became the successor to the family property. P. C. Randolph, however, persisted in his application and succeeded on the 30th July, 1927, in obtaining the "rectification" that he desired by two documents, one being a reconveyance of the property to the mortgagees on the condition that they should reconvey the mortgaged property to him as the sole mortgagor, and the other by which the mortgagees gave to P. C. Randolph the whole property as the sole and bona fide owner in possession, or otherwise, as a freehold property with an absolute right to devise.

The Trial Judge disposed of these documents on which, as he says, the defendant's case ultimately rests, by saying:

"If we put aside entirely all questions as to the propriety of a trustee of an estate acquiring the estate for himself as was sought to be done here, the fact remains that a stranger mortgagee or his representatives could not by conveying property mortgaged to them in a particular way affect the character of that property and however it was conveyed to P. C. Randolph he would still in my opinion hold the property as a trustee."

Nothing, therefore, that he did in dealing with the property afterwards in the various leases which were granted of the estate in question can have any effect in altering the succession of what was family property and which is now vested in the plaintiff who succeeds his mother as head of the family.

While this disposes of the claim with regard to the greater part of the property known as St. Janet's Harbour, the same considerations do not necessarily apply to two additional parcels of land which were acquired by P. C. Randolph on the 9th June, 1910, and which now form part of the whole parcel described as St. Janet's Harbour. The parcels, however, were not conveyed to P. C. Randolph as the estate of Janet Plange, and they were to be held to the use of "the purchaser his successors, and people forever." The inference is obvious that they were acquired out of Janet Plange's estate and not from the money of P. C. Randolph, and were intended to be family property. On her death intestate they would pass with the rest of the family property through the female line. It may be added that, subsequent to their acquisition, these two parcels were always treated along with the original property as forming the property of St. Janet's Harbour.

The anxiety of P. C. Randolph to secure this property for his own children may be explained by the great rise in its value which has taken place since the Kreshie family came into existence. In September, 1885, the house that then stood upon the property was yielding a rent of £2 monthly and a small shop below it 15s. per month. In the following year it was let to Messrs. Taylor Laughland & Company at £60 per annum and after various other leases had been entered into it was finally demised for a term of 99 years at a rent of £200 per annum. As P. C. Randolph was the head of the family it was apparently within his power as administrator to grant these leases. The immediate cause of the action taken by the plaintiff was a proposal by the two respondents to accept from the lessees £1,000 in full discharge of ten years' rent, or one-half of the amount payable under the

lease in question. Had this been carried out the respondents would have deprived the plaintiff of the right to recover the rents for ten years, the right to which had by this time become vested in him as the head of the family. This action on the part of the respondents which was not denied, compelled the plaintiff to establish his rights by the present suit.

The Court of Appeal have attached great importance to the fact that some of the deeds on which the respondents founded their claim were signed by him as a witness. Such signature, however, does not imply consent or knowledge of the contents and it was only after the plaintiff became himself head of the family on the death of P. C. Randolph that he could effectively represent the family in the preservation of the family estates.

In the result their Lordships are of opinion that the judgment of the Appeal Court should be reversed with costs and the judgment of the Trial Judge be restored and they will humbly advise His Majesty accordingly. The respondents will pay the costs of the appeal.

OHENE TEKYI AKYIN III REPRESENTATIVE OF
THE STOOL AND OMAN OF AMPENYI APPELLANT
AND
KOBINA ABAKA II, PHENE OF BRENU AKYINMI
(SUBSTITUTED FOR KWAMIN MENSAH, DECEASED)
SUIING ON BEHALF OF HIS STOOL RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A. 49)

1939 July 21

Lords Thankerton, Fairfield and Sir Lancelot Sanderson

Inadmissible evidence—Effect where there is other evidence to sustain finding—Concurrent findings of fact will not be lightly disturbed on appeal.

(1) Concurrent findings of fact by two courts where the question is one which relates to the boundaries of the lands of two native chiefs will not be lightly disturbed, for the two courts are in a much better position to weigh the value of the evidence.

(2) Although there was certain evidence admitted which should not have been admitted, there was sufficient evidence, apart from the inadmissible evidence, to justify the decision arrived at.

SIR LANCELOT SANDERSON. This is an appeal by the defendant in the suit from the judgment of the West African Court of Appeal dated the 21st December, 1935, which affirmed a judgment dated the 14th of March, 1935, of Strother-Stewart J. sitting as a Divisional Court of the Supreme Court of the Gold Coast.

The suit was brought on the 5th January, 1931, by Kwamin Mensah, the Ohene of Brenu Akyinmi Stool, against the Priest-in-charge of the Catholic Mission, Ampenyi, claiming damages for trespass alleged to have been committed on certain property belonging to the Stool of Brenu Akyinmi and an injunction to restrain the defendant and his servants from continuing the said trespass.

On the 29th January, 1931, the appellant was joined as a defendant and on the 7th March, 1933, the respondent Kobina Abaka II was substituted as

the successor of the original plaintiff who had died.

The Priest-in-charge of the Mission was only a nominal defendant, and he is not a party to this appeal.

The real dispute was between the plaintiff, the chief of Brenu Akyinm, and the defendant, Tekyi Akyin III, the chief of Ampenyi, as to the ownership of certain lands called " Botokul " or " Abutuku," which are on the west side of the Brenu Lagoon and are delineated upon the plan, which was exhibit A in the suit. The lands, which are the subject-matter of the action, are marked on the said plan as being within the red line thereon.

The suit was first tried in 1931 by Yates J., who entered judgment for the plaintiff. There was an appeal, and for reasons which need not be referred to, the Court of Appeal ordered that there should be a new trial *de novo*.

The new trial began before Michelin J. on the 15th March, 1934; but the learned judge heard the opening statements of counsel and the examination and cross-examination of the plaintiff only.

The trial was resumed before Strother-Stewart J. on the 19th March, 1934, and it was then treated as if a claim and counterclaim for the delimitation of the boundaries of Botokul and a declaration of title were on the record. The learned Judge found that the boundaries of the present village of Ampenyi are from the mouth of the Brenu Lagoon along the course of Eduardu stream and thence in a more or less straight line to the mouth of the Inkani stream as marked by the yellow line on exhibit A.

He was satisfied that Eduardu Hill on which the Catholic Church was being built is outside such boundary and is land belonging to the Brenu Akyinm people.

He held further that the land within the red line on the plan exhibit A belongs to the Brenu Akyinm people and not to the Ampenyi people and is the land commonly known as Abutuku land.

He therefore held that a trespass had been committed by the Priest-in-charge of the Catholic Mission building and that such trespass was in consequence of permission to build the church given by the defendant appellant, who had no right to give such permission. He assessed the damages at £25 and granted an injunction to restrain the defendants, their agents, workmen or servants from continuing the said trespass.

The defendants appealed to the West African Court of Appeal.

The Appeal was heard by the Chief Justice of Nigeria, the Chief Justice of Sierra Leone and Bannerman J., who affirmed the judgment of Strother-Stewart J. and dismissed the appeal. It is against this judgment that the defendant, the Ohene Tekyi Akyin III, representing the Stool of Ampenyi, has appealed to His Majesty in Council.

The main ground upon which the learned counsel for the appellant relied was that the trial Judge and the Court of Appeal were influenced in their decision by inadmissible evidence.

Reference was made particularly to two exhibits Q and V.

Q was a judgment of the Native Tribunal of the Paramount Chief of Elmina given on the 8th June, 1917, in a case which was brought by the Ohinba of Ampene in respect of land which was in the area now in dispute. Judgment was given for the defendants.

Their Lordships need not refer to these proceedings in further detail, inasmuch as the Court of Appeal were of opinion that exhibit Q was wrongly admitted in evidence in view of the fact that the proceedings therein referred to had not been certified as the " true copy " of the original tribunal record and for other reasons.

The Court of Appeal therefore did not rely upon exhibit Q.

Exhibit V was relied upon by both Courts, and it must therefore be considered whether it was properly admitted in evidence.

This was what has been called by the learned trial Judge the "Oath case."

The case was heard in June, 1918, by certain persons, described as the representatives of the Ten Companies of Elmina.

It was headed, "In the matter of Kwamina Nkertsia Takie Mensay of Brenu Akyinm" against certain persons, who were "charged with the offence of having violated the oaths of (1) the Oman of Elmina, (2) Sword of Omanhin of Elmina, (3) Brenu Akyinm Sunday which the plaintiffs swore at Elmina for the purpose of prohibiting the people of Ampene from cultivating their lands without permission from them."

The plea was not guilty, judgment was given for the plaintiffs and the defendants were ordered to pay oath fines of £10 1s. and costs £6 10s.

It was not disputed that this document, if admissible in evidence, was material to the issue between the parties to this appeal and would support the plaintiff's case.

It was however submitted that the tribunal which gave the decision referred to in exhibit V had not jurisdiction and therefore the proceedings and the decision in respect thereof were not admissible in evidence.

This depends upon certain provisions contained in the Native Jurisdiction Ordinance of 1882, c. 113.

In section 2 "native tribunal" is defined as meaning a head or chief or the chief of a subdivision or village as the case may be, sitting with the captains, headmen and others who by native customary law are the councillors of such head or chief.

Section 10, as amended by 7 of 1910, section 7, provides as follows:

"10. The head chief of every division and the chiefs of subdivisions or villages shall, with their respective councillors, authorised by native law, form native tribunals, having power and jurisdiction to try breaches of any bye-laws made and approved in the manner in this ordinance before mentioned, or existing at the commencement of this ordinance, and to exercise civil and criminal jurisdiction in the causes and matters after mentioned in which all the parties are natives, or in which any party not a native consents in writing to his case being tried by the native tribunal."

Section 11 provides that the said civil jurisdiction shall extend, among other matters, to the hearing and determination of suits relating to the ownership or possession of lands held under native tenure and situated within the particular jurisdiction of the tribunal.

The first clause of section 17 is as follows:

"17. The jurisdiction, civil and criminal, the exercise of which is facilitated and regulated by this ordinance shall be exclusive of all other native jurisdictions, and shall not be exercised by any other native tribunal on any pretext whatsoever."

The second clause of section 17 provides as follows:

"Provided that no proceeding or judgment shall be void by reason of any cause or matter having been brought or tried before any other tribunal than that before which it ought to have been tried, but shall be

liable to be set aside or amended if the justice of the case so requires, upon being removed to the Court by appeal or otherwise.”

It was argued on behalf of the appellant that representatives of the Ten Companies of Elmina did not constitute a native tribunal within the meaning of the above-mentioned section 10, inasmuch as the chief was not a member of the tribunal at the time it gave its decision.

On the other hand, at the trial it was submitted on behalf of the plaintiff that the tribunal of the representatives of the Ten Companies of Elmina was empowered by customary law to try cases of violation of the Great Oath, and that the jurisdiction of the tribunal had not been taken away. It seems to have been admitted at the trial that the representatives of the Ten Companies did not constitute a “ Native Tribunal ” within the meaning of the ordinance, and the learned trial Judge admitted the record of the proceedings referred to in exhibit V merely as some evidence of an act of possession giving no decision as to the question of *res judicata* or on their validity from the point of view of enforcing the judgment.

There is no specific finding by either of the Courts in Africa on the question whether the representatives of the Ten Companies of Elmina had jurisdiction by customary law to adjudicate in the “ Oath ” case as to the ownership of land, though both Courts seem to have assumed that they had such jurisdiction.

In the absence of any such finding by the Courts in that respect and of any satisfactory evidence on the point, their Lordships are not in a position to express an opinion upon the question whether the representatives of the Ten Companies would be a “ tribunal ” within the meaning of the second clause of section 17 of the ordinance; and it is unnecessary to consider the proper construction of the clause.

It was urged on behalf of the defendant at the trial that exhibit V should not be admitted as evidence on the ground that the case was not decided by the representatives of the Ten Companies, but that the parties had come to an agreement and that the settlement so arrived at was different to that set out in the judgment in exhibit V.

Their Lordships are satisfied that the trial Judge had evidence before him to justify his finding that there was no such settlement, although attempts at settlement may have been made.

There is no specific finding of the Court of Appeal affirming the conclusion of the trial Judge in this respect, but it seems that the Court of Appeal must have been of the same opinion as the trial Judge inasmuch as the learned Judges in the Court of Appeal held that exhibit V was properly admitted in evidence, thereby impliedly holding that the settlement alleged by the defendants had not been effected.

Their Lordships are of opinion that the representatives of the Ten Companies did not constitute a native tribunal within the meaning of section 10 of the ordinance and that in view of the state of the record hereinbefore mentioned and, having regard to the express terms of sections 10 and 11 and the first clause of section 17 of the ordinance, the proceedings referred to in exhibit V should not be admitted in evidence.

This however does not dispose of the appeal, for it is necessary to consider whether apart from the evidence disclosed by the exhibit V there was sufficient evidence to justify the decision of the Court of Appeal in affirming the judgment of the trial Court.

There was documentary evidence which was admissible and which went to show that from time to time the representatives of the Stool of the Brenu

Akyinm were successfully pressing their claim to some parts of the land now in dispute. Their Lordships do not think it necessary to refer in detail to such claims, but the case which was tried by Nicol J. in May, 1900, may be taken as an instance.

Further there was oral evidence as to the history and tradition of the two Stools.

Shortly stated, the appellant's case was that the Ampenyi were the first settlers in the part of the country where the land in dispute lies, and that the Brenu Akyinm people settled by permission of the Chief of Ampenyi at Brenu Akyinm on the east side of the Brenu Lagoon for the purpose of making salt, and that the Brenu Akyinm people had no land on the west side of the lagoon.

On the other hand the plaintiff's case was that the Brenu Akyinm people were the first to clear the land, and that the appellant's people had been licensed by the plaintiff's predecessors to occupy a portion of the Brenu Akyinm lands within certain defined boundaries, which did not include the lands now in dispute.

The learned trial Judge held that the traditional history given by the plaintiff was the correct one. He was of opinion that the evidence of the appellant's witnesses was the result of a careful study of the reports of former litigation and he did not take it at its full face value.

After inspecting the *locus in quo* and after due consideration of the oral evidence, he came to the conclusion that the plaintiff had established his case in this respect.

The Court of Appeal affirmed the decision of the trial Judge, saying that the learned Judge in the Court below carefully considered the traditional evidence on behalf of both parties and came to the conclusion he did.

The learned Judges in the Court of Appeal were of opinion upon the question now under consideration that overwhelming facts existed to sustain the finding of Strother-Stewart J.

In their Lordships' opinion these are concurrent findings of fact by the two Courts in Africa, and in such a case as this where the question is one which relates to the boundaries of the lands of two native chiefs, their Lordships would hesitate long before disturbing the concurrent findings of the Courts in Africa, who are in a much better position to weigh the value of the evidence than their Lordships.

Their Lordships' conclusion is that although there was certain evidence admitted which should not have been admitted, there was sufficient evidence, apart from the inadmissible evidence, to justify the decision at which the two Courts in Africa arrived, and consequently that the appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

ISAAC THEOPHILUS AKKUNNA WALLACE
JOHNSON

APPELLANT

AND

THE KING

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1939) 5 W.A.C.A. 56

Criminal Law—Sedition—Seditious intention—Criminal Code of the Gold Coast contains full and complete statement of the law of sedition for Gold Coast.

(1) The Criminal Code is designed to suit the circumstances of the people of the Gold Coast. The elaborate structure of section 330 of the Criminal Code of the Gold Coast Colony (c. 29), suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the country. It must therefore be construed in its application to the facts of the case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland.

(2) Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result.

THE LORD CHANCELLOR. This is an appeal by special leave from a judgment of the West African Court of Appeal (Gold Coast Session) (Reported at 3 W.A.C.A. 104) dismissing an appeal by the appellant against his conviction on the 13th October, 1936, by the Supreme Court of the Gold Coast at the Assizes held at Victoriaborg, Accra. The appellant was tried upon an information containing two counts charging him with offences against section 330 of the Criminal Code of the Gold Coast Colony (c. 29). The first count charged the appellant with unlawfully publishing a seditious writing of and concerning the Government of the Gold Coast contrary to section 330 (2) (b) of the Criminal Code. The second count charged him with unlawfully having in his possession documents containing seditious writing of and concerning the Government of the Gold Coast contrary to section 330 (2) (e). The trial took place before the Chief Justice of the Gold Coast Colony sitting with three assessors on the 7th, 8th, 9th, 10th, 12th and 13th October, 1936. The appellant was convicted by the Chief Justice on both counts, and was sentenced to pay a fine of £50 on the first count and, in default of payment within 14 days, to be imprisoned for three months. No punishment was inflicted on the second count.

The appellant appealed to the West African Court of Appeal against his conviction. The appeal was heard on the 17th and 18th November, and the 1st December, 1936, and was then dismissed.

The appellant petitioned His Majesty in Council for special leave to appeal, and this was granted on the 28th July, 1938.

The writing which was the subject matter of the charges was part of an article signed "Effective" and published in a newspaper circulating in the Gold Coast Colony. The material words as set out in the information, together with allegations as to the meaning attributable to certain words and phrases, were as follows:

" Personally, I believe the European has a God in whom he believes and whom he is representing in his Churches all over Africa. He believes in the god whose name is spelt Deceit. He believes in the god whose law is 'Ye Strong, you must weaken the weak. Ye "civilised" Europeans, you must "civilise" the "Barbarous" Africans with machine guns. Ye "Christian" Europeans, you must "Christianise" the "pagan" Africans with bombs, poison gases, etc.'

In the Colonies the Europeans believe in the god that commands 'Ye administrators' (meaning to include therein the Government of the Gold Coast) 'make Sedition Bill' (meaning to include therein the Criminal Code Amendment Ordinance No. 21 of 1934 of the Gold

Coast) ' to keep the African gagged. Make Forced Labour Bill ' (meaning to include therein the Labour Ordinance of the Gold Coast) ' to work the Africans as slaves. Make Deportation Ordinance ' (meaning to include therein the Kofi Sechere Detention and Removal Ordinance No. 1 of 1936) ' to send the Africans to exile whenever they dare to question your authority.'

" Make an Ordinance to grab his money so that he cannot stand economically. Make Levy Bill ' (meaning to include therein the Native Administration Ordinance No. 25 of 1936 of the Gold Coast Colony) ' to force him to pay taxes for the importation of unemployed Europeans to serve as Stool Treasurers. Send detectives to stay around the house of any African who is nationally conscious and who is agitating for national independence and if possible to round him up in a " criminal frame-up " ' (meaning thereby a criminal charge in which the evidence is fabricated) ' so that he could be kept behind the bars ' (meaning thereby prison)."

Section 330 of the Criminal Code (now section 326 of the Criminal Code 1936 Revision) is as follows:

" Subsection (2): Any person who—

(b) prints or publishes by any such act as is specified in Title 18 any seditious words or writing or

* * *

(e) being found in possession of any newspaper book or document or any part thereof or extract therefrom containing seditious words or writing does not prove to the satisfaction of the Court that at the time he was found in such possession he did not know the nature of its contents

shall be liable—

(i) for a first offence under paragraphs (a), (b), (c) and (d) to imprisonment for two years or to a fine not exceeding one hundred pounds . . .

(ii) for a first offence under paragraphs (e) and (f) to imprisonment for one year or to a fine not exceeding fifty pounds . . .

Subsection (8): ' A seditious intention ' is an intention—

(1) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors or the Government of the Gold Coast as by law established; or

(2) to bring about a change in the sovereignty of the Gold Coast; or

(3) to excite His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure the alteration, otherwise than by the lawful means, of any other matter in the Gold Coast as by law established; or

(4) to bring about a change in the sovereignty of the Gold Coast: against the administration of justice in the Gold Coast; or

(5) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or

(6) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast.

It is not a seditious intention—

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

- (b) to point out errors or defects in the government or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or
- (c) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in paragraph (2) of this subsection; or
- (d) to point out with a view to their removal, any matters, which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast.

Provided that none of the acts or things mentioned in provisos (a), (b), (c) and (d) shall be deemed to be lawful if they are done in such a manner as to effect or be likely to effect any of the purposes (1) to (6) which are declared in this section to be a seditious intention.

' Seditious words ' are words expressive of a seditious intention.

' Seditious writing ' included anything intended to be read and any sign or visible representation which is expressive of a seditious intention."

At the trial a plea of not guilty was entered. The appellant admitted the writing and publication of the article. His defence was that the article was not seditious and that it was not calculated to bring the Government of the Gold Coast Colony into hatred and contempt. A great deal of evidence was called as to the application of the article to the affairs of the Colony. Notwithstanding the statements of witnesses for the defence that they did not read the article as having reference to the Gold Coast Colony, it was not really in dispute that the appellant had the Government of the Colony in view when he wrote the article and that it referred to legislation and events generally in the Colony. There was no evidence of any outbreak of violence or of any manifestation of hostility to the Government of the Colony as a result of the article.

The case presented by Counsel for the appellant for their Lordships' consideration was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for these submissions was sought in the summing up by Cave J. in *R. v. Burns*, 16 Cox C.C. 355, quoted at length in *Russell on Crime* (9th ed.), pp. 89-96. Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave J. Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly, the language of the section, under which the appellant was charged, lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law of sedition by Stephen J. in the *Digest of Criminal Law* (7th

ed.), arts. 123-126, quoted with approval by Cave J. in his summing up in *R. v. Burns*. The fact remains however, that it is in the Criminal Code of the Gold Coast Colony and not in English or Scottish cases that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of section 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions however authoritative of the law of England or of Scotland.

In these circumstances, their Lordships turn to the Code, and they find nothing in the section under consideration to support the appellant's contentions. "Seditious words," in the terms of sub-section (8), "are words expressive of a seditious intention." By an earlier definition in the same subsection, "'A seditious intention' is an intention to bring into hatred or contempt . . . the Government of the Gold Coast as by law established."

Their Lordships find these words clear and unambiguous. Questions will necessarily arise in every case as in this case as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to "bring into hatred or contempt . . . the Government of the Gold Coast," and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-section (8), "to point out errors or defects in the Government of the Gold Coast." It is quite another thing to add words which are not in the Code and are not necessary to give a plain meaning to the section. Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import the appellant's argument.

The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist must also fail and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined "seditious words" by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.

For the reasons indicated this appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

OKUSANYA AND ANOTHER (REPRESENTING AKE
PEOPLE) APPELLANTS
AND
AKANWO AND ANOTHER (REPRESENTING IJESHA
PEOPLE) RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1941) 7 W.A.C.A. 1

Res judicata—What amounts to claim adjudicated upon.

LORD RUSSELL OF KILLOWEN. This is an appeal from a judgment of the West African Court of Appeal, which dismissed an appeal from a judgment of Paul J., dismissing an action brought by the appellants against the respondents. The action was dismissed as to part of the relief claimed upon the ground of *res judicata*, and as to the rest of the relief claimed upon the ground that it was misconceived and unnecessary. The Court of Appeal dismissed the appeal of the appellants upon the ground that all the questions then sought to be raised were clearly *res judicata*. They made no specific reference to the claim which Paul J. considered to be misconceived and unnecessary.

The appellants represent the people of Ake and the respondents are representatives of the people of Ijesha.

In order to make clear how the question of *res judicata* arises, it is necessary to describe the litigation which has taken place from time to time from the year 1905 onwards, between the representatives of these two peoples; and the litigants in each case will be referred to as the people whom they represented, *i.e.* as Ake and Ijesha respectively.

In 1905 Ake sued Ijesha in the District Court of Shagamu, claiming damages for trespass to land and an injunction. This action resulted in a judgment (known as the Duncombe judgment) in the following terms:

“ Judgment for plaintiff for nominal damages. Plaintiff to have and hold all that land known as Ake, with the exceptions of farms there actually being cultivated by and in the possession of the natives of Ijesha.”

In 1915 Ake sued Ijesha to recover possession of a parcel of land situate at Ake in the Ijebu-Ode division and known as Inyowu. Ake obtained a judgment in the following terms:

“ Judgment for plaintiff: the boundary between the plaintiff and defendants to be the Ona river, subject to any rights of the Crown. Defendants to be permitted to reap their corn and yams on the land and to take no further action on this land.”

An appeal from this judgment was ultimately decided on the 7th February, 1924, in the Supreme Court of Nigeria by Tew J., who varied the judgment in the Court below and declared Ake to be owners of a certain area defined by him, but that Ijesha were entitled to exercise farming rights over a portion of the said area, which portion was defined by the judge and was stated to comprise ten farms therein described by name, and hereinafter referred to as the specified farms.

It will be observed that this judgment (hereinafter referred to as the Tew judgment) established a right in Ijesha to exercise farming rights over the specified farms. It did not, however, in any way define the farming rights.

In the year 1928 Ijesha sued Ake in the Provincial Court at Ijebu-Ode claiming an injunction to restrain Ake from infringing the farming rights given to Ijesha by the Tew judgment. Ake contended that the farming rights were limited to planting yams and corn. The Resident, however, by his judgment given on the 12th March, 1928, held that Ijesha were entitled to “ full farming rights ” over the specified farms and granted an injunction. He subsequently changed his mind, and purported to give another judgment on the 26th April, 1928, upon the footing that Ijesha were only entitled to

cultivate the ordinary annual crops such as yams and corn, and not to plant cocoa, kola, coconut, palm trees etc.; and were only entitled to exercise their farming rights by agreement with Ake. This *volte-face* may, however, be disregarded, because on appeal by Ijesha to the Supreme Court of Nigeria, that Court decided that the judgment of the 26th April, 1928, was of no legal effect or authority, and that the judgment of the 12th March, 1928, stood.

At this stage of the litigation the position of Ijesha, as judicially determined between the parties, was that Ijesha were entitled to full farming rights over the specified farms: but although the area over which the rights were exercisable was clear, there had been no decision as to what rights were covered by or included in full farming rights.

On the 28th June, 1932, Ake brought an action against Ijesha in the Provincial Court of Ijebu-Ode, in which the following relief was claimed:

“ The plaintiffs seek a declaration that the farming rights to which the defendants are entitled (under the Tew judgment) on a certain area of farmland referred to in the said judgment, do not include:

(a) The right to reap palm nuts.

(b) The right to plant kola, cocoa and other live trees.

(c) The right to use the farmlands without payment of tribute.

2. An injunction restraining the defendants, their servants and agents from reaping palm nuts and planting kola, cocoa and other live trees on any portion of the said area.”

Ake delivered a statement of claim in which, after sundry allegations and contentions, they conclude with the words “ whereupon the plaintiffs claim as per the writ of summons.” By their defence Ijesha pleaded that in the action before Ames Assistant J., Ake had sought precisely and in essence the same declaration as Ake were then seeking and that the matter was *res judicata* by the judgment of the 5th February, 1935.

The action was tried by Paul J. who was of opinion that since Ames Assistant J., has given judgment for the defendants, his judgment bound the parties as *res judicata* of the whole claim stated in the writ in that action; and that all that he (Paul J.) had to consider was to what extent the claim in the action before him coincided with the claim in the action before Ames Assistant J. Applying that test, he was of opinion that the matters covered by paragraph 1 (a), (b) and (d) of the present claim were *res judicata*. As regards (c) he disposed of the claim in the following words:

“ As regards 1 (c) of the plaintiffs' claim I hold that the claim is completely misconceived and unnecessary. The right to fell these trees can be given only by a permit from the Forestry Department not by a judgment of this or any other court. The defendants' counsel admitted that a right to fell timber could be given nowadays only by Forestry permit and not by the judgments in question. To give a declaration that the defendants' farming rights do not include a right to fell timber would be in effect simply to declare that the provisions of the Forestry Ordinance were in force. The Court does not grant declarations of that nature and for that reason the declaration sought in (1) (c) of the claim is refused as unnecessary.”

The Court of Appeal in their judgment, after rejecting the obviously false contention (made apparently on behalf of Ake in that Court) that the action did not relate to the specified farms, stated that so far as the specified farms were concerned, “ all the questions now sought to be raised are clearly *res judicata* in the judgment of Ames Assistant J., in 1935. The appeal

therefore fails and is dismissed with costs . . ." That is in substance the whole of the judgment in the Court of Appeal.

Their Lordships, unfortunately, have not had the assistance on the hearing of this appeal of any argument on behalf of Ijesha; but having considered the matter from all points of view they have come to the conclusion that the plea of *res judicata* does not afford a defence to the whole of Ake's claim, and that the action must be sent back in order that certain limited issues may be tried.

Their Lordships agree with the Court of Appeal in their opinion that the action is concerned only with the specified farms and with no other land: but they cannot assent to the view that all the questions sought to be raised in the action are *res judicata* by the judgment of 5th February, 1935. Some they think are, but some are not, and to a partial extent this appeal must succeed.

Thus, so far as the present action seeks to establish that Ijesha are not entitled to reap palm nuts on the specified farms, it is clearly *res judicata*. That was the subject of the judicial decision given by Ames Assistant J. on the claim (a) in the action before him. Again, while it may be doubtful whether the present action seeks to establish that Ijesha are not entitled to plant kola or cocoa trees on the specified farms, it is clear that if and so far as it does, that matter also is *res judicata* by reason of the same judicial decision.

To this claim Ijesha pleaded *res judicata* relying on the Tew judgment, and the judgment of the 12th March, 1928. Ames Assistant J., upheld the plea of *res judicata* as regards (a) and as regards (b) in so far as it referred to palm nuts, kola and cocoa trees. As regards the claims in respect of planting "other live trees" and the payment of tribute, Ake were to be at liberty to continue their action. Eventually Ake decided not to continue the action for that purpose, but stated that they would perhaps take another form of action. The judgment, signed by the judge and dated the 5th February, 1935, was in the following terms:

" Court reads its ruling on plea of *res judicata*.

Upholding plea as regards (a) of the claim, and as regards (b) in so far as it relates to palm nuts, cocoa and kola trees. But rules that plaintiffs can continue the action to sue for the declaration they seek as regards 'other live trees' in (b) of the claim and as regards (c) of the claim if they wish to.

Majekodunmi consults his clients and decides that they will not proceed—but will perhaps take another form of action.

Judgment for defendants, with costs assessed at 25 guineas."

The litigation next to follow was the action which has given rise to the present appeal. It was instituted by Ake in the Native Court of the Ode Remo, Ijebu Province, but was subsequently transferred to the High Court. By the particulars of claim in the writ of summons (dated the 22nd June, 1936), Ake claimed a declaration that certain rights were not included in Ijesha's farming rights, and an ancillary injunction. The declaration claimed runs thus:

" Plaintiffs seek a declaration that the 'farming rights' which the defendants were given by the judgment of the Supreme Court, Lagos, dated the 7th day of February, 1924, on a certain area of farmland referred to in the judgment, do not include

1. (a) The right to reap palm nuts in farms actually cultivated by, and have always been in the possession of the plaintiffs on the Ake side of the Ona river.

(b) The right to reap kola nuts and cocoa on kola trees and cocoa trees actually planted by the plaintiffs as owners of the Ake land according to native custom on the Ake side of the Ona river.

(c) The right to fell on the Ake side of the Ona river 'lawful trees'—as Iroko, Oganwo, Opepe and Abora, which only an owner of land has the right to fell according to native custom.

(d) The right to exercise the said 'Farming Rights' on the Ake side of the Ona river without payment of tribute, as native law and customs requires."

There remain three other claims to consider. Claim 1 (b) is a claim to prevent Ijesha from reaping nuts on trees which have been planted by Ake. Their Lordships do not find that this particular claim has ever been raised before. It was not raised in the action before Ames Assistant J., nor in any of the other litigations of which their Lordships have information. This matter would not appear to be *res judicata*.

In regard to the claim for tribute their Lordships are unable to hold that this matter is *res judicata*. It is true that it was included in the action before Ames Assistant J., but there was no judicial decision upon it. The claim has never been judicially considered or adjudicated upon between the parties. All that happened was that Ake elected not to proceed with that action for the purpose, but to seek a judicial decision in other proceedings. In those circumstances the judge had necessarily to give judgment in the action for Ijesha, but, as the judgment shows on its face, without any decision as regards that particular issue.

The last matter is the claim to establish that Ijesha have no right to fell trees. This question is in their Lordships' opinion clearly not *res judicata*. It appears for the first time in the present action. But there are other considerations which apply to it, and which lead their Lordships to the conclusion that the appeal should fail in regard to that particular claim.

It is evident that Paul J., with his local knowledge of the conditions prevailing under the Forestry Ordinance, and the rights of the Forestry Department in regard to the trees situate on the specified farms, treated this claim as wholly misconceived. This view seems to have been shared by the Court of Appeal if the claim was made there, for they make no mention at all of the claim in their judgment. But it would seem that the claim was not made before the Court of Appeal. What they say in their judgment is that "all questions now sought to be raised are clearly *res judicata*." These cannot refer to the claim now under consideration, which, as stated, appears in this action for the first time. Their Lordships accordingly draw the inference that this claim which had been treated with such scant respect by the trial Judge, was not further pressed in the Court of Appeal. A note of the proceedings in that Court appears in the record. From that it would appear that Counsel for Ake said that the only point in the appeal was whether the judge was right as to *res judicata*, and no mention is made of the claim in regard to felling trees which the trial Judge disposed of on other grounds. Their Lordships, however, are without information as to the author of the note, which may or may not be a judicial note of the proceedings. In those circumstances they prefer to rely for their conclusion upon this point upon the language used by the Court of Appeal in its judgment, and quoted above. They think it right, however, to state

expressly that their decision in regard to the claim as to felling trees involves no decision as to what (apart from the powers of the Forestry Authorities) are the rights of either party in that regard.

In the result their Lordships are of opinion that the appeal should succeed to the following extent, *viz.* that the judgment of the Court of Appeal should be wholly set aside, that the judgment of the trial Judge should be set aside in so far as it declares that the claims undermentioned are *res judicata* and provides for costs and that the action should be remitted to the High Court for the purpose of trying (but only in relation to the specified farms) the claim of the plaintiffs to declarations in terms of paragraph 1 (b) and paragraph 1 (d) of the particulars of claim and to any necessary ancillary injunction. They will humbly advise His Majesty accordingly.

The respondents will pay to the appellants one-half of their costs of the appeal to His Majesty in Council and of their appeal to the Court of Appeal. The costs in the High Court (including the costs of the original hearing) will be dealt with by the Judge on the further hearing of the action.

ABIBA ALI APPELLANT
 AND
 ALHAJI MAMA ALI RESPONDENT
 [ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1942) 8 W.A.C.A. 1

1942 July 3

Lords Thankerton, Russell of Killowen, Romer,
 Sir George Rankin, and Sir Madhavan Nair

Will—Construction of will—Creation of trust—In construing one paragraph of will it should be read in conjunction with other paragraphs—Devise of rent of land for indefinite period equivalent to devise of land itself.

The testator made a will containing seven clauses. Three of the clauses material to the decision are, 1, 2 and 4 namely:

“ 1. I leave my house in Horse Road in Ussher Town to the South of the late B. D. Coker's House in the charge of Madame Amina, Meriam Ali and my son Mama Ali. The said House is never to be sold but the rent received therefrom is to be divided equally between the said Madame Amina, Meriam Ali and my son Mama Ali.

2. I leave the land known as Ali's land behind the Mosque at Zongo in the charge also of Madame Amina, Meriam Ali and Mama Ali.

4. I bequeath the balance of my money in the Bank of British West Africa after deducting the (£140) one hundred and forty pounds referred to in the preceding paragraph to Madame Amina, Meriam Ali and Mama Ali. They are to use the money for the benefit of themselves and the members of my family and children in Accra.”

The question of construction that arises is under clause 2 and it is: Is the property thereon mentioned, Zongo land, devised to Madame Amina, Meriam Ali and the respondent merely as trustees or is it devised to them for their own benefit?

Held: (1) The words “ I leave in charge of ” are not those commonly used for creating a trust and may well have been used as meaning no more than “ I leave in the hands of ” the three named persons.

(2) The paragraph must be read in connection with the rest of the Will including paragraph 4 in which the testator when desiring to create a trust, used the appropriate words for doing so.

(3) In particular it must be read in connection with paragraph 1, the second sentence of which makes it abundantly clear that the three named devisees were

to take absolute interests in the house at Horse Road as tenants in common in equal shares, it being well settled that a devise of rent of land for an indefinite time is now equivalent to a devise of the land itself.

(4) The words "I leave in charge of . . ." in paragraph 1 are equivalent to "I devise absolutely to . . ." and should have the same meaning in paragraph 2 and are therefore effectual to confer upon the three named persons the absolute beneficial interest in Zongo land.

(5) The position of the word "also" in paragraph 2 suggests that the testator was not merely adding a new clause to his Will but was adding a new subject-matter to the "charge" *i.e.* the beneficial devise contained in the preceding paragraph (1) though without the attempted restraint on alienation.

LORD ROMER. Their Lordships on this appeal are called upon to determine the true meaning and effect of a devise of certain real estate contained in the Will of one Ali, a native officer in His Majesty King Edward the Seventh's Hausas. This Ali was a much married man, being the possessor of no less than seven wives, of whom the senior was Madame Amina. He had, on the other hand, comparatively few children, for they numbered but eight in all. Of these children one, a son, was the respondent Mama Ali; another, a daughter, was called Meriam Ali; a third, also a daughter, was the appellant Abiba Ali.

On the 12th December, 1901, Ali made his Will. It is written in the English language and is in the following terms:

" IN THE NAME OF GOD AMEN!

This is the last Will and Testament of ALI an Officer in His Majesty King Edward the Seventh's Hausas.

1. I leave my House in the Horse Road in Ussher Town to the South of the Late B. D. Coker's House in the charge of Madame Amina, Meriam Ali and my son Mama Ali. The said House is never to be sold but the rent received therefrom is to be divided equally between the said Madame Amina, Meriam Ali and my son Mama Ali.

2. I leave the land known as Ali's land behind the Mosque at Zongo in the charge also of Madame Amina, Meriam Ali and Mama Ali.

3. I bequeath to Adama, Aramu, Asibi Maminah, Adjumah, Zanaboo, Agara, my wives a sum of Twenty Pounds each.

4. I bequeath the balance of my money in the Bank of British West Africa after deducting the (£140) One hundred and forty pounds referred to in the preceding paragraph to Madame Amina, Meriam Ali, and Mama Ali. They are to use the money for the benefit of themselves and the members of my family and children in Accra.

5. I bequeath to my son Mama Ali all my effects consisting of trinkets, war medals and wearing apparel.

6. I appoint Henry Hely Wartemberg of Elmina and Timothy Laing of Accra and Cape Coast Son of the late Revd. Timothy Laing my executors. They are to see that the conditions and the terms of this Will are carried out and they are to be properly compensated by Madame Amina, Meriam Ali, and Mama Ali.

7. This Will shall be in full force at the date of my death."

On the 2nd February, 1908, Ali died and on the 10th September 1908, the Will was proved by Timothy Laing, one of the executors.

The question of construction to be determined on this appeal arises under clause 2 of the Will. It is this: Is the property therein mentioned, which is hereinafter referred to as the Zongo land, devised to Madame Amina, Meriam Ali, and the respondent merely as trustees, or is it devised to them for their own benefit? If the former be the true view, then inasmuch as the trusts upon which the property is to be held are not declared in the Will, the

beneficial interest in it devolved as upon an intestacy. Their Lordships are informed that in that case, according to the law governing its succession, the property passed to all the testator's children in equal shares except that a son took two shares to a daughter's one. It was not, however, until the 18th October, 1937, that any attempt was made by the appellant to establish her right to a share in the Zongo land. On that date she began the present action as plaintiff, purporting to sue on behalf of herself and four other of the testator's children who would be interested on the footing of an intestacy. She claimed by her writ to have her and their title to share in the Zongo land declared and to have the usual consequential accounts taken. The defendants to the action were the respondent and Meriam Ali. In the meantime the respondent and Meriam Ali and, until her death in the year 1912, the widow Madame Amina, had treated the Zongo land as though it had been devised to them beneficially. If it had in truth been so devised, the question whether the three took it as joint tenants or as tenants in common need not be discussed. For it appears that on the death of Madame Amina all her real and personal estate devolved upon Meriam Ali, and that by a deed dated 22nd October, 1917, the last named conveyed to the respondent the whole of her interest in the Zongo land, or rather in so much of it as then remained unsold, it being recited in the deed that part of the land had been sold and the proceeds divided between Meriam Ali and the respondent. On the assumption therefore that the devise of the Zongo land to the three passed the beneficial interest, the respondent as from the 22nd October, 1917, had become the sole owner of the land still remaining unsold, whether the three took as joint tenants or tenants in common. From that date down to the institution of this action it remained in his sole and undisputed possession.

The action came on for hearing in the month of August, 1938, before Petrides C.J., who on the 8th October of that year gave judgment in favour of the plaintiff. Upon the question of construction he held that the Zongo land had not been devised by paragraph 2 of the Will to Madame Amina, Meriam Ali, and the respondent but was placed in their charge. "It results," he said, "from this paragraph that these persons were trustees of the land and held the land not for their own benefit but for the heirs of the testator, *i.e.* in this case the children." He accordingly declared that the appellant and those she purported to represent were entitled to certain specified shares in that part of the Zongo land that remained unsold, and directed an account to be taken of the moneys received by the respondent from that part of the land. It should be mentioned in this connection that, for reasons which it is unnecessary to specify, the appellant at the trial had abandoned her claim against the defendant Meriam Ali.

From this judgment the respondent appealed to the West African Court of Appeal (Webb C.J., Lloyd A.C.J. and Strother-Stewart J.) who on the 6th April, 1939, made an order allowing the appeal. From that order the appellant now appeals to His Majesty in Council.

There is unquestionably much to be said in favour of the construction of paragraph 2 of the Will for which the appellant contends. Upon the whole, however, their Lordships find themselves in agreement with the conclusion reached by the majority of the Court of Appeal. If that paragraph were the only one in the Will it is probable that the result of it would be what Petrides C.J. held it to be. But even so, the words "I leave in charge of" are not those commonly used for creating a trust and may well have been used by this native officer as meaning no more than "I leave in the hands of" the three named persons. The paragraph, however, must be read in connection

with the rest of the Will including paragraph 4 in which the testator, when desiring to create a trust, has used the appropriate words for doing so. But in particular it must be read in connection with paragraph 1, a paragraph that Petrides C.J. unfortunately thought it unnecessary to construe as the appellant made no claim to the property with which it was concerned. Surely in order to construe the words "I leave in charge of" contained in paragraph 2 it is very material, to say the least of it, to construe the same words where they occur in paragraph 1. Turning then to this latter paragraph the first observation to be made is that the second sentence in it makes it abundantly clear that the three-named devisees were to take absolute interests in the house in Horse Road as tenants in common in equal shares, it being well settled that a devise of the rent of land for an indefinite time is now equivalent to a devise of the land itself. It is argued, however, on behalf of the appellant that these absolute interests are equitable interests only, and that the legal estate in the house was by virtue of the first sentence of the paragraph vested in the three-named persons jointly as trustees, the trusts on which the property was to be held by them being declared in the second sentence. It is said in other words that the testator's intention was to constitute these persons jointly trustees for themselves absolutely as tenants in common in equal shares. Their Lordships are not prepared to attribute to the testator so unlikely an intention. It seems to them a far sounder construction to regard the first sentence as conferring upon the devisees the absolute beneficial interest in the property and the second sentence as an attempt, though an ineffectual attempt, to impose upon them a restraint on alienation. If, indeed, the first sentence merely constituted the devisees they would not as such have possessed a power of sale. As the absolute beneficial owners on the other hand they would, of course, have had such a power. The attempt to deprive them of that power seems therefore an indication that by the first sentence the testator intended to confer the beneficial ownership upon the three persons and not merely to constitute them trustees.

Their Lordships are accordingly of opinion that in paragraph 1 of the Will the words "I leave in the charge of . . ." are upon their true construction equivalent to "I devise absolutely to . . ." But if these words have that meaning in paragraph 1, there can be no valid reason for giving them a different meaning in paragraph 2. They are therefore effectual to confer upon the three-named persons the absolute beneficial interest in the Zongo land. Some confirmation of this view is afforded by the use and the position of the word "also" in that paragraph. The place in which it is found suggests that the testator was not merely adding a new clause to his Will but was adding a new subject matter to the "charge," that is to say to the beneficial devise contained in the preceding paragraph, though without the attempted restraint on alienation.

In adopting this construction of the words "I leave in the charge of" contained in paragraph 2 of the Will their Lordships do not doubt that they are giving effect to the real intention of the testator. They find it difficult to suppose that the testator intended to devise the Zongo property to trustees and yet deliberately refrained from indicating the trusts upon which such property was to be held.

For these reasons, which are substantially the reasons upon which the decision of Webb C.J. and Lloyd A.C.J. in the Court of Appeal was founded, their Lordships are of opinion that the appeal should be dismissed. They will humbly advise His Majesty accordingly.

The costs of the respondent must be paid by the appellant.

JOHN ONI AKERELE APPELLANT
 AND
 THE KING RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1942) 8 W.A.C.A. 5

1942 Dec. 7 The Lord Chancellor, Lord Porter, Sir George Rankin,
 and Sir Madhavan Nair

Criminal Appeal—Manslaughter—Dangerous acts—Degree of negligence in manslaughter—Evidence of other acts—Degree of negligence in charge against medical men—Effect of misdirection.

The appellant in the course of his medical practice was touring the Owerri Province in May, 1940, and the inhabitants of the districts of Ashaga and Akanu were notified that they could be treated by him on the 6th and 7th of the month. On 6th and 7th May he treated 78 people at Ashaga (of whom 57 were children). Also on 7th May he treated 61 persons at Akanu (of whom 33 were children). With a few exceptions the patients suffered from yaws. Two methods of treatment were well recognised for the disease viz., the injection of (1) N.A.B., an arsenical preparation, and (ii) sobita, which consists of sodium bismuth tartrate (as given in the British Pharmacopoeia). Sobita is a trade preparation supplied to doctors in powder. The appellant was accustomed to use the sobita treatment. The evidence was that he dissolved the powder himself for use on the two days. Following the treatment ten children died and there were some other cases of illness. All the children who died came from Ashaga: five were treated on the 6th and five on the 7th. The charge relates to one of the children: Kalu Ibe:

Held: (1) The evidence of illness and death of other persons is admissible, not to prove the bad character of the appellant nor to prove a course of conduct or system, but to establish one of the essential points which the prosecution had to establish: to show that such a large proportion of the other children who were similarly injected by the appellant at the same time and place had reactions similar to those of Kalu Ibe as to prove that his reaction could not be due to his own idiosyncrasy and therefore must be due to an overdose.

(2) The degree of negligence required in a charge of manslaughter is that it should be gross and neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation, and gross negligence has to be proved.

(3) The only negligence on which reliance could be placed is the single act of dissolving the powder in water before giving the injections. It is immaterial that the symptoms were revolting or that the result was to make many persons ill. The act had already taken place and its observed consequences which only showed themselves at a later date could not add to its criminality. The negligence to be imputed depends upon the probable, not the actual, result.

(4) A mere misdirection on the part of the Court below, as for example in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. The Privy Council does not interfere merely because they themselves would have taken a different view of the evidence admitted.

LORD PORTER. The appellant in this case is a duly qualified medical practitioner who carried on practice in Nigeria.

On the 7th March, 1941, he was charged before the Assistant Judge at Umuahia Sessions of the High Court of the Enugu-Onitsha Division in the Protectorate of Nigeria on three charges.

- (i) Manslaughter contrary to section 325 of the Criminal Code in killing one Kalu Ibe in May, 1940.
- (ii) Reckless and negligent acts contrary to section 343 (1) (e) of the said Code in giving medical treatment to the said Kalu in a manner

so rash or negligent as to endanger human life or to be likely to cause harm.

- (iii) Reckless and negligent acts contrary to section 343 (1) (f) of said Code in dispensing or administering medicine or poisonous or dangerous matter to the said Kalu.

The learned Assistant Judge who tried the case without jury found the appellant not guilty on the second count but guilty on the first and third counts, sentenced him on the first charge to three years' imprisonment with hard labour and on the third to a fine of £100 or twelve months' imprisonment with hard labour to run concurrently with the punishment awarded on the other charge, and refused bail pending an appeal.

On appeal the West African Court of Appeal quashed the sentence on the third charge, affirmed the conviction on the first charge, but varied the sentence to a fine of £500 and in default of payment to imprisonment with hard labour for twelve months.

The appellant's case states that as a result of this conviction his name was struck off the local medical register by the Board of Examiners for Nigeria.

The fine was paid but the appellant petitioned His Majesty in Council for special leave to appeal from the conviction and sentence of the Court of Appeal and on the 27th November, 1941, his petition was granted by His Majesty in Council. Pursuant to this leave their Lordships heard the appeal on the 28th and 29th of October last.

At that hearing the Attorney-General on behalf of the Crown, whilst maintaining that it was open to him to support the conviction on the third charge on the ground that the sentence alone had been quashed, admitted that if the conviction for manslaughter should not be upheld, the conviction for negligent dispensing or administering medicine could not be supported. It accordingly becomes unnecessary for their Lordships to consider either the propriety of recording a conviction on the two counts or whether the evidence would support a conviction on the third count.

The sole question is whether sufficient grounds were shown to persuade their Lordships that the case was one in which it would be proper for the Board in accordance with the principles upon which it acts, to advise His Majesty to grant the petition of appeal against the decision of the West African Court of Appeal upholding the conviction for manslaughter recorded by the learned Assistant Judge.

The facts giving rise to the charge may be briefly stated. The appellant in the course of his medical practice was touring the Owerri Province in May, 1940, and the inhabitants of the districts of Asaga and Akanu were notified that they could be treated by him on the 6th and 7th of that month.

According to a list kept by the appellant seventy-eight persons were treated at Asaga of whom fifty-seven were children; forty-four of these of whom thirty-six were children were dealt with on the 6th May and thirty-four of whom twenty-one were children on the 7th. On the latter day the appellant proceeded to Akanu where sixty-one persons were treated of whom thirty-three were children and the remainder adults.

With a few exceptions the patients appear to have been suffering from an endemic disease known as yaws which attacks both adults and children causing lesions and ulcerations on all parts of the body and in particular on the lower limbs and feet.

Two methods of inoculative treatment for this disease are now well recognised, the injection (i) of N.A.B. an arsenical preparation and (ii) of sobita, which consists of sodium bismuth tartrate as given in the British Pharmacopoeia, and is a trade preparation supplied to the doctor by a drug

company in the form of a powder. It is now common ground that the proper dose for an adult is three grains and for a child one.

The appellant was accustomed to use the second specific and on his visit to Asaga and Akanu used it in the case of nearly all his patients though apparently not in every one.

Following his treatment ten children died and there seem to have been some other cases of subsequent illness, but the history of the latter was only lightly developed.

All the ten children who died came from Asaga and so far as their Lordships are able to ascertain from the evidence five were inoculated on the 6th and five on the 7th May. No illness was reported from Akanu.

The charge relates to one of these children, *viz.* Kalu Ibe. At the trial, besides the testimony of his mother and half-brother, evidence as to his symptoms was given by Dr. Ibiam, a qualified medical practitioner, who had been called in to treat him but not until ten days after the inoculation. In corroboration of this evidence the deposition was put in of Miss Margaret U. B. Reid, a District Mission worker of the Church of Scotland at Asaga, who had seen this boy a day earlier. From this evidence it was apparent that he was suffering from stomatitis induced by bismuth poisoning. There was no doubt and indeed no dispute but that this poisoning resulted from the injection, and both Dr. Ibiam and a Dr. Henry, who was also called for the Crown, inferred that the subsequent death was caused by an overdose. The defence on the other hand maintained that Kalu Ibe was peculiarly susceptible to the effect of bismuth and therefore unexpectedly succumbed to a dose which would have been harmless in the case of a normal child, and that in any case the negligence (if any) did not amount to criminal negligence.

In order to show that the injection given was too strong and to negative the suggestion that the boy's death was due to an exceptional reaction to sobita in his case, the Crown tendered evidence of the symptoms, illness and death of nine other children. In their Lordships' view this evidence was rightly received. The learned Judge speaks of it as being "evidence of a course of conduct resulting in these various consequences of which the death of Kalu Ibe was only one." In their Lordships' view, no question as to a course of conduct arises, but the summing up goes on: "The evidence is admissible in proof that Kalu Ibe's was not an isolated case which might conceivably be due to mere inadvertence or idiosyncrasy in relation to bismuth in Kalu Ibe himself." If the words 'inadvertence or' are omitted this statement, in their Lordships' opinion, expresses the true ground for the admission of the evidence, and its propriety is perhaps better explained by the Court of Appeal when its President says: "The evidence of the illness and death of other persons was tendered not to prove the bad character of the appellant, nor to prove a course of conduct or system but to establish one of the essential points which the prosecution had to establish . . . to show that such a large proportion of the other children who were similarly injected by the appellant at the same time and place had reactions similar to those of Kalu Ibe as to prove that his reaction could not be due to his own idiosyncrasy and therefore must be due to an overdose."

According to the appellant's own evidence, he himself dissolved the powder in sterile water and carried a 20-oz. bottle made up for the day's work: made up as he said fresh the same day. Strictly speaking, this evidence would lead one to suppose that the mixture injected at Asaga on the 7th was made up separately from that injected on the 6th, and if this were so some question might arise as to the admissibility of the effects of

that administered on the latter date. But the appellant's counsel before their Lordships withdrew any objection to the admissibility of the evidence as a whole because he was anxious to make use of the argument that many of the patients on both days were unaffected—a result which could not, as he maintained, have been reached if the mixture had been dangerously strong.

Even if only the events of the 6th May are to be considered, not less than five children out of thirty-six, so far as their Lordships are able to ascertain, died after the first day's treatment; and from the description of the symptoms the Courts in Nigeria were plainly justified in inferring that the cause was stomatitis resulting from bismuth poisoning.

No doubt an overdose might be given in one of two ways, either by injecting too much of a proper mixture or by injecting the right quantity of too strong a preparation. In the former case, the evidence would not be admissible as showing that because the appellant had been careless in one administration he was likely to be negligent in another. But it is clear that the charge was based upon the latter suggestion and therefore the evidence was admissible as tending to show, from the effect produced, the strength of the mixture in the bottle.

The question therefore for their Lordships to determine is whether it is proved that the appellant negligently prepared too strong a mixture on the morning of the 6th May, and if so, whether that one act amounted to criminal negligence.

Various other acts of negligence were at one time suggested by the prosecution, *viz.* that the accused failed to instruct his patients to come back after injection and took no adequate steps to treat them after he was informed of their illness.

These suggestions were subsequently withdrawn, and were rightly discarded by the learned trial Judge in his summing-up. It is therefore unnecessary for their Lordships to pronounce upon his criticism of the appellant's excuse, when he returned to Asaga on the 17th after having been informed of his patients' illnesses, that the fault was his "boy's," and of his failure to treat them further. Their Lordships would only observe in passing that he did come back, that out of his own pocket he provided mouthwash and milk, that he endeavoured without success to enlist an assistant to continue the treatment: that the excuse, admittedly false and recognised to be false at the time it was made by those who heard it, was put forward when the appellant was in the midst of a hostile mob, some armed with knives, who were at least threatening him and one of whom tried to kill him, though he ultimately managed to escape.

The learned trial Judge found that the appellant negligently prepared too strong a mixture and that his negligence was criminal. In his summing-up he points out that the negligence on which the case rests lies not in the manner in which the accused proceeded but in what he injected, and relies upon the evidence as to the deaths of the other nine children and upon that of a government medical officer called for the defence who said that he only knew of ten to twelve cases of severe reaction in 1,000 to 2,000 sobita injections given by him and that he would be shocked at a proportion of ten to fourteen out of seventy.

The learned Judge goes on to ask whether on this evidence it can be said that the accused was guilty of negligence in a criminal degree in causing the death of Kalu Ibe.

No complaint can be made of what he says in reference to the degree which the courts have held essential to constitute a criminal offence of

negligence. He quotes the observations of Lord Hewart L.C.J. in *R. v. Bateman* (1925) 94 L.N. (K.B.) 791:

“ A doctor is not criminally responsible for a patient’s death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State,”

and adds from *Halsbury’s Laws of England* (Hailsham ed.), Vol. 9, subtitle “ Criminal Law ”: “ What amount of negligence is to be regarded as gross is a question of degree for the jury, depending on the circumstances of each particular case.”

Both statements are true and perhaps cannot safely be made more definite, but it must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. The further words spoken by the Lord Chief Justice in the same case are, in their Lordships’ opinion, at least as important as those which have been set out: “ It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.”

How necessary it is to keep this distinction in mind may be illustrated by reference to two cases. In a note to *R. v. Noakes* (1866) 4 F. and F. 920 it is said: “ It is impossible to define it (*i. e.*, culpable or criminal negligence) and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinions.”

That was a case in which a customer sent two bottles to a chemist, one for aconite and the other for henbane. The chemist by mistake put the aconite into the henbane bottle with the result that the customer took thirty drops of the former and died of it. Erle C.J. left the case to the jury, but “ put it strongly to them that they ought not to call upon the prisoner for his defence: the case was not sufficiently strong to warrant them in finding the prisoner guilty on a charge of felony.”

So in *R. v. Crick* (1859) 1 F. and F. 519. Pollock C.B. summing up in a case in which the prisoner, who was not a regular practitioner, had administered lobelia, a dangerous medicine, which produced death, said in his summing-up: “ If the prisoner had been a medical man, I should have recommended you to take the most favourable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.”

The two cases quoted are of course only examples, but in their Lordships’ view they do rightly stress the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

It is unfortunate that in the present case the two doctors called for the Crown were accustomed to use N.A.B. and had little if any practical experience of sobita, with the result that no information was forthcoming as to what excess of strength in the mixture would be required to produce the observed consequences in a normal patient and how widespread among the medical profession is or ought to be the knowledge of the danger of an overdose. It may be conceded that both N.A.B. and sobita are dangerous

drugs if not properly used, as Dr. Ibiam said, but the known margin of error is nowhere referred to.

The trial Judge ends his summing-up by saying:

“ The question now is, on this evidence, can it be said that the accused was guilty of negligence of criminal degree in causing the death of Kalu Ibe? We have heard that sobita is supplied in powder form which has to be dissolved in water in a certain strength. Evidently this involves no matter of any particular technical finesse. But accused in giving these injections managed to make at least eleven persons gravely ill with symptoms of the most revolting order. In the single visit to Asaga when he gave the injection to Kalu Ibe out of a total of 78, there were eight other cases besides this boy—a proportion of over 11 per cent. serious casualties all like Kalu Ibe, through overdose of sobita.

One would think that in travelling the countryside, as is the accused's practice, giving these injections on what may be termed a wholesale scale, to these somewhat primitive people who have little knowledge of what to do if anything goes wrong and little access to medical assistance, he would at least make as certain as is humanly possible that he injects the correct doses. In my view the conclusion is inescapable that accused acted with a degree of negligence that can only be described as criminal.”

If, as their Lordships have indicated, the only negligence on which reliance could be placed is the single act of dissolving the powder in water before giving the inoculations, it is immaterial that the symptoms were revolting or that the result was to make many persons ill: the act had already taken place and its observed consequences which only showed themselves at a later date could not add to its criminality. The negligence to be imputed depends upon the probable, not the actual, result. It is unfortunate that the learned Judge nowhere states in what he finds the negligence to consist unless it be in its fatal consequences in so large a number of instances. If one may judge from his reference to the fatal consequences in the case of the other children, he seems to have thought that one death might have been due to inadvertence, whereas ten could not, and to have forgotten that one act only could be complained of, *viz.* the mixing of too strong a solution in making up the preparation. To hold this opinion is to impute to the accused repeated acts of negligence as if he were to be blamed for want of care in the case of each injection instead of the one act of carelessness in preparing the mixture to be injected. Moreover, the learned Judge in the penultimate paragraph of his summing-up, quoted above, so far from considering whether gross negligence has to be proved, appears to think it enough if the appellant did not make as certain as is humanly possible that he injected the correct doses.

Their Lordships cannot accept the view that criminal negligence has been proved merely because a number of persons have been gravely ill after receiving an injection of sobita from the appellant coupled with a finding that a high degree of care has not been exercised. They do not think that merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence was proved.

In coming to this conclusion their Lordships do not find themselves in substantial disagreement with the judgment of the Court of Appeal in Nigeria save in one respect, *viz.* in their understanding of the grounds upon which the learned Judge based his decision. That Court as they apprehend did not itself pronounce upon the facts but inquired only whether the

finding of the Court below had sufficient evidence to support it. It did not consider whether the learned Judge had sufficiently directed his mind to an analysis of the acts said to constitute a felony and to the degree of care required of a professional man against whom a criminal charge is preferred.

Nor are their Lordships conscious of departing from the rules which they have laid down for their own guidance in considering whether they should allow an appeal in a criminal matter. "The exercise of the prerogative" said Lord Haldane in *Dal Singh v. The King-Emperor* (1917) 44 I.A. at p. 137, "takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere misdirection on the part of the Court below, as for example in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor does the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Court below."

Their Lordships are not in any circumstances prepared to differ from the Courts below in a criminal case for any less cogent reason than those required by this statement. In this particular case, however, in their view the distinction between civil and criminal liability has been inexactly drawn, the ground upon which a criminal charge is based ill defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death. In the result the case is one in which they consider that they ought humbly to advise His Majesty to allow the appeal and quash the conviction.

CHIEF YAW NIMO APPELLANT
 AND
 CHIEF KWAKU WUO RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1943) 9 W.A.C.A. 1

1943 Feb. 25 Lords Atkin, Russell of Killowen, Porter, Sir George Rankin,
 and Sir Madhavan Nair

Kumasi—Stool land—Boundary Book—Executive decision conclusive for all purposes whatsoever—Proper reading of maps tendered in evidence.

Held: (1) Executive decisions in relation to boundaries and recorded in Boundary Book are conclusive for all purposes (s. 3 Boundary, Land, Tribute, Fishery disputes (Executive Decisions Validation) Ordinance of April 30, 1929).

(2) Where decisions adverse to the appellant have been based upon a misreading of the plan used in the case, there is a vital flaw in their foundation and such decisions cannot stand.

LORD RUSSELL OF KILLOWEN. The question for determination in this appeal is the ownership of an area of land in Kumasi Division (Kumasi State) of the Crown Colony of Ashanti. The land stretches about two miles from North to South with a width of from a mile to a mile and a half from East to West, and is shown on the map Exhibit "L" as bounded on the

West by a river or stream called Ahiresu, its other boundary lines being shown by a yellow border. This land is hereafter referred to as "the land now in question."

The appellant is the Chief of Donyina and claims that the land is attached to the Stool upon which he sits. The respondent is the Chief of Nyamiani and claims that the land is attached to appellant and respondent.

The land now in question is part of a large area known as Kyim Kwayem which many years ago had been acquired by conquest from a chief named Dapoa in a war between him and the Chiefs of Ejisu, Donyina, Nyamiani and Kwarso. The land was portioned out among the conquerors, but, as might be anticipated, disputes have not infrequently arisen as to boundaries. In or about 1907 such a dispute arose between Ejisu on the one hand and Donyina and Nyamiani on the other, owing to alleged trespasses by Ejisu which extended beyond the Eastern portion of Kyim Kwayem which had been allotted to Ejisu and far beyond it into those portions which had been allotted to Donyina and Nyamiani respectively.

This dispute was settled by an executive decision (dated 19th February, 1907) made by Captain Hobart, the District Commissioner, and confirmed or approved by Captain Armitage, the Acting Chief Commissioner of Ashanti on the 20th August, 1907. This decision, which is officially recorded in a Boundary Book, determined that the Donyina-Ejisu boundary was the road (stated to be practically only a hunters' track) from Esienipon (*i.e.* Asiempong) through Dumasi (*i.e.* Odumasi) to Aku. This decision purports to establish that Ejisu had no land on the Western side of the boundary, and that on that side Donyina was the adjoining neighbour of Ejisu. It would follow from that, that Nyamiani's land in Kyim Kwayem did not at any point adjoin Ejisu land, but lay to the West of the Donyina land.

It subsequently appeared that on the line described in the Hobart decision between Odumasi and Boadja Nkwanta there existed in fact two tracks, which diverged at Odumasi and met again at Boadja Nkwanta. This led to a suit between Donyina and Ejisu, which resulted in a judgment in the Chief Commissioner's Court dividing the land between the two tracks equally between Donyina and Ejisu. The effect of this is shown by the blue line on Map "L." It does not seem directly to affect the question of the title to the land now in question.

The proceedings in the present litigation, which have led to this appeal to His Majesty in Council, have been numerous and prolonged, and must be mentioned in some detail. They were commenced in Asantehene's Divisional Native Court "B" in October, 1935, the appellant occupying the position of plaintiff and swearing the Great Oath that he was the owner of the land to which the defendant Chief Kwabena Dumfeh (who was then Chief of Nyamiani) responded to the effect that he and the plaintiff owned the land. This would seem to be an allegation of joint ownership, but he ultimately claimed that he and not the plaintiff was the owner.

The evidence given before the "B" Court was vague, and after hearing it the Court deputed five individuals (not members of the Court) "to view the disputed land and submit a written report before judgment is delivered." At this point two matters should be noted. (1) The land then in dispute included the land shown on the map "L" within the border-line coloured pink; but the appellant's claim in these proceedings is now confined to the land indicated above. (2) The map "L" was not in existence at this time, but was prepared as will hereinafter appear at a much later date.

The five viewers made their report on the 30th March, 1936, in which after narrating the procedure adopted by them, the statements made by the parties, and the events which happened in the course of their expedition, they set out their "findings," which were in favour of the defendant. The Court apparently adopted the report and decided that the land was the property of the defendant.

On appeal to the "A" Court (the Native Court of Appeal) that Court, having reheard the case on the record of the Court "B," and on additional evidence, found in favour of the appellant. Part of the land originally claimed by him was excluded from the judgment, *viz.* the land mentioned above which is enclosed within the borderline coloured pink on map "L." The reason for this exclusion was the fact that (as stated in the report of the viewers and as proved before Court "A") it had been claimed by the Odikro of Aku as having been sold to his ancestors by the respondent's ancestors over 90 years ago. In view of this adverse claim of ownership by a stranger to the suit, the appellant could not, nor does he any longer seek to establish any title to that land in these proceedings. As to the land now in question, the Court held that it was the property of the appellant. Among the witnesses who gave evidence was a representative of the Ejisuhene who denied that any boundary existed between the Ejisus and the Nyamianis.

The defendant then appealed to the Chief Commissioner's Court, which dismissed the appeal in view of the Hobart executive decision. The Commissioner refused to review his judgment. He said: "I consider I am bound by the record in the Boundary Book and it is not in my power to make any enquiry into the circumstances under which the executive decision was made."

The defendant appealed to the West African Court of Appeal. The learned Chief Justices who heard the appeal sent the case back to the Chief Commissioner's Court to be tried on the merits, notwithstanding the Boundary, Land, Tribute, Fishery Disputes (Executive Decisions Validation) Ordinance (dated the 30th April, 1929), which enacts (s. 3) that "any executive decision in a dispute or matter relating to ownership or boundaries of any land . . . in Ashanti given confirmed or approved by the Chief Commissioner prior to the commencement of this Ordinance and officially recorded in a Boundary Book is hereby validated and invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved." They were of opinion that the decision recorded in the Boundary Book was ambiguous in that it was doubtful whether the boundary was meant to be a boundary between Ejisu on the one hand and Donyina on the other, or merely a boundary between Ejisu on the one hand and Kumase on the other. They were further of opinion that this alleged ambiguity was resolved in the latter sense by the production of a document, Exhibit B (not recorded in any Boundary Book), which appears to be a version of the same decision but which contains a statement that it was "upheld" by Chief Commissioner Fuller and the words "Boundary Dispute between Kumase and Ejisu," in place of the words which appear in the recorded decision, *viz.* "Land Dispute between Kumase and Ejisu Donyina-Ejisu Boundary."

The case was then reheard in the Chief Commissioner's Court, when witnesses were called and the evidence fully gone into. The decision was in favour of the appellant.

The defendant appealed to the West African Court of Appeal. That Court was of opinion that the matter could not be properly determined without a proper plan drawn to scale having been prepared. They

accordingly sent the case back to the Chief Commissioner's Court with a direction to that Court "to cause to be made by a Licensed Surveyor . . . a proper plan of the land in dispute and the surrounding areas showing all places mentioned in the proceedings, and then to amend its judgment by reference to the new plan." The map "L" was accordingly prepared by Mr. Andrews and proved by him in the Chief Commissioner's Court. In the meantime the Chief of Nyamiani had died, and the respondent was added as a party in his place.

The Acting Chief Commissioner then delivered his amended judgment on the 14th August, 1939. He examined all the evidence in the case and on that evidence held that the land belonged to the appellant, and confirmed the judgment of Court "A".

The appeal to the West African Court of Appeal was then heard, and on the 24th February, 1940, the judgment of that Court was delivered allowing the appeal, and restoring the judgment of Court "B".

The results of these numerous stages in this unfortunately prolonged litigation, and the reasons for the views of the four different tribunals as they appear from the judgments may now be summarised.

Court "B" seems merely to have adopted the "findings" of the viewers, and to have relied on statements in the report that two people had sworn the Great Oath "that the land in dispute does not belong to the plaintiff, but that they have boundaries with the defendant, but the plaintiff did not respond to the Oath." This would appear to be a misapprehension so far as concerns the land now in question. Neither of the persons referred to swore the Great Oath in reference to any of that land.

Court "A" upon a consideration of the evidence adduced before Court "B" and having heard further evidence (including that of the representative of Ejisu) were satisfied that the land now in question was the property of the appellant.

The Assistant Chief Commissioner at the first hearing before him based his decision in favour of the appellant upon the Hobart decision and the before-mentioned Ordinance. At the second hearing before him after hearing further evidence (including the evidence of another representative of Ejisu) and with the assistance of Map "L" came to the conclusion after considering all the evidence that the land now in question belonged to the appellant. The representative of Ejisu confirmed the evidence of the former representative that Ejisu had no boundary with Nyamiani after the division of the land. He also stated in reference to the division of the land after the war with Dapoa "Donyinahene . . . was given the middle of the land . . . Nyaminahene also was given a land on the right of Ahiresu to Boni and Donyina was in the middle."

The West African Court of Appeal reversed this decision. Before considering the reasons which led the Court of Appeal to reverse the second judgment of the Chief Commissioner's Court their Lordships think it right to state that the first decision of that Court ought to have been affirmed. The Ordinance invested the recorded executive decision with full legal force and effect for all purposes whatsoever as against all persons whomsoever. It was therefore binding on and conclusive against Nyamiani. In their Lordships' opinion there is no ambiguity in the recorded decision, nor, had there been any ambiguity in the record would it be right to resolve it by reference to Exhibit B. If any inference could properly be drawn from a comparison of the record with Exhibit B, the only proper inference to draw would be that the purpose of the alteration in the record was to achieve some result which without the alteration would not have been achieved. But

the recorded decision states plainly that it is fixing a boundary, and that the boundary which it is fixing is the boundary between the land of Donyina and the land of Ejisu. This being the true interpretation of the recorded executive decision, the appeal from the judgment of the 1st December, 1936, should have failed.

Their Lordships, however, are also of opinion that the appeal from the judgment of the Chief Commissioner's Court of the 16th August, 1937, should have been dismissed. The grounds upon which the Court of Appeal reversed that judgment now require consideration. After stating the history of the litigation and mentioning four previous land disputes to which they attached no importance (although one suit between Ejisu and Donyina was actually concerned with trespass on the land now in question), the Court proceeded to consider a plan "C" which had been produced by the appellant. To that plan the greatest importance was attached; indeed it is the foundation of the Court decision, because it is their reading of that plan that brought them into agreement with the viewers' report and the adoption of it by Court "B."

In their Lordships' opinion the viewers and the Court of Appeal placed upon Plan "C" a reading or construction which it cannot bear; and that if it be read as it should be read it strongly supports the claim of the appellant. To make this clear a description of plan C, and the words thereon, is necessary. The plan C shows the land on each side of the Jackson line. The land on the Ejisu side of it is marked Ejisu's Land, the word "Ejisu's" being written in large letters followed at some distance by the word "Land" in smaller letters. As to the land on the other side of the Jackson line, plan C shows by a green edging the easterly boundary of the land now in question, from Boadja Nkwanta to the Wonwa stream; the green edging then continues up to Odumasi. Above the Wonwa stream and on the side of the green edging farthest from the Jackson line is written in large letters the word "Doyin" and below the Wonwa along the easterly boundary of the land now in question is written in much smaller letters the words "Stool property." The viewers in their report took the words "Stool property" to be isolated words which merely indicated that the land was "Stool property" without identifying any particular Stool (a somewhat useless fact to record on a plan); and this view apparently commended itself to the Court of Appeal. With this view their Lordships cannot agree. In their opinion the words "Stool property" are not isolated words but must be linked up with the word "Doyin," just as the word "Ejisu's" on the other side of the plan must be linked up with the word "Land." So read, Plan C shows a large part of the land now in question to belong to the appellant. The decisions adverse to the appellant have, their Lordships think, been based upon a mis-reading of Plan "C", and with this vital flaw in their foundation they cannot stand.

Moreover in their Lordships' opinion proper effect has not been given to the evidence of the appellant's ownership which was given in the Native Court "A" and in the Court of the Chief Commissioner which influenced the decisions of those tribunals. Their Lordships refer in particular to the following facts which were proved: It was proved that in 1929, when Nyamiani and another chief had a land dispute Mr. Wood, a licensed surveyor, in the presence of the two disputants and of Donyina fixed in the ground a stone pillar to mark the point at which the lands of the three adjoined. This pillar is marked A.10/29/2 on Map "L." It is on the westerly boundary of the land now in question. The Court of Appeal say truly that this pillar is difficult to reconcile with the respondent's claim; and

they suggest an explanation which does not even purport to be other than guesswork. Further, the fact that at no point have the Ejisu any boundary with Nyamiani and that on the division of Kyim Kwayem after the war "Nyaminahene was given a land on the right of Ahiresu to Beni, and Donyina was in the middle," is strong in support of the claim that the land now in question (which is bounded on the west by the left bank of the Ahiresu) is Donyina land. Finally, the land now in question has been under the control and in the possession of the appellant and not of Nyamiani. This is made clear not only by the appellant's evidence but also by the evidence given by the original defendant in the Native Court "A."

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal should succeed, that the orders of the West African Court of Appeal dated the 24th April, 1937, and the 24th February, 1940, should be set aside and the orders of the Chief Commissioner's Court dated the 1st December, 1936, the 16th August, 1937, and the 14th August, 1939, and the judgment of Asantehene's Native Court "A" should be restored. The respondent must pay the appellant's costs as provided by the restored orders and judgment, and also his costs of all the proceedings in the West African Court of Appeal (including the whole cost of making the map Exhibit "L") and the costs of the appeal to His Majesty in Council.

CHIEF KWABENA AGYARE OF ASAKRAKA APPELLANT
AND
CHIEF KOFI KWAYKE OF NTESO RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1943) 10 W.A.C.A. 1

1943 June 2

Lords Atkin, Thankerton, Russell of Killowen,
Macmillan and Wright

Stool land—Boundaries—Refusal by court to issue witness summonses—Decision of native tribunal on matters peculiarly within its knowledge.

Where the actual hearing of the case had proceeded for three days and the proceedings had been before the court for a very long time, the native tribunal saw no reason why the defendant should not have taken steps to have his witnesses present if he had wished to call them before that late date in the hearing.

Held:—the matter was entirely within the discretion of the native tribunal and there was nothing in the refusal that was in any way contrary to natural justice.

Held also: While the decision was given on May 7, 1937, the defendant having called some evidence, then elected not to call further evidence and the proceedings were adjourned *sine die* and were not resumed until September, the defendant if he had wished to do so, could have appealed in the mean time against the refusal to allow him to call witnesses.

Held further: The Privy Council will not lightly disturb a decision of a native tribunal, on a matter peculiarly within its knowledge, arrived at after a fair hearing on relevant evidence and without any demonstration that it is wrong.

LORD ATKIN. This is an appeal from a judgment of the West African Court of Appeal sitting in their Gold Coast Session, by which they reversed the decision of the Provincial Commissioner's Court, which in its turn had set aside a judgment given by the Native Tribunal of the Paramount Chief of Kwahu.

The claim was by one Stool Chief against another in respect of the boundaries of their respective stools.

The action was commenced in the year 1936 by a civil summons which related only to a small portion of the land which afterwards came in dispute; but it appeared in May, 1937, that there was already another dispute pending between the parties, which had been commenced by proceedings on oath. What was the exact nature of that dispute their Lordships have not been told; but they do know that by consent of the parties that pending proceeding was consolidated with the summons relating to the smaller claim and with the consent of both parties the two actions proceeded together.

It appears to their Lordships, as it did, they think, to the West African Court of Appeal, to be fairly obvious that both parties must at that time have been in a position, as they thought, to deal with both cases or they would not have consented to go on at the time that they did go on.

The case proceeded before the Native Tribunal for some days and eventually the Native Tribunal, after having directed a surveyor to mark out what were the disputed boundaries between the parties in 1938 came to a conclusion, by which they delimited the boundaries over the whole of the land which was then in dispute.

That decision was reversed by the Court of the Provincial Commissioner, but was restored by the West African Court of Appeal.

The Court of Appeal, as their Lordships think quite rightly, founded itself upon a passage in the judgment of this Board in *Abakah Nthah v. Anguah Bennieh* [1931] A.C. 75. The passage which they cited and which their Lordships repeat was this:

“ By Colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of Native Tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the Native Tribunal on such matters, which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong; and their Lordships fail to find such proof in the present case.”

Applying those principles, the West African Court of Appeal allowed the appeal and in their Lordships' opinion they were quite right in so doing.

The two points that were urged before that Court and were urged before their Lordships were these: First of all, it was said that the Native Tribunal had refused leave to the defendant, who is the appellant before their Lordships, to issue subpoenas for the purpose of calling two witnesses, the Native Tribunal holding that, in their opinion, the application was made too late. The actual hearing had been proceeding for three days; the proceedings had been before the Court for a very long time and apparently the Native Tribunal saw no reason why the defendant should not have taken steps to have had the witnesses present, if he had wished to call them, before that late date in the hearing.

That appears to their Lordships to be entirely a matter for the discretion of the Native Tribunal. There is nothing that their Lordships can find that is in any way contrary to natural justice in their decision. It has to be remembered that the case had been proceeding for a long time and that several adjournments had been made at the early stages of the smaller claim for the express purpose of subpoenaing witnesses. Their Lordships think

that it is very likely that the Native Tribunal were a little tired of adjournments for the purpose of subpoenaing witnesses, but they were perfectly entitled to come to the conclusion to which they did come. As is pointed out by the Court of Appeal, there was no material before them, and there is no material before their Lordships to show that the evidence of those witnesses was even material, but certainly none to show that it would be conclusive. Further, it is not irrelevant to remember that, while this decision was given on the 7th May, 1937, the defendant, having called some evidence, then elected not to call further evidence and the proceedings were adjourned *sine die* and were not resumed until September, during which time, if the defendant had wished to do so, he could have appealed against the refusal to allow him to call witnesses.

The other point arises on a suggestion that the Native Tribunal erred in drawing the boundary line which they did draw, on the ground that it was arbitrary and not based upon evidence and that it merely indicated that that was what the Native Tribunal thought would be a fair division between the parties.

Their Lordships are far from saying that, if the Native Tribunal had not purported to proceed upon evidence at all, but were merely proceeding on what they thought to be a reasonable settlement between the parties, that would not be outside their duty; but in this case it appears from a survey of the record, as was considered by the Court of Appeal, that the Tribunal founded themselves on the evidence before them and came to a right conclusion. At any rate, there is no evidence before their Lordships that they came to a wrong conclusion or that they acted in any respect otherwise than as they conceived to be in accordance with the evidence.

If that is so, this is exactly a case within the rule as laid down previously by the Board. It is a decision of a Native Tribunal, on a matter peculiarly within its knowledge, arrived at after a fair hearing on relevant evidence and without any demonstration that it is wrong.

In those circumstances, it appears to their Lordships that this appeal must be dismissed with the usual consequences. Their Lordships will humbly advise His Majesty accordingly.

OTTO GEORGE GFELLER APPELLANT

AND

THE KING RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.]

(1943) 9 W.A.C.A. 12

1943 June 24

Lords Macmillan, Porter, Clauson, Sir George Rankin
and Sir Madhavan Nair

Criminal appeal—Receiving stolen property—Substance of fair trial—Defence not properly considered—When the Privy Council will interfere with a criminal sentence.

SIR GEORGE RANKIN. The appellant, Otto George Gfeller, is a Swiss national. At Lagos, in July, 1941, he was tried by the Supreme Court of Nigeria on a charge framed under section 427 of the Criminal Code of Nigeria that he did on the 20th February, 1941 receive 156 bottles of

Gordon's gin, knowing the same to have been stolen. He was convicted and sentenced to three years' imprisonment with hard labour. On appeal to the West African Court of Appeal his conviction was upheld but his sentence was reduced to eighteen months' imprisonment with hard labour. From this decision, dated 6th November, 1941, he appeals to His Majesty in Council by special leave. Their Lordships are informed that he has undergone the imprisonment to which he was sentenced. His learned counsel, Mr. Douglas, focused a most careful and accurate review of the evidence by submitting, first, that there was no such evidence as could properly be left to the jury, and secondly that the appellant's individual case had not been properly laid before the jury by the learned judge in his summing-up, with the result that the appellant did not have "the substance of fair trial." He maintained that his criticisms if made good would satisfy the conditions which in *Dillet's* case (L.R. 12 A.C. 459) and other cases have been laid down as controlling the administration of the prerogative in criminal appeals.

The trial was held before His Honour Judge Baker and a jury of twelve, of whom six were natives and six non-natives.

The appellant was the sixth out of seven accused. Against the first four, the prosecution case was that they participated in the theft of 18 cases of Gordon's gin from a certain Customs warehouse on or about the 17th February, 1941. In fact the full number of cases stolen seems to have been 21. Each case contained 12 bottles. A charge of receiving was also framed against these four, but the primary charge on the evidence was one of breaking and entering a warehouse and stealing therein contrary to sections 390 (4) (c) and 413 (1) of the Criminal Code. One of these four was a superintendent in charge of the sheds from which the goods were taken: he was accused No. 2 and was acquitted. The main thief, according to the prosecution case, was a lawyer's clerk, called Adebowale (accused No. 1), the third and fourth accused, Vasco Dagama and Rufai Apena, being persons of the labouring class who were engaged in the removal of the goods. Those three persons were not only convicted by the jury of the charge of theft and warehouse breaking but also on the charge of receiving; and unfortunately, the trial judge sentenced them upon both charges, imposing upon all three a sentence of four years' imprisonment with hard labour on the main charge and three years on the charge of receiving, these sentences to run concurrently. The West African Court of Appeal, holding that the charges were alternative charges, set aside the convictions on the main charge and maintained the convictions for receiving and the sentences of three years' imprisonment with hard labour.

Their Lordships have considered whether this somewhat unfortunate complication affects in any way the validity of the conviction of the appellant. They are of opinion that it does not.

Of the three accused who were charged only as receivers, one was a Syrian named Jaffar (accused No. 5), who was charged with receiving 14 cases (168 bottles) and another was Nemi Hassan Saidi (accused No. 7) who, like the appellant (accused No. 6), was charged with receiving 156 bottles. Nemi was a person who had arranged with Adebowale for Jaffar to sell the gin. The reason given by him for so doing was that Adebowale owed him some £112 and that he in turn owed £100 to his cousin Ali Saidi. Nemi was charged with receiving on the footing that he had "aided in disposing" of the gin within the meaning of the last words of section 427 of the Criminal Code. The appellant had bought the goods from Jaffar, against whom there is no allegation that he had been in trouble before, though it is no part of the

appellant's case that Jaffar was, in fact, acting innocently in the transaction now in question.

The appellant does not now seek to dispute either that he received 156 bottles of the gin on the 20th February, or that these were part of the goods stolen by accused numbers 1, 3 and 4 on the 17th February. His case is simply that he did not know that the gin which he received had been stolen. He says that the Crown called no evidence to prove his knowledge, and claims further that he has given an explanation consistent with innocence which may reasonably be true and that it is not for him to prove his innocence. It is conceded by the Crown's case on this appeal that "the evidence did not in any way implicate the appellant with the theft of the 21 cases or with the receiving by Jaffar of the 168 bottles nor did it show any association between the appellant and the convicted persons other than Jaffar."

In these circumstances, their Lordships think proper to confine their references to the evidence to those matters in which the appellant took part or which were plainly within his knowledge. His wife had an interest in and was manageress of the Grand Hotel. He assisted her in the buying of goods and spirits which for some time before February, 1941, had been difficult to procure, since the war had caused a shortage in supplies. His case was in outline as follows: Some six months or more before the transaction now impugned Jaffar had been introduced to him as a person who could get supplies of alcohol and provisions; and he gave Jaffar many orders which were fulfilled from time to time. He believed that Jaffar was getting supplies from various shops and stores. Jaffar, when he had got the quantity required, brought the goods to the hotel. On the 19th February Jaffar had come to him at the hotel and said that he could obtain a large quantity of gin and asked fifteen shillings a bottle; he had agreed to take it, or about 150 bottles of it, for fourteen shillings a bottle, plus six pence per bottle as Jaffar's commission. One hundred and fifty-six bottles of gin were brought to the hotel on the 20th in a taxi-cab by Jaffar at a time when the appellant was absent. They were not in cases, but loose; they were carried into the hotel by using a petrol box; they were put into a room or store called the "fancy shop" and a receipt for 156 bottles was given by the hotel's clerk. Later in the day the appellant gave Jaffar two cheques on his own account at Barclays Bank—one an "order" cheque for £109 4s. 0d. made out at Jaffar's request in the name of Ali Saidi as payee; the other in the form "pay bearer three pounds eighteen shillings" being for Jaffar's commission. The appellant's case is that he did not know Nemi Saidi, that Ali Saidi's name was given to him by Jaffar at the time of making out the cheque. He told the trial court in his statement from the dock that he did not remember asking Jaffar where he had obtained the gin. Jaffar, who gave evidence on his own behalf, deposed that he did not tell the appellant from whom he got the gin. It is not quite clear on Jaffar's deposition whether he mentioned the name of Nemi to the appellant: but Jaffar's story is that he did not at the first interview with the appellant on 19th February accept the figure of 14 shillings plus sixpence commission, but said that he would have to get the seller to agree to it; and that if the seller agreed, he, Jaffar, would bring the gin. Delivery of the gin from the taxi-cab was made openly in the day-time and there is no suggestion that the "fancy shop" was a place of concealment. Other details of the transaction might be mentioned, *e.g.* the counterfoil of the cheque to Ali Saidi had been torn out of the cheque book; Jaffar had soon afterwards sold to a prosecution witness Sarrouh a dozen bottles of the same gin saying that he had sold

plenty gin to the Grand Hotel for 14s. 6d., that he wanted to use the money and that this was why he was selling at 14 shillings. These and other details when examined do not however appear significant to their Lordships, who regard them as immaterial since they have little or no effect either to strengthen or to negative any adverse inference as to the appellant's state of mind. His statement from the dock was consistent in all material respects with what he had told the police when first challenged on the 1st of March but he did not elect to give evidence.

In considering the appellant's conduct from the standpoint of an issue as to guilty knowledge two important factors are: first, the price which an honest seller possessed of some 150 bottles of Gordon's gin would expect to obtain for it at the time in Lagos; second, the previous purchases made by the appellant from or through Jaffar—whether in point of quantity and character these were comparable to the sale now in question.

The price at which Gordon's gin when available could have been bought by retail in the local shops in February, 1941, was proved in their Lordships view to be 16s. per bottle and for an hotel keeper, the chance to buy 156 bottles at 14 shillings, plus sixpence commission to Jaffar, was an exceptional opportunity, but the price was not so very low as to suggest of itself that the goods were stolen goods.

The appellant's previous transactions with Jaffar included no purchases of gin and no purchases at all similar in quantity to that now impugned. The point is not that the hotel would have no need for so much gin: on the contrary, it might be very prudent to lay in all the gin it could get. The question is rather whether it was in keeping with what the appellant knew of Jaffar that he should have so much gin on offer at a price definitely low. The appellant's description in Court of the beginning of the present transaction was that "Jaffar came to the hotel and said he could obtain a large quantity of gin and he asked 15 shillings a bottle." Jaffar's evidence included two statements as follows: "I have been supplying Gfeller with whisky and provisions. I used to go to Grand Hotel and ask them what they wanted, then I went round the town and bought them." Originally I bought in bottles one or two at a time and sold to Gfeller. I got liquor cheaper from the firms."

The question whether there was such evidence of the offence charged as made it proper to leave the case against the appellant to the jury may be asked either on the basis of the prosecution evidence alone, or on that evidence coupled with the appellant's statement from the dock, or upon the whole of the evidence as it stood at the end of the trial. As the appellant's account of his previous transactions with Jaffar and of this transaction as given to the police had been laid before the Court by the prosecution evidence such distinctions are of no materiality from the standpoint of the Board. For the purposes of such a question the appellant cannot rely on the evidence of Jaffar: indeed he could hardly expect the jury to put much faith in Jaffar as a witness. On the other hand, there is no question here of a case against the appellant being made out by Jaffar's evidence, indeed Jaffar's evidence for what it was worth supported the appellant's defence.

The learned judge dealt with the charges of receiving on the basis of the law laid down in the well known case of *Abramavitch* (1914) 84 L.J.K.B. 396; 11 Crim.App.Rep.1. His note states that he read the judgment in that case to the jury and told them:

"that upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any

explanation by the accused of the way in which the goods came into their possession which might reasonably be true find him guilty, but that if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth the prisoners were entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused."

Their Lordships agree that this correctly states the law applicable to the appellant. What then was his position? On the 20th February, 1941, though gin was in short supply he was in possession of 156 loose bottles part of some 21 cases stolen from the Customs shed on the 17th, the bottles having been delivered to the hotel from a taxi-cab by a person from whom he had previously obtained alcohol and provisions—not so far as appears in any similar quantity but collected in small quantities from various shops and stores. He had paid 14 shillings per bottle as price and sixpence per bottle as commission. When challenged he had professed to have made no inquiry as to the source of the supply or the immediate supplier.

In this summary every single fact might turn out to be free from suspicion, but if it can be regarded as a broad statement of the main facts the appellant had something to explain. The question must then be whether the explanation given was such that the learned judge ought to have directed himself or the jury to the effect that while they might or might not think it proved, they were obliged to hold that it might reasonably be true and in this limited sense to accept it? Their Lordships are unable so to hold. They think that it was open to the jury to reject as untrue the story that the appellant asked Jaffar nothing and was told nothing about the person from whom Jaffar got so substantial a quantity of gin. The appellant did not have to prove his story but if his story broke down the jury might convict. In other words the jury might think that the explanation given was one which could not reasonably be true, attributing a reticence or an incuriosity or a guilelessness to the appellant beyond anything that could fairly be supposed. The verdict must in view of the summing up be taken in this sense. Whether it was right, may depend in some measure on the habits of the people and the conditions of life in Lagos at the time; or on the mentality of the appellant—whether he was shrewd or dull, quick or slow witted, sharp or unsuspecting. These matters are typical of the considerations which a jury may be taken to appreciate, but the existence of a case to go to the jury did not depend upon them. So too the appellant's omission to go into the witness-box did not make the case against him: whether he elected or refused to give evidence he took a certain risk.

The second submission made for the appellant invites their Lordships to interfere on the ground of defects in the summing up. These it is said can be brought within the requirement stated by Lord Sumner delivering the Board's judgment in *Ibrahim v. The King* (1914) A.C. 599 at 615. "Misdirection as such, even irregularity as such, will not suffice . . . There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law . . ."

The summing up is open to no complaint as regards the definition of the offences charged and the notes of the evidence are particularly good and clear. The learned judge set forth correctly, as has been shown, the rule of law which the case of *Abramavitch supra* has settled. Unfortunately the judge's own note is the only record of the summing up, there being no

provision for a shorthand note of the proceedings in the trial Court. The note concludes: " Then summarise the evidence reading the record of the principal witnesses' evidence and again warn them that the accused must be given the benefit of any reasonable doubt they might have."

On this it is complained that there is nothing to show that in the summing up attention was paid to the separate individual case of each of the three persons accused only of receiving; that Jaffar and Nemi were both shown to have been in touch with the actual thieves whereas the appellant on the evidence had been in touch with no one except Jaffar; and that the jury should have been cautioned lest the appellant should suffer from being tried jointly with the others. That the appellant's case required separate consideration is indeed obvious, and if it can really be shown that it was not laid before the jury as a case separate from that of Nemi or Jaffar the appellant has indeed serious grounds of complaint. But their Lordships see no ground for imputing this to the learned judge, who naturally enough, having no shorthand writer, made a note of his directions in point of law and left it to be taken that this disquisition upon the facts carried out the principles which he had laid down. They cannot think that any probability attaches to the suggestion that a juryman could have supposed, after listening to the evidence, that the appellant was shown to have been in touch with any of the thieves or that guilty knowledge was imputed to him on that basis. When the judge's note says " Then summarise the evidence reading the record of the principal witnesses' evidence," this need hardly be taken to mean that extracts from the evidence were read without any attempt to show their bearing. Substantially, the sole issue as regards the appellant was the issue as to knowledge, and the jury had been told that the onus of proving this always remains upon the prosecution and that if they thought that his explanation of his possession of the goods might reasonably be true they should acquit. They had heard the explanation both as given to the police as stated by himself from the dock and as supported in substance by Jaffar's evidence. Mr. Wells Palmer the appellant's counsel had made a separate address to the jury on his behalf. The original and amended grounds of appeal filed for the appellant in the West African Court of Appeal do not in their Lordships' view reflect any grievance that the appellant's individual case on the facts had not been put before the jury nor do they find from the judgment in appeal that this particular complaint was made at the time. They do find that for the appellant, for Jaffar and for Nemi it was argued that there was no evidence at all of guilty knowledge and that the Court of Appeal disposed of this point as against all three by a few summary sentences without discriminating between the three. This however throws no light on the judge's charge to the jury and in their Lordships' view there is on the materials before the Board no sufficient basis for the suggestion that his clear and correct directions as to the law were in danger of being misapplied to the facts alleged against the appellant so as to deprive the appellant of the substance of fair trial.

" Their Lordships have repeated *ad nauseam* the statement that ' they do not sit as a Court of Criminal Appeal; for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice ' *per* Lord Dunedin in *Mohindar Singh v. The King Emperor* (1932) L.R. 59 I.A. 233 at p. 235. *Cf. Muhammad Nawaz v. The King Emperor* (1941) L.R. 68 I.A. 126 at p. 129."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

GEORGE MATTOUK

APPELLANT

AND

ELIE MASSAD

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1943) 9 W.A.C.A. 8

1943 Aug. 5

Lords Atkin, Thankerton, Porter, Clauson, and
Sir George Rankin

Seduction—Action lies when rape proved as well as if intercourse is by consent—Evidence—Corroboration required—Judge improving record of proceedings after appeal lodged: practice deprecated.

(1) In a claim in seduction *per quod servitium amisit*, where rape is proved, the master will have precisely the same action, basing it on the wrong done to his servant, as in the case of any other tort to the servant by which the master was deprived of her service. The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse, or on the wrong done to the girl by a felony of rape by which the master suffered damage. The fact that the wrong to the servant was a felony has no bearing on the master's action.

(2) In judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age (15 years) in charging men with sexual intercourse. There is no law against believing them, but in nearly all cases justice requires such caution in accepting their story, that a practical precept has become almost a rule of law.

(3) *Obiter*: The practice of preparing notes (in this case a fuller statement of his reasons for judgment as delivered by him) by a Judge and placing such notes on record after appeal is objectionable, however well meaning the intention.

LORD ATKIN. This is an appeal from a judgment of the West African Court of Appeal who set aside a judgment of Fuad J., a Judge of the Supreme Court of the Gold Coast in favour of the plaintiff. The claim was brought by the plaintiff against the defendant for the seduction of the plaintiff's daughter Mary by the defendant. The parties were Syrians living at Kumasi. Mary lived with her parents and younger children in a flat above some shops. The plaintiff worked in a store at Kumasi, and his wife worked at a shop of her own. Mary who apparently was a well developed girl of 15 at the material date gave evidence for the plaintiff and deposed that the defendant and his wife used to visit her parents frequently. The defendant aged 42 was a leading man in the Syrian Community, and had recently married a young wife of 17, who had a baby born on September 4, 1939. Mary deposed to various occurrences, the first being in October, 1939, when the defendant and his wife were present at which the defendant had followed her to another room and fondled her, another at a later date when the same thing occurred, and the third when the defendant, his wife and Mary's mother were sitting on the veranda and the defendant exposed his person to her. Later, about November 15, the defendant came to the house alone, found Mary alone, and followed her to her parents' bedroom and there had intercourse with her against her will. She then referred to a second occasion when the defendant came again with his wife and the baby. They were on the veranda with Mary and her mother. Mary had the baby in her arms and when it slept took it to the parents' room to lay it on the bed. As she was bending over with the baby in her arms, the defendant came behind

her, put one hand over her mouth and had intercourse with her against her will from behind. The room had two windows, one overlooking the veranda with drawn curtains, and a door opening into the veranda with folding doors which were open but had a curtain over them. She alleged that as the result of this intercourse she gave birth to a child on July 24. It was for the expenses and loss of service consequent upon the birth that the defendant [plaintiff] claimed damages. The defendant gave evidence and denied the whole of the girl's story. The learned Judge accepted the girl's story and gave the plaintiff damages £1,200. It was not suggested by the plaintiff's counsel that there was any corroboration of the girl's evidence or that the story of a connection against the will of the girl should be accepted or that the story of the second intercourse could be received as having happened in the way described. The trial Judge who tried the case without a jury said that he had to warn himself how dangerous it was to act on the girl's evidence alone, but that nevertheless having watched her demeanour and that of the defendant he came to the conclusion that she was telling the truth. The Court of Appeal came to the conclusion that the story was wholly incredible, and entered judgment for the defendant. They emphasised the fact that it was not even contended that the girl's story of rape was true, and were of opinion that the trial Judge was thereby reduced to reconstructing a case of intercourse by consent as to which there was no evidence, and they commented on the fact that the Judge's notes of his judgment did not discuss in any detail the facts of the occurrences which he found to be true. Both the trial Judge and the Court of Appeal attached importance to the difference between rape and intercourse with consent, and appear to have inclined to the view that proof of the former would not support a case of seduction. In the Court of Appeal therefore the difference between the story of rape as told and the story as accepted appeared the more significant.

In their Lordships' opinion the members of the Court of Appeal attached perhaps excessive importance to the falsity of the girl's story as to rape. It is so common for young women in cases of this kind to attempt to save appearances by alleging that they were forced to consent, that such a falsehood by itself does not afford a very strong ground for disbelieving a story otherwise credible. But they were on very strong ground when they dealt with the improbability of the details as narrated by the girl. As to the first occasion when the man and the girl were in the house alone there is nothing intrinsically improbable in the story told. But the events of the second occasion which is supposed to have occurred within two or three yards of a veranda where the girl's mother and the man's wife were sitting with an open door opening into the bedroom only veiled by a curtain, with details such as counsel for the appellants did not venture to put forward as true, throw the gravest suspicion on the credibility of the girl's story. It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age in charging men with sexual intercourse. No doubt there is no law against believing them: but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law. In the case of *Graham*, 4 Crim.App. 218 on which the trial Judge relied, the criminal charge had been tried before a jury: the judge had warned the jury of the danger of convicting on the complainant's story alone, but as the jury had convicted the Court of Criminal Appeal did not feel justified in interfering with the decision of the only tribunal of fact. In the present case, however, the Court of Appeal were judges of fact. It was a case in which in a special degree,

corroboration was demanded, for not only was the girl's story admittedly untruthful on the question of consent, but it was admittedly untrue as to the details of the second occasion. The Court of Appeal were in the circumstances completely justified in refusing to accept the story even when it came supported by the trial Judge's satisfaction with the witness's demeanour. There were other circumstances such as the girl's failure to make any complaint against the man, her repeated denials that she knew she was pregnant, and the very significant evidence of the defendant, his wife, the wife's mother, and the midwife who attended the wife, that after her confinement on September 4 she was for 40 days unable to leave the house, and the first three of them that she did not leave the house with or without the baby in October and November. Their Lordships therefore are satisfied that the judgment of the Court of Appeal was just: and that this appeal should be dismissed.

They wish to add that there seems to have been some misapprehension on the question above referred to whether proof of rape is inconsistent with seduction. The father's or master's cause of action is for the loss of the girl's service: and it seems illogical in the extreme to suppose that he could recover if the girl yielded, but not recover if he lost the service because the girl was forced. In one of the earliest cases, *Norton v. Jason* (1653) Style 398 (82 Eng. Rep. 809), the declaration was in trespass on the case that the defendant assaulted and carnally knew the plaintiff's daughter *per quod*, etc. The case turned on the point that though the daughter had lost her cause of action in trespass by reasons of limitation (then 4 years) the father retained his independent action in case with a longer period of limitation. The fact is that in the case of rape the master would have precisely the same action, basing it on the wrong done to his servant, as in the case of any other tort to the servant by which the master was deprived of her service. The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse or on the wrong done to the girl by the felony of rape by which the master suffered damage. And it has also been decided that the fact that the wrong to the servant was a felony has no bearing on the master's action (*Osborne v. Gillet* (1873) L.R. 8 Ex. 88, where the alleged felony was manslaughter).

Their Lordships cannot pass over what appears to have been an unfortunate proceeding of the trial Judge in sending to the Chief Registrar of the Supreme Court of the Gold Coast after the hearing and decision of the appeal what purports to be a fuller statement of his reasons for judgment as delivered by him. It is not clear at what stage these notes were prepared: the learned Judge says they were intended for the assistance of counsel for the defence: but there can be no doubt that part of the note must have been prepared after the criticism of the Court of Appeal on the absence of any detailed reference to the evidence. However well meaning the intention it appears to their Lordships that any practice of preparing such a note and placing it on record after appeal is objectionable, and it is to be hoped that it will not be repeated. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

OKE LANIPEKUN LAOYE AND OTHERS APPELLANTS
 AND
 AMAO OYETUNDE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1944) 10 W.A.C.A. 4

1944 June 12

Lords Thankerton, Wright, and Sir Madhavan Nair

Chiefs—Election of chief—Native law and custom—Native Authorities Ordinance—Jurisdiction of Courts—Construction of statute—Title of statute forms part of statute.

Held:—(1) The Native Authorities Ordinance 1933 gives supplementary powers to a Bale but has nothing to do with the actual appointment of the Bale: and furnishes no ground for overruling the traditional law and custom in the appointment of a chief.

(2) The title of Ordinance 14 of the Law of Nigeria 1930 is: "An Ordinance to provide for the appointment and deposition of Chiefs in the Colony [of Lagos] and Head Chiefs in the Protectorate." and section 2 (2) of the Ordinance states: "The Governor shall be the sole judge as to whether any appointment of a chief or Head Chief as the case may be, has been made in accordance with native law and custom." It was contended that these words oust the jurisdiction of the court and make conclusive the recognition by the Governor of the respondent as Bale.

Held:—It is true that section 2 (2) does not contain the words "Chief of the Colony" or "Head Chief in the Protectorate" but these qualifications are clearly imported if the ordinance is read as a whole. The title quoted forms part of the enacting statute and may be considered in determining the scope of the enactment. It is true that the title much in the same way as the preamble cannot be taken to override any clear and specific provision in the body of the statute. The statute must be read as a whole.

LORD WRIGHT. This appeal raises an important question as to the customary and statutory law relating to the election of chiefs in the Protectorate of Nigeria. The policy of the British Government in this and in other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible, and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The Courts which have been established by the British Government have the duty of enforcing these native laws and customs so far as they are not barbarous as part of the law of the land. In particular native laws and customs regulating the appointment and election of chiefs have been recognised as having the force of law. This was pointed out in the judgment of this Board in the case of *Eshugbayi Eleko v. Nigerian Government* (1931) A.C. 662 at p. 673. In this way the dispute which had arisen as to the successor to the chieftainship of the town or district of Ogbomosho was brought for adjudication to the High Court of the Ibadan Judicial Division of the Protectorate of Nigeria, to which it had been transferred from the Native Court of Oke Are Land Court, and on appeal from the High Court to the West African Court of Appeal held at Lagos, Nigeria.

Ogbomosho is a town in the Protectorate of Nigeria, in the Province of Oyo. Its native authority consists of a head called the Bale and a Council. This is subordinated to the Olubadan and Council of Ibadan, the native authority appointed for the Ibadan Division in which Ogbomosho is situate. It is important to observe both that Ogbomosho is in the Protectorate of

Nigeria and not in the Colony of Lagos, and that the Bale of Ogbomosho though a chief is not a head chief, within the definition of the Interpretation Ordinance 1939 Laws of Nigeria, No. 27, which apply to this case. The material definitions are: " Chief or Native Chief " means any native whose authority and control are recognised by a native community, and " Head Chief " means any chief who is not subordinate to any other chief or native authority, and " Native authority " means a native authority constituted under any ordinance authorising the constitution of native authorities. These definitions apply in the facts of the present case.

The subordination of the native authorities of Ogbomosho to those of Ibadan is for purposes of administration and does not affect the rules as to the appointment of the Bale of Ogbomosho which are regulated by the custom applying to it. What this custom is was the subject of elaborate evidence at the trial before the Judge of the Ibadan Division. His finding on this matter was not questioned in the West African Court of Appeal, but it was treated as irrelevant on the ground that it had been superseded in its operation by Nigerian Ordinances. Before examining these issues in detail, their Lordships will briefly explain how the dispute arose.

The Bale of Ogbomosho by native law and custom is entitled to the use and occupation of a property in the town known as Sohun. This property contains shrines, furniture and paraphernalia which it is part of the Bale's duty to keep up so that separation of the property from the office would be intolerable under native law and custom. The appellants who were plaintiffs in the action as representing their several families claimed that the respondent was illegally in possession of the Sohun, which he held on the footing that he was the Bale, whereas he had not been elected in accordance with the relevant law and custom. The four families which the appellants represented, together with a further family, that of Ajibola were, it was alleged, entitled to elect the Bale according to the custom. That custom, so the appellants objected, had not been followed in the appointment of the respondent, which was thus invalid. The appellants accordingly claimed possession of the Sohun.

The custom alleged and proved by the appellants, is that when the office of Bale became vacant, the five families in turn are entitled to fill the vacant office, their eldest member, and if he was unfit, their next eldest member being appointed to the office. The difficulty which led to the trouble was that on the previous vacancy Oyekola, of the family of Laoye, which was the family whose turn it was, would have become Bale but he died before going to Ibadan for the approval of his succession by the Bale and Council of Ibadan. He thus died before his installation and never became Bale. The contest which arose was whether the vacancy should be filled by his son, the respondent, or by his brother Oke Laniperkun [*sic*] Laoye, who was the next eldest fit member of the same family. It was not disputed that the appointment remained in the family since it was the family's turn to appoint. The appellants alleged as a further ground of their claim that according to custom no one could be a Bale whose father had not been a Bale. Another element of the custom which was spoken to in the evidence was that the member of the family entitled to the right of selecting the Bale must have at least the general consent of the responsible members of the family. The trial Judge accepted the evidence called by the appellants and held that the custom which they alleged was proved. He summed up his conclusion as follows: " The result of my consideration of the evidence about the relevant native law and custom, is that if I thought the case had to be decided according to whether or not I find that the appointment of the

defendant as Bale accorded in all respects with the relevant traditional law and custom, my finding would be that it did not so accord and I should give judgment in favour of the plaintiffs. I do not think that the case so falls to be decided. There are other relevant factors as it seems to me." His view, which he goes on to explain, is in effect that the traditional law and custom in regard to this matter had been altered by the legislation contained in the Native Authorities Ordinance 1933. In virtue of that ordinance, the Baleship of Ogbomosho had become, in his opinion, "a cog in the machinery of Government and administration": all native authorities being charged with the obligation to maintain order and good government. From this he seems to have deduced that the law and custom regulating the mode of appointing a Bale has been changed and that as there was difference of opinion in the Council as to whether the first appellant in his personal capacity or the respondent should become Bale, this difference was properly put before the Olubadan and his Council at Ibadan. These authorities having made a recommendation in favour of the respondent, which was approved by the Resident, the Judge held that the respondent was in due course installed as Bale and entered into possession of the compound. The Judge also relied on General Order (e) which he held delegated to Chief Commissioners and Residents the executive power to approve appointments and dismissals of staff under the native administration, with exceptions not here relevant. This order he held, justified a letter from the Chief Commissioner approving the Resident's recognition of the respondent's appointment.

Their Lordships are of opinion that the ordinance and general orders on which the Judge relies furnish no ground for over-ruling the traditional law and custom in the matter. They agree in this respect with the decision of the Court of Appeal who point out that the Native Authorities Ordinance "gives supplementary powers to a Bale, but has nothing to do with the actual appointment." On this ground the Court of Appeal rightly in their Lordships' opinion, held that the ordinance and the General Orders did not change the native law and custom here in question. The Court moreover while they quote, with apparent approval, the finding of the trial Judge as to the native law and custom proceed to dismiss the appellants' claim on a different statutory ground which they find in ordinance 14 of the Laws of Nigeria of 1930. The title of this is "An Ordinance to provide for the appointment and deposition of Chiefs in the Colony (sc. Lagos) and Head Chiefs in the Protectorate." The Court base their decision on section 2 (2) of the ordinance which is in the following terms: "(2) The Governor shall be the sole judge as to whether any appointment of a chief or Head Chief as the case may be, has been made in accordance with native law and custom."

Those words, the Court holds, oust the jurisdiction of the Court and make conclusive the recognition by the Governor of the respondent as Bale.

Their Lordships are unable to agree with this decision. It is true that section 2 (2) does not contain the words "Chief of the Colony" or "Head Chief in the Protectorate" but these qualifications are clearly imported if the ordinance is read as a whole. The title quoted above forms part of the enacting statute and may be considered in determining the scope of the enactment. This is now settled law for which if authority is needed reference may be made to the clear statement of Lindley M.R. in *Fielden v. Morley Corporation* (1899) 1 Ch. 1. It is true that the title, much in the same way as the preamble, cannot be taken to override any clear and specific provision in the body of the statute. The statute must be read as a whole. There is, however, in the ordinance now being considered, nothing to extend the

particular scope defined in the title. Section 2 (1) uses the full phrases "Chief in the Colony," "Head Chief in the Protectorate." The curtailed language of sub-section (2) which is merely ancillary to sub-section (1) is in their Lordships' opinion not to be taken to refer to anything other than what is specified in subsection (1) or to go beyond the scope of the title.

It follows from this construction that since the Bale of Ogbomosho is according to the definition quoted above, not a Head Chief being subordinate to Ibadan and is not a Chief in the Colony of Lagos but in the Protectorate of Nigeria sub-section (2) has no application to this office. This ordinance therefore cannot any more than the legislation relied on by the trial Judge, serve to override or qualify the relevant law or custom, which both Courts on evidence which their Lordships' regard as conclusive, have accepted as established.

In the result their Lordships are of opinion that the appeal should be allowed and the judgment appealed from should be set aside, and that it would be declared that the possession of the Sohun is illegal and that the first appellant is entitled to be appointed Bale and to be given possession of the Sohun with its furniture and paraphernalia and that the case should be remitted to the Court in Nigeria to do what is necessary to carry out these declarations. The respondent will pay the appellants' costs of the appeal and in the Courts below. They will humbly so advise His Majesty.

ONIKOYI CHIEFTAINCY FAMILY APPELLANTS
AND
CHIEF SECRETARY TO THE GOVERNMENT RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1944) 10 W.A.C.A. 10

1944 Dec. 19 Lords Thankerton, Macmillan, Simonds, Sir Madhavan Nair,
and Sir John Beaumont

Compulsory acquisition of land—Compensation—Construction of statute.

LORD SIMONDS. This appeal is brought from a judgment of the West African Court of Appeal given on the 19th October, 1942, affirming a judgment of the Supreme Court of Nigeria.

The appellants claim that the land, compulsorily acquired as hereinafter mentioned, formed in the year 1865 part of the family property of King Docemo, then Chief Onikoyi, and that they are his lawful successors according to native law and custom and are accordingly entitled to a part of the compensation payable upon the compulsory acquisition.

The relevant facts and the proceedings out of which this appeal arises can be briefly stated.

On the 5th April, 1941, a notice was issued on behalf of the Government of Nigeria under the provisions of the Public Lands Acquisition Ordinance (c. 88 of the Laws of Nigeria 1923) that certain land at Ikoyi, Lagos, therein particularly described, was required for public purposes absolutely. The notice required any person claiming to have any right or interest in the said land to send in a statement of his interest and claim in the manner therein prescribed, and gave other directions to which it is not necessary to refer.

It is not in dispute that the lands described in this notice are in that part of Lagos land which was originally the property of the Onikoyi Chieftaincy, one of the land-owning families of Lagos, or that they were included in the tract of land which was in the year 1865 given by King Docemo to Captain Glover, R.N., Governor of the Island, on behalf of her late Majesty Queen Victoria.

Divers claims having been made to an interest in the lands in question and in the compensation payable therefor, an originating summons was, in accordance with the provisions of the same Ordinance, issued on the 23rd February, 1942, in the Supreme Court of Nigeria upon the application of the Chief Secretary to the Government to determine the persons entitled to the lands in question and the amount of compensation payable therefor. It was therein stated that the Governor was willing to pay as compensation the sum of £6,800. No dispute as to the amount is raised in this appeal. The summons was addressed to 25 persons, among them the present appellants.

It appears that at the hearing before the Supreme Court the appellants put their case in alternative ways, claiming in the first place that the gift to Governor Glover, to which reference has been made, was not an outright gift, but made for the limited purpose of providing farming land for Hausa ex-soldiers, and that the purpose of this gift having become exhausted on the death in 1916 of the last of these ex-soldiers, the land reverted to the family of the Onikoyi Chieftaincy, and claiming in the second place that in any case the gift had been made without the consent of the family and was therefore of no effect. The second ground of claim, which was summarily rejected in the Courts below, has not been repeated before their Lordships. It is the first ground of claim upon which alone the appellants relied, and before this is examined it is necessary to refer to the Ikoyi Lands Ordinance, formerly cited as the Southern Nigeria Ordinance No. 16 of 1908, but now as chapter 91, Laws of Nigeria 1923. The title of that Ordinance is "An Ordinance to provide for the proper identification and demarcation of lands granted by the Crown to private owners and situated in that part of Lagos Island east of the MacGregor Canal generally known as Ikoyi." It recites that by a Treaty dated the 6th August, 1861, Docemo, King of Lagos, on the part of himself and chiefs, gave and transferred unto the Queen of Great Britain her heirs and successors for ever His Sovereign rights over the port and island of Lagos with all the rights, profits, territories and appurtenances whatsoever thereunto belonging, that the Island of Lagos was then divided into two unequal portions by the cutting known as the MacGregor Canal, that the fee simple in possession of the greater part of the portion situate to the east of that Canal (generally known as Ikoyi) was granted to the British Crown in or about the year 1865, which fact was established by a judgment of the Supreme Court of the Colony in the year 1904, that Crown grants had been made, or were alleged to have been made, from time to time of certain parts thereof, that the position of the majority of the lands alienated by such grants was not sufficiently defined and that the lands themselves had in many cases been deserted and abandoned for years, and that it was desirable that the boundaries of all private lands still occupied on that portion of Lagos Island should be defined and the areas of Crown lands clearly ascertained.

The Ordinance then enacts by section 2 that all private persons claiming to be possessed of lands situated on that part of the Island of Lagos east of the MacGregor Canal should within the periods of six or 12 months therein mentioned establish their titles thereto to the Commissioner of Lands, by section 3, that all Crown grants (whether registered at the Land Registry or

not) purporting to include any portion of the said land to which no claim was made and no title exhibited as provided by section 2 should lapse as from the end of the period of 6 or 12 months as the case might be, by section 4 that all lands specified in every Crown grant produced should be resurveyed and a fresh Crown grant issued as therein mentioned, and by section 5 that all lands held under any other title than through an original grant from the Crown should have their boundaries demarcated as therein prescribed. By section 6 provision is made for the determination of any unproved or disputed claims. Section 7 is in the following unambiguous terms: "All lands situated within the limits above described to which no claim is made within the prescribed time shall be deemed to be Crown lands thenceforward: Provided always that any owner who shall not have submitted a claim thereto within that period may nevertheless within the further period of one year, on satisfying the Supreme Court of the former validity of his claim recover the agricultural value of the land in question."

Two further facts must be stated. First (as was found by the learned Acting Chief Justice), in the years following 1865 a number of Crown grants were issued covering portions of the land acquired from King Docemo and purporting to convey an absolute interest to the grantees and the land, the subject of these proceedings, lies wholly within the area covered by five of these grants. Secondly, no claim was at any time made under the Ordinance by the Onikoyi Chieftaincy family.

The Acting C.J., upon a consideration of these facts and of the Ordinance and of a decision of their Lordships in the year 1929, to which further reference will be made, came to the conclusion that from and after the date of the Ordinance, owners of Crown grants approved under the Ordinance acquired an indefeasible title to the land covered by their grants and the Crown to any land which remained unclaimed, and accordingly held that the appellants had no interest in the land to be compulsorily acquired. His judgment was affirmed by the West African Court of Appeal.

In their Lordships' opinion this decision is clearly right. The language of the Ordinance, and particularly of section 7, does not admit of any doubt. Its validity and effect have been challenged on the ground of an alleged inaccuracy in the recitals. There appears to their Lordships to be no substance in the allegation. But even if there were any such inaccuracy, the result could not be different: the enactment must still take effect according to its terms. If land was situate within the prescribed limits, then from the date of the Ordinance it belonged either to claimants who established their title or, failing such persons, to the Crown.

It was further contended by the appellants that the Ordinance had no application to such an interest as that which, as they alleged, lay in them, viz. a reversionary interest which, subject to the occupancy of the land by the Hausa ex-soldiers, for whose benefit the original grant was made, was, according to native law and custom, conserved for the appellants' family. But here again the language of the Ordinance is fatal to the appellants' contention. It is unnecessary to consider what might, apart from the Ordinance, have been the legal effect of the cession made in 1865 or whether any reversionary right or interest remained in the appellants' family. For the provisions of the Ordinance are comprehensive and conclusive and leave no room for the assertion of any such outstanding right or interest.

The view which their Lords take of the meaning and effect of the Ordinance is in accord with that previously expressed by them in *Bakare Ajakaiye v. The Lieut.-Governor of Southern Nigeria* [1929] A.C. 679. In that case, in which the question was whether section 7 applied to lands held

under a native title not acquired by or through any grant from the Crown, the provisions of the Ordinance were exhaustively examined, and it was determined that, since the lands there in question were within the described limits and the prescribed time had elapsed without any claim to ownership and having been established, the title of the Crown was unchallengeable thereafter. Their Lordships then observed, "Such an interpretation of words, sufficient in themselves, completes the scheme of the Ordinance, for it clears up all ambiguities of title." So in this case it would be clearly inconsistent with the language and scheme of the Ordinance to hold that there is some outstanding right or interest to which it does not apply. Their Lordships will for these reasons humbly advise His Majesty that this appeal should be dismissed with costs.

OHENE OF ASSACHERE APPELLANT
 AND
 OHENE OF DADIASE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1945) 11 W.A.C.A. 1

1945 July 10 Lords Thankerton, Goddard and Sir John Beaumont

Concurrent findings of fact cannot be upset.

LORD THANKERTON. Their Lordships have heard this case on behalf of the Appellant at considerable length, and the result has been to put it beyond doubt that the Appellant has been seeking to have three concurrent judgments on that which is a pure question of fact reviewed by this Board, which is contrary to the well-known practice of this Board, there being in this case no special reason for departing from the usual practice; accordingly their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The Appellant will pay the respondent's costs of this appeal.

KWAKU MENSAH APPELLANT
 AND
 THE KING RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1945) 11 W.A.C.A. 2

1945 Oct. 11 Lords Porter, Goddard, and Sir John Beaumont

Criminal appeal—Murder—Provocation—Manslaughter—Pointing an unloaded gun—Judge—Qualification to sit in Appeal Court.

(1) It is unnecessary that a person for the time being performing the duties of a Judge should first have acted as a Judge in some other cause or proceeding before he is qualified to sit in the Court of Appeal.

(2) Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed without legal excuse it is an unlawful act.

(3) If on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the Judge must put the question to the jury.

(4) If on the whole of the evidence there is nothing which could entitle a jury to return a lesser verdict, the Judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence, then whether the defence have relied on it or not, the Judge must bring it to the attention of the jury.

(5) If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief, there can be no question but that it amounts to provocation of the most serious character.

LORD GODDARD. Their Lordships now give their reasons for the humble advice which they have tendered to His Majesty that this appeal should be allowed and a verdict of manslaughter substituted for that of murder.

The appeal was brought by special leave against a judgment of the West African Court of Appeal dismissing the Appellant's appeal against his conviction for the murder of one Abudu Zabrama before Lane J. and a special jury on 15th May, 1943. It appears that in the early morning of 27th November, 1942, the deceased man with some others of his tribe, the Zabrama, arrived at the village of Kajakron, where the Appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep. An alarm was given by someone, and there were cries of "thief" and a fight ensued. The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand the case for the defence was that the incident started because the tribesmen, or some of them including the deceased, entered the compound of the Appellant and tried to break into his home. However the fracas started there seems to be no doubt that in the course of the fight the Appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the Appellant among others, entered a house and was followed by some of the villagers, still calling out "thief." The deceased ran out of the house and as he was running away the Appellant fired a gun and killed him.

The Appellant and nine others of the villagers were charged with murder, the Appellant as a principal in the first degree and the others as abettors. The sole defence set up at the trial on the part of the Appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned Judge in the course of his summing up directed the jury that there were three possible verdicts that they could return, murder, manslaughter and acquittal, and that in his opinion no verdict of manslaughter could be entered unless the jury accepted the Appellant's own account as to how he shot the deceased. He further directed them that if they did accept that account the Appellant would be guilty at least of manslaughter as pointing a gun at the deceased as he was running away was an unlawful act. The jury found the Appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal, the West African Court of Appeal dismissed the appeal of the present Appellant, holding that though in their opinion there was a misdirection in saying that on the Appellant's own evidence he was at

least guilty of manslaughter, a matter with which their Lordships deal hereafter, the jury must have rejected his evidence as was shown by their returning a verdict of murder. With regard to the remaining accused they quashed the conviction on the ground that the jury should have been directed that in their case the only possible verdicts were murder or acquittal. The case of these other nine accused is of course not before their Lordships.

The first submission on behalf of the Appellant was that the Court which heard the appeal was not properly constituted in that Mr. Quashie-Idun, who sat as an acting Judge, had not been properly appointed in accordance with law. The West African Court of Appeal is constituted and has its powers conferred by various Orders in Council now consolidated in the West African Court of Appeal Orders 1928-35, being No. 11 of 1935. By section 2 the expression " Judge " includes any person for the time being performing the duties of such office. By section 5 the Judges of the Court are the Judges of the Supreme Courts of the Gold Coast and Nigeria and such other colonies to which the Order is applied, and by section 9 there must be at least 3 Judges to form a Court. The Supreme Court of the Gold Coast is constituted by Ordinance No. 7 of 1935, which provides for the appointment of a Chief Justice and as many Puisne Judges as the Governor may from time to time appoint by letters patent. By section 9 it is provided that in case of temporary illness or absence of any Judge it shall be lawful for the Governor in his discretion to appoint a fit and proper person to fill the office of such Judge until he shall resume the duties thereof. Now it appears that the Chief Justice of the Gold Coast had appointed Monday 16th August, 1943, for the hearing of this appeal before a Court of Appeal consisting of himself, Fuad and Martindale J.J., but the latter fell ill at the end of the previous week. No other Judge was available to form a Court for various reasons and so to prevent the expense and inconvenience of a long adjournment, the case was put off till 17th August, and in the meantime the Governor appointed Mr. Quashie-Idun, a District Magistrate, to be an acting Judge of the Supreme Court, the date of his appointment, as appears from the *Gazette*, being 17th August. On that day therefore he became an acting Judge of the Supreme Court of the Gold Coast.

In their Lordships' opinion he was a person for the time being performing the duties of such office, and it was unnecessary that he should first have acted as a Judge in some other cause or proceeding before he was qualified to sit in the Court of Appeal. It was also contended that his appointment was bad because he was not expressly appointed to act in place of Martindale J.; but in their Lordships' opinion he was appointed in fact to act in place of that learned Judge who was prevented by illness from sitting on the appointed day. No doubt another of the Puisne Judges might have sat in the Court of Appeal had one been available and the acting Judge could then have sat in the Supreme Court. But the fact remains that the illness of Martindale J. caused a temporary vacancy, which under section 9 could be filled by the appointment of an acting Judge, who during the period of his appointment had all the powers of an ordinary Judge. In their Lordships' opinion the decision of the Board in *Butler v. R.* [1939] A.C. 484, on which reliance was placed, has no application to the present case. There the constitution of the Court of Criminal Appeal in Trinidad and Tobago came in question. The legislation establishing that Court at that time was quite different to the Ordinances that have to be considered in this case, and in particular contained no such provision as is to be found in section 2 of the West African Ordinance.

The next point that was submitted for the Appellant depends partly on the direction of the learned trial Judge and partly on the verdict with regard to the prisoners other than the Appellant who were found guilty by the jury of manslaughter only. As has already been said the Appellant's defence was that he pointed the gun at the dead man only for the purpose of frightening him, that he did not know it was loaded and that it was discharged accidentally. The learned trial Judge directed the jury that only in the event of the Appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him.

Their Lordships think it is clear that his direction was that if the jury thought that his account was true the Appellant was on his own showing guilty of manslaughter because the pointing of the gun was in itself an unlawful act from which death resulted. The Court of Appeal however held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act. On this point their Lordships are in agreement with the learned trial Judge and disagree with the view taken by the Court of Appeal. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here as the dead man was running away, it is an unlawful act. They need only to refer among the many cases on the subject to *R. v. Jones*, 12 Cox 628, and *R. v. Weston*, 14 Cox 346. But they agree with the Court of Appeal that by their verdict of murder the jury show that they rejected the Appellant's evidence on this subject. Then it is said that as the other accused were only abettors and were found to have abetted manslaughter only it is impossible for the verdict of murder against the accused to stand. Their Lordships have not to consider the case of the other accused whose convictions have been quashed, but they are quite unable to agree with the argument that because the jury found those accused persons guilty only of manslaughter that can affect the verdict of murder against the principal offender. There was ample evidence of deliberate firing by the accused and but for the point with which their Lordships will now proceed to deal they would not have been able to advise His Majesty to allow the Appeal.

It was finally submitted on behalf of the Appellant that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter this ought to have been submitted by the Court to the jury, and the failure to do so on the part of the trial Judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the Appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the Courts below to argue that there was sufficient provocation to reduce the crime to manslaughter, and indeed as the defence relied on was one of accidental killing it is not surprising that counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence. But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the Judge must put that question of the jury. This was distinctly laid down in *R. v. Hopper* [1915] 2 K.B. 431, a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. This ruling was expressly approved by the House of Lords in *Mancini v. R.* [1942] A.C. 1. The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is

always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then whether the defence have relied on it or not the Judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder. Now in the present case there was undoubtedly a fracas in which at some stage the prisoner took part and in which he was admittedly stabbed at a time before the shot was fired. The case was that the deceased man tried to get into his house after he had retired for the night and that he received the wound while trying to drive off or capture the intruder.

If that was true the stabbing would undoubtedly have amounted to provocation. The prosecution's case was on the other hand that the disturbance was caused by the villagers attacking the dead man and his fellow smugglers for the purpose of robbing them. As the case developed at the trial the truth of these two versions became immaterial, but on the issue of provocation it was all important. If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief there can be no question but that it amounts to provocation of the most serious character. The jury accordingly ought to have been told to consider whether the accused received his wound while acting in defence of his property or whether he got it in consequence of an attempt by him to steal from or injure a man who had done him no harm. That would have enabled them to say whether there was provocation in fact. Then another question would have arisen. The law relating to murder and manslaughter in the Gold Coast is contained in the Criminal Code, but in all material respects the Code reproduces the Common Law of England on the subject. Section 233 provides that intentional homicide shall be manslaughter only, if among other matters of extenuation it is proved on the accused's behalf that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in section 234. Among the matters which may amount to extreme provocation is an unlawful assault of such a kind . . . as to be likely to deprive a person being of ordinary character and in the circumstances in which he was of the power of self-control. Then section 235 excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country. Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self-control. So it might have been in *Hopper's case (supra)*. In both cases it was inevitable that this should be so seeing that the line of defence was accident. But if the jury reject that defence it yet may be that in truth the shooting was due to a lack of self-control caused by provocation. Then again it can be said that as there had been a chase and the dead man had fled to a house and was killed while he was escaping from the house and was shot from behind there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion however the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury. There may no doubt be cases where the facts were such that they could not be made the subject of extenuation; for instance a blow or wounding one day,

and a killing after a night had elapsed. Here though there is no evidence how long after the stabbing the shooting took place it seems clear it was all in the course of one continuing fracas. The tests have to be applied to the ordinary West African villager and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable. In both *R. v. Hayward*, 6 C. & P. 157, and *R. v. Thomas*, 7 C. & P. 817, some time had elapsed between the provocation and the fatal act, but in both cases it was left to the jury to say whether in the circumstances the crime amounted to murder or only manslaughter. It follows therefore that the direction to the jury that the question of manslaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime. The principles upon which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the Appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the Appellant in his case. It was not indeed raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords in *Mancini's case* (*supra*) as to the duty of the Court in such circumstances as they find existed here, they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction. In these circumstances it is proper to take the course followed by the Court of Criminal Appeal in *Hopper's case* (*supra*) and substitute for the jury's verdict one for the lesser offence. Their Lordships have accordingly humbly advised His Majesty that this Appeal should be allowed and the verdict of guilty of murder and the sentence of death passed on the Appellant should be set aside; that the case should be remitted to the West African Court of Appeal with directions to them to substitute for the verdict found by the jury a verdict of guilty of manslaughter and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence.

ALFRED LATUNDE JOHNSON APPELLANT

AND

AMUSA ONISIWO AND OTHERS RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1945) 11 W.A.C.A. 9

1945 Dec. 3

Lords Thankerton, Goddard
 and Sir John Beaumont

*Land—Notice of incumbrance—Bona fide purchaser without notice
—Solicitor—Reference of papers to Attorney-General for consideration of
appropriate action.*

LORD THANKERTON. This is an Appeal from a judgment of the West African Court of Appeal, dated the 8th July, 1943, which affirmed the judgment of the Supreme Court of Nigeria, dated the 1st March, 1943, whereby the Appellant's action against the Respondents was dismissed.

In the action, which was instituted on the 20th June, 1942, the present Appellant sought to set aside a deed of lease dated the 1st September, 1936, under which the present Respondents Nos. 1, 2 and 3 leased to Respondent No. 4 for a period of thirty years the premises at 68 Martins Street, Lagos, and to recover possession thereof, with mesne profits as from the 31st October, 1940. Of the same date the lease of 1936 was registered in the Land Registry at Lagos pursuant to the land Registration Ordinance, 1924 (No. 36 of 1924). Admittedly, the 4th Respondent entered into possession and has since continued to possess either himself or by sub-tenants.

The trial Judge, Lloyd J., gives a short history of the property in suit:

“ It undoubtedly originally belonged to Chief Ajalegbe Onisiwo. In 125 his descendants, the first three defendants and their uncle Lawani Onisiwo, who at the time regarded themselves as solely entitled to the property and the adjoining one No. 70, partitioned the properties between themselves and executed cross conveyances, Lawani taking No. 70 and the first three defendants taking No. 68. In 1936 the first three defendants executed the lease of No. 68 to the fourth defendant which is now sought to be set aside. In case No. 5/1939 a third member of the family sued Lawani claiming an interest in both properties and obtained judgment for a share of the rents collected by him in his capacity as head of the family. A further claim for partition failed because the first three defendants were not parties. In case No. 153/1940 the same plaintiff brought an action for partition of No. 68 and 70 against both Lawani and the first three defendants. This action was settled on the terms that the plaintiff was given No. 70, and No. 68 was divided equally between Lawani and the first three defendants. Immediately after this partition Lawani's half share of No. 68 was attached and sold in satisfaction of the previous judgment. The purchaser was N. J. Chacra, who obtained a certificate of title under the Registration of Titles Ordinance. Chacra subsequently transferred his interest to the plaintiff. It is to be noted that the plaintiff was the solicitor for the plaintiff in both of the cases already mentioned and that he also acted as solicitor for the original purchaser Chacra on effecting the registration.”

In the course of investigation the Registrar of Titles received a letter dated the 24th April, 1941, from a solicitor on behalf of the present first three Respondents stating “ my clients have and have always had a tenant on their portion of the premises, and the applicant for registration is well aware of this fact.” This letter was passed on to the Appellant, as Chacra's solicitor, and he stated to the Registrar, “ I am aware of no tenant on the premises.” It is true that Mr. Franklin, the solicitor, withdrew his intimation. Lloyd J. held that he could not accept the Appellant's contention that he had no notice actual or constructive of the lease, as the 4th Respondent had been in possession of the premises since 1936, a fact which he had not the slightest doubt was perfectly well known both to the original purchaser Chacra and the Appellant. He further held that in any case Mr. Franklin's letter constituted constructive notice of the tenant's possession. The Court of Appeal agreed with the findings of Lloyd J. on

this question of fact. While their Lordships are inclined to regard these findings as constituting a finding that the Appellant had actual notice, as well as a finding of constructive notice, they are of opinion that the fact of actual notice is placed beyond doubt by the statement in paragraph 7 of the Appellant's statement of claim that, on the 9th November, 1940 (a few months prior to the registration of title) the 4th defendant was duly notified of the interest of Lawani in the property having changed hands and was requested to yield up the possession thereof forthwith, but that he refused and still refuses to comply with the said request. Such being the main point at issue in the case it is also open to serious adverse comment that the Appellant did not go into the witness box.

Despite this, in a statutory declaration dated the 25th November, 1941, in support of his client Chacra's application, made in terms of section 13 of the Registration of Titles Ordinance 1935 (No. 13 of 1935), the Appellant declared,

" 3. The actual possession or receipt of the rents and profits of the said land is in accordance with the title of the applicant as deduced to the Registrar . . .

4. That my client holds the said hereditaments in fee simple free from all incumbrances by virtue of certificate of purchase dated the 14th day of January, 1941."

Their Lordships hold that, on the subsequent transfer by Chacra to the Appellant, he is clearly not in a position to maintain that he was a *bona fide* purchaser for value, without notice of the tenancy, and that it is not possible for him to take advantage of his want of *bona fides*, and the statements in his statutory declaration, which to his knowledge were inconsistent with the truth, under any of the sections of the Ordinance of 1935 on which he sought to rely.

As regards the rectification of the register under section 61 of the Ordinance of 1935, which was ordered by Lloyd J. and affirmed by the Court of Appeal, their Lordships agree with the reasoning of the Court of Appeal, and this ground of Appeal also fails.

The only remaining matter relates to the action of Lloyd J. in sending the papers in the action to the Attorney-General for such action as he might think fit. Their Lordships were informed that the Attorney-General was deferring consideration until the disposal of this appeal. The Court of Appeal declined to interfere with the order of Lloyd J., or to express any opinion whatever, one way or other. Their Lordships' opinions expressed above would lead them to agree with Lloyd J. that the material in the case justified examination and consideration by the appropriate authority, the Attorney-General, but they regret that the learned Judge went beyond this, and, without leaving the matter to the appropriate authority, expressed his opinion that an offence had been committed. As the Court of Appeal rightly thought, it was beyond their province; so also it was beyond the province of the learned Judge, and it is equally beyond the province of this Board, to express any such opinion.

The Appeal, accordingly, fails, and their Lordships will humbly advise His Majesty that the Appeal should be dismissed, and that the judgments appealed from should be affirmed. The Appellant will pay the fourth Respondent's costs of this Appeal.

THOMAS SHORUNKE APPELLANT
 AND
 THE KING RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1946] A.C. 316

1946 Apr. 11

Lords Porter, du Parcq, and Sir John Beaumont

West Africa (Nigeria)—Criminal law—Subpoena ad testificandum—Statutory provisions—Concurrent English common law right—Unconditional issue of subpoena—Supreme Court Ordinance, c. 3 of Laws of Nigeria, 1923, s. 14—Protectorate Courts Ordinance, No. 45 of 1933, s. 12.

The Ordinances and Rules in force in Nigeria governing the issue of subpoenas *ad testificandum* do not provide the only method by which such subpoenas can be obtained in the colony, for there exists therein, by virtue of section 12 of the Protectorate Courts Ordinance 1933, side by side with the Ordinances and Rules in appropriate cases, the English common law right of subpoena, which gives a right to the issue of subpoenas, without the imposition of any conditions. Accordingly, where the trial judge refused to direct the issue of subpoenas at the request of the appellant until he had disclosed the purpose for which he desired to call the various witnesses, so that the judge might be satisfied that they could give relevant evidence, it could not be said that a grave miscarriage of justice had not occurred.

The provision in section 62 of the Supreme Court Ordinance 1914, that "in any cause or matter, and at any stage thereof, the court . . . may summon any person within the jurisdiction to attend to give evidence . . ." does not do away with the right of the subject to the issue of a subpoena as of course. It merely gives an additional right for the court to issue process at any stage either of its own motion or at the request of any party.

Veerabadran Chetty v. Nataraja Desikar (1904) I.L.R. 28 M. 28, 36, referred to.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 85 of 1944) *in forma pauperis*, by special leave, from a judgment of the West African Court of Appeal (Kingdon C.J., Nigeria, Petrides C.J., Gold Coast, and Paul C.J., Sierra Leone) (April 27, 1940) which had dismissed the appellant's appeal against his conviction by the High Court of the Protectorate of Nigeria (John Asst. J.) (February 13, 1940), for breaking and entering a building and committing a felony therein. The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The only question raised by this appeal was whether the trial judge ought to have issued or caused to be issued subpoenas asked for by the appellant without attaching any conditions, or whether he was justified in requiring the appellant to satisfy him that there was a likelihood that the witnesses could give material evidence on the appellant's behalf. It was stated in the case for the appellant that he had served the sentence of seven years' imprisonment with hard labour to which he was sentenced by the trial judge.

1946. March 6, 7. Elliot Gorst for the appellant. There is nothing in the Nigerian Ordinances or Rules which compels a court to inquire into any matters in respect of the issue of a subpoena except, where a free subpoena is asked for, to inquire whether the applicant is in fact a pauper. The issue of a subpoena is as of course, and here there was a refusal *in limine* to issue a subpoena at all. (Reference was made to the relevant Ordinances and

Rules: see the judgment of the Judicial Committee.) There is no fetter on an accused person to call any witnesses he likes. It is important to note that sections 67 and 82 of the Criminal Procedure Ordinance, c. 20 of the Laws of Nigeria, 1923, both refer to specific moments in the trial; stress is laid on the words in section 82, "at the close of the evidence in support of the charge." Section 12 of the Protectorate Courts Ordinance 1933, which provides, *inter alia*, that the common law in force in England shall be in force within the jurisdiction of the Supreme Court of Nigeria, can be applied if there be any doubt about the matter being adequately covered by the other Nigerian statutory provisions. (Reference was made to *Raymond v. Tapson* (1882) 22 Ch. D. 430, *Rex v. Baines* [1909] 1 K.B. 258 and to *Halsbury's Laws of England*, 2nd ed., Vol. 13, p. 733, para. 808.) In England a subpoena issues as of right unconditionally. In *Veerabadrán Chetty v. Nataraja Desikar* (1904) I.L.R. 28 M. 28, 36) it was said, "it is not for him (the judge) to assume or infer that such witness is not likely to know anything of the matter in dispute or to be of any use to the party applying. That is a matter for the applicant himself to consider." In *Muhammad Nawaz v. King-Emperor* (1941) L.R. 68 I.A. 126, 128, one of the grounds on which a petition in a criminal case might properly be presented to the Board was that the accused "was not allowed to call relevant witnesses." There is an inherent duty placed on the court to ensure that no accused person is hampered in his defence by the refusal or neglect of the court to implement the rights which the law gives to an accused to assist him to prove his own case or to negative that for the prosecution.

The right of an accused person who is in custody to call witnesses and to the production of documents is vested in every prisoner, and he should only be deprived of it by circumstances which render its reasonable enforcement impossible. It was the duty of the trial court both under Ord. V. r. I, of the Protectorate Courts Ordinance 1933, and also as a matter of essential justice, to issue the summonses to witnesses to give evidence and to produce documents which the appellant requested, and the court had no discretion in the circumstances to refuse the application. It was not for the court to assume or infer that the witnesses asked for did not know anything material, and the only ground on which a summons to any such witness could have been lawfully refused was because it was evident that the witness was not being summoned *bona fide* and that the summons would therefore be an abuse of the process of the court. The appellant was unconditionally entitled to call such witnesses as he reasonably considered would help him in his defence, and the refusal of witnesses summonses made it impossible for him to put forward his defence to the charges made against him. The trial judge was not entitled to require the appellant to disclose to him, still less to the prosecution, the gist of the evidence expected from each witness. After the refusal to issue the subpoenas the conviction was unlawful and ought to be quashed. The refusal of the Court of Appeal to admit before them the evidence which the appellant desired, or otherwise to cause such evidence to be considered, amounted in the circumstances to a denial of justice.

Sir Patrick Hastings K.C. and Gahan for the Crown. The appellant has asked the Board to interfere here on the well-known grounds specified in *Muhammad Nawaz v. King-Emperor*, L.R. 68 I.A. 126—that there has been an infringement of the essential principles of justice. It is submitted that not only was this trial absolutely fair, but that the trial judge went to the extreme limits to ensure a fair trial. Further, he not only did what he was entitled to do, but what he was bound to do, in inquiring, before the issue of

a subpoena in the circumstances of this case during the trial, whether or not it was a *bona fide* application—which could only be satisfied by a statement as to the purpose for which the evidence was required—or whether it was a delaying application, as he seems to have thought. Anybody can apply to subpoena witnesses, in Nigeria as in England, and it is the duty, or, at any rate, the practice of the magistrate who commits people for trial on indictment to ask them (a) whether they want to call witnesses before him, and (b) whether they want witnesses to be called at the trial.

That course was adopted in this case, and all the accused said “no” at that time. Before trial anybody is entitled to a subpoena, but according to the practice and law of Nigeria, because, no doubt, of various local difficulties, a limitation is put on the powers of the judge if he is required to issue subpoenas during the course of the trial. Section 67 of the Criminal Procedure Ordinance, c. 20 of the Laws of Nigeria, 1923, is made applicable to this particular trial, so if a prisoner during the trial asks for a witness to be called the judge can so direct but before doing so he must be satisfied (a) that it is not owing to the defendant that the witness is not there, and (b) that if he is called he will be of some use. That is conclusive of this appeal. There was thus a statutory provision that was duly carried out; this trial was regularly conducted, no substantial miscarriage of justice has occurred, and this appeal should be dismissed.

April 11. The judgment of their Lordships was delivered by Lord Porter. This is an appeal, *in forma pauperis*, brought by special leave from a judgment of the West African Court of Appeal, dated April 27, 1940, whereby the appellant appeals against his conviction by the High Court of the Protectorate of Nigeria on February 13, 1940, for breaking and entering a building and committing a felony therein.

The appellant, a police constable, was charged, together with three other constables and three other persons, with having broken and entered a store at Ogbomosho and having stolen therefrom £300. There were other indictments not now material. The charge was originally investigated in the District Magistrate's Court at Ibadan, and after the evidence had been given for the prosecution the appellant, together with the rest of the accused, reserved his defence. All seven defendants were then committed for trial at the next Ibadan Assizes. The trial began on February 1, 1940, when the appellant pleaded not guilty and stated that he was represented by a barrister—a Mr. Wells Palmer. As this gentleman was not in court the learned judge adjourned the trial until the following morning and gave instructions that a telegram was to be sent to Mr. Wells Palmer informing him of the adjournment. He also asked the police to give every facility to the appellant to get in touch with his lawyer or employ one locally if necessary. Mr. Wells Palmer replied that he was not appearing, and the trial proceeded on February 2, and continued on the following days. During that day's sitting a list of witnesses and documents was handed by the appellant to the court, but he refused to tell the police anything about the contents of the papers required for production or the evidence expected to be given by the witnesses whose names were set out. The learned judge at the end of the sitting warned the appellant that he must give the gist of the evidence required, in order that it could be judged if relevant, and told him that if relevant, free subpoenas would be issued, but not otherwise. On February 3, the Solicitor-General, who was appearing for the prosecution, informed the court that he had endeavoured to assist the appellant to sort out his witnesses and documents. The appellant, however, had refused his assistance—quite rightly, as the learned judge observes in the course of his

judgment—as he did not want to disclose his defence to the Crown's representatives.

The Solicitor-General appears mistakenly to have thought that the learned judge had instructed the police to assist the appellant and accordingly asked that they might be relieved from any further obligation to assist in collecting witnesses or documents. In the circumstances the learned judge reconsidered his decision and determined to see the accused in chambers on the rising of the court to discover what witnesses and documents would be necessary in the interests of justice to be produced on the appellant's behalf. In the course of his day's proceedings, and during the appellant's cross-examination of one of the prosecution witnesses, the Solicitor-General objected to one of the questions put as being irrelevant and the appellant thereupon informed the court that he would ask no more questions and make no statement until he got a lawyer. He did thereafter throughout the whole course of the trial remain mute and refuse to take any further part in the proceedings. Nevertheless, in accordance with his promise the learned judge saw the accused in his private room at the close of the day. At this interview the learned judge, the interpreter, the appellant and one other accused alone were present, though a police officer had been in the room originally and the Solicitor-General came in for a moment to say that all the necessary documents would be produced. On this occasion the appellant repeated his assertion that a lawyer was being sent to defend him, and was then asked to give a list of the names of the witnesses he wished to call, and the reasons for calling them, in order that subpoenas could be issued by the court to avoid delay. The reason for this requirement, the learned judge says, was because it appeared that several were being called from Ondo and it was doubted if they could give any relevant evidence. The appellant replied that he did not wish to give the purpose for which his witnesses were being called and that a list had already been furnished. The learned judge seems to have thought this list confused and to have asked for a fresh one; the accused man, however, failed to furnish a fresh list and again refused, whether from timidity, suspicion or obstinacy, to state the purpose for which he was calling his witnesses. Their Lordships have seen the list furnished by the appellant, and, though it contains a list of both witnesses and documents and, perhaps, might be clearer, think it sufficient to show the names of the witnesses desired and the places where they were to be found. At a later point in his judgment the learned judge states that on this occasion the accused was told that he would get no further assistance, and that he could make his own arrangements about subpoenas, but as the appellant was then, and had for some three months previously been, in prison, it is difficult to see what further arrangements he could make.

The appellant lodged an objection on the morning of February 5 against the case being continued before the learned judge because of what happened at the interview of February 3, and indeed, if his own statement is to be accepted, he made the same objection when the Solicitor-General contended that his cross-examination was irrelevant and the learned judge so ruled. In these circumstances the learned judge took the view that the appellant had lost heart when he was unable to shake the testimony of the principal witness for the prosecution and was adopting the course he had pursued for the purpose of endeavouring to intimidate the court and delay the proceedings and not from any genuine desire to have witnesses called. He accordingly proceeded with the trial and found the appellant and all save one of the other prisoners guilty, and sentenced the appellant to seven years'

imprisonment. After his conviction the accused man obtained legal assistance and appealed to the Court of Appeal complaining (*inter alia*) of the refusal of the court to issue subpoenas, stating that his defence was an alibi, filing affidavits by himself and by his counsel and applying that he himself and his witnesses should be called to give evidence. This application was refused by the Court of Appeal and the conviction affirmed on April 27, 1940. From this dismissal he appeals to His Majesty in Council.

In these circumstances the only question which was, or could be, argued before their Lordships of the Judicial Committee was whether the learned judge ought to have issued or caused to be issued the subpoenas asked for without attaching any conditions, or whether he was justified in requiring the appellant to satisfy him that there was a likelihood that the witnesses to be subpoenaed could give material evidence on the appellant's behalf. It was conceded by the Crown's representatives that if this question had arisen in England, an accused man could have applied for, and must have been furnished with, subpoenas without the imposition of any conditions. It is true that those subpoenas might afterwards have been set aside on its being shown that those to secure whose presence they were issued could give no relevant evidence, but the *onus* would be on them to satisfy the court to this effect. No consideration of that kind arises in the present case. It might, however, be said that there was no duty on the judge trying the case to see that the appropriate subpoenas were issued and that the taking of the necessary steps was a matter for the accused man. Some such suggestion is contained in the judgment of the learned judge when he says that at the vital interview the applicant was told that he would get no further assistance and could make his own arrangements about subpoenas. Their Lordships did not understand that this argument was put forward before the Board on behalf of the prosecution in any case, as has been pointed out above, it is difficult to see how a man under arrest in the midst of a trial could take steps to ensure that subpoenas would be issued without the assistance of the court.

The representatives of the Crown, however, maintained that the position in Nigeria differed from that in England; that the English rule was established by the common law, whereas the whole procedure in Nigeria was governed by the appropriate Ordinance and the procedure thereby made applicable. Before considering what procedure those Ordinances prescribed their Lordships would point out that the principal Ordinance dealing with the administration of justice in Nigeria is the Supreme Court Ordinance of October 1, 1924, c. 3 of the Laws of Nigeria, 1923. Section 14 of that Ordinance enacts that subject to the terms of that or any other Ordinance the common law, the doctrines of equity, and the statutes of general application which were in force in England on January 1, 1909, shall be in force within the jurisdiction of the court (*i.e.*, the Supreme Court of Nigeria). This provision is repeated in section 12 of the Protectorate Courts Ordinance, No. 45 of 1933. Section 62 of the earlier Ordinance ordains that "in any cause or matter, and at any stage thereof, the court, either of its own motion or on the application of any party, may summon any person within the jurisdiction to attend to give evidence, or to produce any document within his possession, and may examine such persons as a witness . . . and require him to produce any document in his possession or power, subject to just exceptions." It is true that this latter section states only that the court may summon any person, but their Lordships do not think that this provision does away with the right of the subject of the issue of a subpoena as of course. It merely gives an additional right for the court

to issue process at any stage either of its own motion or at the request of any party. Moreover, a similar provision contained in section 159 of Act XIV of 1882 and section 149 of Act VIII of 1859 of Madras was discussed in the courts of that province, and it was decided in *Veerabadran Chetty v. Nataraya Desikar* (1904) I.L.R. 28 M. 28 that a party is entitled to obtain a summons for the attendance of any witnesses on application before the day fixed for disposal of the case and the judges cannot under the sections referred to refuse the application.

The prosecution, however, rely on the terms of other sections of the Ordinances of Nigeria as showing that the judge trying the case has the right and duty to inquire into the relevancy of the evidence to be given before issuing a subpoena or directing it to be issued. As establishing this contention they refer to section 66 and 67 of the Criminal Procedure Ordinance of Nigeria 1914 (c. 20 of the Laws of Nigeria, 1923). These sections are to be found in Part II of the Ordinance, which deals with Preliminary Investigations. They read as follows: Section 66. "Immediately after the accused shall so have had opportunity of making his answer to the charge, the court shall ask him whether he desires to call any witnesses, and the depositions of such witnesses as the accused shall call and who shall appear on his behalf shall then be taken in the like manner as in the case of the witnesses for the prosecution." Section 67. "If the accused person states that he has witnesses to call, but that they are not present in court, and the court is satisfied that the absence of the witnesses is not due to any fault or neglect of the accused, and that there is a likelihood that they could if present give material evidence on his behalf, the court may adjourn the investigation and issue process, or take other steps, to compel the attendance of such witnesses."

On their face, and having regard to the heading and terms of this *fasciculus* of sections in which they appear, these sections apply only to the procedure at preliminary investigations. Part III, however, of the same Ordinance, which is headed "Summary Trial," contains sections 77 and 82, which provide: Section 77. "Trials in Provincial Courts and before commissioners of the Supreme Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of this Ordinance."

Section 82. "At the close of the evidence in support of the charge, if it appears to the court that the case is made out against the accused sufficiently to require him to make a defence, the court shall ask him if he wishes to say anything in answer to the charge, or has any witnesses to examine or other evidence to advance in his defence, and the court shall then hear the accused and his witnesses and other evidence, if any. If the accused states that he has witnesses to call but that they are not present, the court may, under the circumstances set forth in s. 67, take the steps therein mentioned to compel their attendance."

The Protectorate Courts Ordinance, No. 45 of 1933, substituted the jurisdiction of the High Court for that of the Supreme Court, and section 14 of the Criminal Procedure (Amendment No. 2) Ordinance, No. 48 of 1933, repealed section 77 of c. 20 and substituted for it the following section. "Trials before commissioners of the Supreme Court and magistrates and, subject to the provisions of the Protectorate Courts Ordinance 1933, trials in the High Court shall be conducted summarily in the manner and subject to the conditions laid down in this part of the Ordinance": *i.e.*, in accordance with the provisions of section 82 set out above. Finally, The Protectorate Courts Ordinance No. 45 of 1933, after

dealing in Ord. V. r. I., with the summoning of witnesses in terms having a similar effect to those of s. 62 of the Supreme Court Ordinance of 1914, provides in Part IV, Rules of Criminal Procedure, Ord. xxxix. Rules for trial after committal to the High Court: " Criminal causes committed to the High Court for trial after a preliminary investigation shall not be tried upon information, but such trials shall be commenced by the court placing upon record the charge or charges made against the accused, and thereafter shall, subject to the provisions of section 19 of the Ordinance and of any Orders made thereunder be conducted, so far as may be, in the manner laid down in Part III of the Criminal Procedure Ordinance." The appellant was committed to the High Court for trial after a preliminary investigation and the other steps prescribed in the last-named order were followed. It follows that the provisions of section 82 of the Criminal Procedure Ordinance of 1914 apply to his case.

The Crown then argued that the only obligations of the court as to summoning witnesses are those contained in section 62 of the Supreme Court Ordinance of 1914. Both they say, are permissive, not obligatory, and the latter requires in addition that the judge should be satisfied in accordance with the terms of section 67 that the proposed witnesses should be likely to give relevant evidence on behalf of the accused. Their Lordships have already stated that in their view the former section even if permissive, does not cover the whole field, but deals merely with the time at which, and the person at whose request, a subpoena may be issued. Moreover, it contains no provision enabling the court to be satisfied that the evidence to be given is relevant. The latter section, however, does contain such a provision and undoubtedly is made applicable by the later Ordinances not only to the procedure to be adopted where an investigation is taking place before a magistrate, but also to a summary trial and to a trial after previous investigation, but the question still remains, as it remained in the case of the earlier section, whether its provisions superseded the common law rights enjoyed by inhabitants of this country on January 1, 1909, or whether its provisions do not take away, but supplement those rights. In this connection it was urged on behalf of the appellant that both section 82 and sections 66 and 67 are dealing with the procedure to be adopted at a particular moment in the trial, namely, after the case for the prosecution is closed and the accused has had an opportunity of answering the charge. It does not deal with the accused man's right to apply for a subpoena before or in the course of the trial, but only enables the court to adjourn and issue processes even at the very end of the trial of the case. It would be strange if a man charged with a crime could only obtain a subpoena for the attendance of witnesses at the very end of his trial, and then subject to the discretion of the court whether it will grant an adjournment or not. In their Lordships' opinion the contention urged on behalf of the appellant is well founded.

As against this view it might, indeed, be argued that if it were to prevail an accused man could put off his application for the issuing of process to compel the attendance of witnesses until his trial was nearing its end and so not only delay its conclusion but also cause excessive inconvenience in the retention of witnesses. Their Lordships would point out, however, that in the present instance the trial lasted some ten or eleven days after the first application made by the appellant to have his witnesses summoned and documents produced. So that this difficulty did not arise, at any rate in any pronounced form. In any case the court can always protect itself by issuing process, but if convinced that the lateness of the application is not due to genuine mistake or justified reason, it can refuse to adjourn the trial. In

their Lordships' opinion the contention that the Ordinances and Rules in force in Nigeria provide the only method by which subpoenas *ad testificandum* can be obtained in the colony cannot be supported. In their view there exists, side by side with them in appropriate cases, the English common law right of subpoena. Having regard, therefore, to the fact that in their Lordships' opinion process ought to have issued at the request of the appellant without the imposition of the condition that he should disclose his reason for wishing to call the various witnesses set out in his list, they are unable to say that a grave miscarriage of justice has not occurred. They will accordingly humbly advise His Majesty that the appeal should be allowed.

Solicitors for appellant: *A. L. Bryden & Co.*

Solicitors for respondent: *Burchells.*

STERIOS THOMOPULOS AND ANOTHER APPELLANTS
AND
JOHN MANDILAS RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1948] A.C. 12

1947 July 30

Lords du Parc, Morton of Henryton
and MacDermott

West Africa—Nigeria—Partnership firm—Registration—Non-compliance with statutory requirements—Whether right of partner to bring action for dissolution against co-partners affected—Registration of Business Names Ordinance (No. 5 of 1926), s. 14.

The omission of a firm to register in the manner directed by the Registration of Business Names Ordinance 1926 of Nigeria (which is couched in terms substantially similar to those of the British legislation on the same topic) does not prevent a partner from obtaining an order for dissolution of the firm. The results of non-compliance with the ordinance are dealt with in sections 8 and 14 thereof, the former providing for a monetary penalty, the latter that "where any firm . . . required to furnish a statement of particulars . . . make default in so doing the rights of such defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect of which particulars were required at any time while he is in default shall not be enforceable by action or otherwise. Provided that (a) the defaulter may apply to the court for relief against the disability imposed by this section . . ." Section 14 refers only to claims made by the defaulting firm against third parties, and there is no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners and no reason why any such provision should be implied.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 27 of 1945) from a judgment of the West African Court of Appeal (Kingdon C.J., Nigeria (President), Harragin C.J., Gold Coast and Brooke J., Nigeria (November 3, 1944)), affirming a judgment of Baker J. in the Supreme Court of Nigeria (August 4, 1944), whereunder judgment was entered for the present respondent, the plaintiff, in the action in which he sought for a declaration that he and the appellants were partners in the firm of S. Thomopoulos, for dissolution of the partnership and for consequential relief. The only issue in the action was whether or not there was a

partnership between the respondent and the appellants.

The facts appear from the judgment of the Judicial Committee.

1947. July 3, 7. *Pritt K.C.* and *A. J. Hodgson* for the appellants.

Tucker K. C. and *J. V. Nesbitt* for the respondent.

July 30. LORD MORTON OF HENRYTON. This is an appeal from a judgment of the West African Court of Appeal dismissing an appeal from a judgment of the Supreme Court of Nigeria in an action by the respondent against the appellants claiming (1) a declaration that the respondent and the appellants were partners in the firm of S. Thomopoulos; (2) dissolution of the partnership; (3) an account of the firm's profits and of the respondent's share thereof; and (4) payment of such shares.

Paragraph 1 of the respondent's statement of claim was as follows: " By a verbal agreement made in or about March, 1936, the plaintiff and defendants became partners in the business carried on at 6 Davis Street, Lagos, and elsewhere in Nigeria, under the firm name of S. Thomopoulos, in terms of which 50 per cent. of the profits of the business were to belong to the first defendant and 25 per cent. each to the second defendant and the plaintiff, the losses to be similarly divided." It was then alleged that the appellants had wilfully and falsely denied the existence of the partnership and had refused to furnish to the respondent an account of " his share in the partnership business." The relief claimed was as set out above. By their statement of defence the appellants in effect, denied that the alleged partnership ever existed, and alleged the respondent was merely an employee who had been dismissed.

The action was tried before Baker A.C.J. The respondent gave evidence that from April 1930 till December 1935 he and the second appellant were employees in a business of " general trade " carried on by the first appellant. The note of his evidence continues as follows:

" Whilst in Ondo at Christmas, 1935, the two defendants both came and spent Christmas with me. The second defendant was then suffering from a disease and his hair was falling out, and we decided he should immediately go home and consult doctors there about the disease. He left Nigeria in 1936. It was also decided amongst the three of us that the first defendant should also go home on leave and on business at the end of financial year, i.e., 31st March, and I should in the meantime take entire charge of the business. We also discussed at that time after the 31st March the business should become a partnership from the 1st April, 1936. We decided that first defendant should take and suffer 50 per cent. of the profits and losses and 25 per cent. to each of us both profits and losses; this we all agreed to. That was all that was discussed at Christmas. In March, 1936, I went to Benin to take stock at Benin with the defendant. I met first defendant there . . . We discussed the partnership and confirmed our Christmas agreement about the partnership."

It is common ground between the parties that no written agreement of partnership was ever drawn up, but their Lordships understand the evidence quoted as meaning that a verbal agreement for a partnership was made, after discussion, at or about Christmas, 1935, such partnership to commence on April 1, 1936. The respondent was cross-examined at some length in regard to various matters including certain entries in the books and certain statements which he had made, in letters and other documents, tending to show that he continued to be merely an employee in the business

of the first appellant after April 1, 1936. He gave his explanation of these entries and statements and he was followed in the witness box by Mr. Frank George Lloyd, an income tax official, who produced a letter dated November 22, 1940, from the first appellant to the Commissioner of Income Tax at Lagos. In the letter the first appellant referred to " a balance of £15,448 9s. 11d. of profit made during 1936/37 and 1937/38 " and continued " Should you decide to tax the amount of £15,448 9s. 11d., and this would be more suitable to me, because it will correspond with my books—the allocation should be made as follows, as regards as my partners are concerned: Myself (S. Thomopoulos) 50 per cent. £7,748 9s. 11d., A. Thomopoulos 25 per cent. £3,850, John Mandilas 25 per cent. £3,850."

On a profit and loss account for the two years to March 31, 1940, which was also produced by Mr. Lloyd, there appeared the words " Partners: S. Thomopoulos, A. Thomopoulos, J. Mandilas " and it is not disputed that the first appellant wrote these words. Further, on April 25, 1941, the first appellant wrote a letter to the Bank of British West Africa Ltd. which contained the following passage:

" Joint Capital £12,000.—Owing to faithful co-operation on the part of my brother, Mr. A. Thomopoulos, and cousin, Mr. John Mandilas, during the hard times we have passed in 1937/39, I am intending of forming a limited liability company immediately all liabilities of my business are paid, and with this object in mind I have created this account. For the time being the business is run on the same basis as since 1936, that is to say I am having a share of 50 per cent. and my brother and cousin 25 per cent. each, in the net profits, but all capital, credit balance, etc., in our name are deemed to be working capital in the business, and jointly and severally responsible for all liabilities."

Having regard to the pleadings, one would have expected the first appellant to give evidence denying the existence of any partnership and explaining the documents mentioned above. He was not, however, called as a witness. The second appellant did give evidence, in the course of which he said:

" I regard myself as an employee and still do so. I have never asked the first defendant of the payment over to me of any moneys. I have never seen the books kept in Lagos. S. Thomopoulos is the owner of the business. There was never any meeting amongst the three of us at Benin in 1935 or at Ondo in which partnership was discussed. All our respective families spent our Christmasses at Ondo in 1935. We have spent other Christmasses together. In March, 1936, I was in Germany, and on my return there was no mention of any partnership. Plaintiff, my brother and myself have never met at any time to go into the accounts of the business."

He also said that in 1942 his brother " dismissed " the respondent, " telling him he was no more employed in his business." This story does not accord with the respondent's evidence. The trial judge said, in regard to the second appellant: " I formed a poor impression of this witness, who would appear to know very little of the business or how the financial part of it was conducted." He concluded his judgment by saying:

“ The plaintiff as a witness created a very good impression on my mind, and I believe him when he says a verbal agreement was entered into by the parties to form a partnership commencing at the end of the financial year of 1935; this supported by the books of the firm, the letter and the return made by the principal partner (first defendant) to the Deputy Commissioner of Income Tax. The first defendant did not go into the witness box to deny the partnership and I am satisfied from all the evidence before me that a partnership did in fact exist between the three parties; that the partnership has not been dissolved and plaintiff is entitled to have the partnership dissolved, the said dissolution to take place from the date of the service of the writ on defendants and in case service was effected at different dates on the two defendants, then from the date of the last service. An account of the firm’s profits must be taken to ascertain plaintiff’s share therein and payment made to plaintiff of such share. Defendants to pay the costs of this action assessed at thirty guineas.”

The appellants appealed to the West African Court of Appeal and their appeal was dismissed.

Before their Lordships’ Board, Mr. Pritt, for the appellants, contended that there were not concurrent findings of fact in this case. He based this contention on certain passages in the judgment of the Court of Appeal. That court reached its conclusion by a line of reasoning which may be open to criticism in some respects, but it is not necessary to examine its reasoning in detail, as their Lordships entirely agree with the conclusion at which the Court of Appeal arrived. Whether there are or there are not concurrent findings of fact in this case, their Lordships can see no good reason why the decision of the trial judge should be disturbed. He arrived at clear and definite findings on questions of fact and there was ample evidence to support these findings. Mr. Pritt suggested that the case put forward by the respondent in his evidence differed from the case put forward in paragraph 1 of his statement of claim. It is true that the statement of claim refers to a verbal agreement of partnership “ made in or about March, 1936 ” whereas the respondent deposed to a verbal agreement made in December, 1935, for a partnership to commence after March 31, 1936 but in their Lordships’ view this variation affords no good reason for disturbing the decision of the trial judge.

Mr. Pritt next submitted that, if a partnership ever existed, it was “ an illegal partnership ” because the partners never complied with the provisions of the Registration of Business Names Ordinance 1926. He suggested that as a result of this the court could not, or should not, entertain a suit by one of the partners for dissolution of the partnership. It is the fact that the firm carried on business in the name of “ S. Thomopulos ” and the partners never supplied the registrar with the necessary statement leading to registration. Consequently the firm was never registered in the manner directed by the Ordinance. In their Lordships’ view, however, this omission in no way prevents a partner from obtaining an order for dissolution of the firm. It is not suggested that the business operations of the firm were in themselves of an illegal nature, and the results of non-compliance with the Ordinance are set out in sections 8 and 14. Section 14 (so far as material) is as follows:

“ 14. Where any firm or person required to furnish a statement of particulars or of any change in particulars makes default in so doing

the rights of such defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect of which particulars were required at any time while he is in default shall not be enforceable by action . . . or otherwise.

Provided that—

(a) the defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally or as respects any particular contract and on such conditions as the court may impose."

Their Lordships read section 14 as referring only to claims made by the defaulting firm against third parties. They can find no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners, and they see no reason why any such provision should be implied. Mr. Pritt was unable to cite any authority in support of his contention, and in their Lordships' view it cannot be supported. If this contention had been one of some weight, it would have been necessary to consider whether it would be right to allow it to be raised, for the first time, before their Lordships' Board. It was not put forward in the West African Court.

Mr. Pritt then submitted that if any partnership existed, it was a partnership at will, and was dissolved in the year 1942, whereas the writ in the action was not issued till May 25, 1943. Their Lordships agree that the partnership proved was a partnership at will, but in their view there is no satisfactory evidence which establishes that on any date in the year 1942 any one of the partners gave to each of the other two notice to dissolve the existing partnership. Nor does it appear that the appellants argued in the courts in Africa in favour of a dissolution before service of the writ. It is, of course, well settled that service of a writ claiming dissolution operates as a dissolution of partnership at will and in this, as in other matters, the trial judge arrived at the right decision.

Mr. Pritt finally suggested that the respondent might have received already more than his share of the profits. That is a matter with which their Lordships cannot deal, and on which they express no opinion. All questions of figures will be dealt with in the taking of the account which has been directed, and no order has yet been made as to the costs of taking that account. No doubt these costs will be dealt with in due course by the appropriate court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

Solicitors for appellants: *H. C. Morris, Woolsey, Morris & Kennedy.*

Solicitors for respondent: *Halsey, Lightly & Hemsley.*

OPANYIN KWASI BAAH	.	.	.	.	APPELLANT
	.	.	.	.	AND
KWAME ABOSSI AND OTHERS	.	.	.	.	RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

Concurrent findings of fact—Privy Council will not interfere.

LORD UTHWATT. It would not be in accordance with the practice of their Lordships' Board, in view of the concurrent findings of fact in the Courts below, for their Lordships to entertain this appeal.

Their Lordships will humbly advise His Majesty that this appeal be dismissed.

VICTOR MADUKA AND OTHERS APPELLANTS
 AND
 EZEODIMEGWU RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1948 Feb. 23

Lords Simonds, Morton of Henryton
 and Sir Madhavan Nair

Declaration of title to land—Unchallenged findings of referee—Binding on parties but not on strangers.

The referee's report was not challenged and a consent order was made in the terms of the claim as amended. That it bound the parties is beyond dispute but it is difficult to see what bearing it can have upon the claim of the people of it who were not parties though they would fain have been added as parties.

LORD SIMONDS. This appeal, which is brought from a judgment of the West African Court of Appeal dismissing with costs an appeal from a judgment of the High Court of Enugu-Onitsha, is concerned with the rival claims of two tribes known as the Umuoris and the Orokwus to a strip of land at or near Onitsha in Nigeria. The appellants, who were defendants in the action, are three members of the Umuori tribe and the respondent, who was plaintiff and purported to sue on behalf of the Chief Aboh of Orokwu, is a member of that tribe. The strip of land in dispute, which will sometimes be referred to as "the disputed land," is a strip of varying width which lies to the west of a line running in a northerly direction from the road from Nobi to Adazi to the Ndide river which is coloured red on the plan being the exhibit "A" in these proceedings.

It is common ground that on the 9th October, 1942, when these proceedings were commenced by originating summons issued in the High Court of the Enugu-Onitsha Judicial Division, the Umuoris were in occupation of the disputed land and the respondent, as plaintiff on behalf of the Orokwus, brought his action accordingly. It is important to note what he claimed. His claim was in these terms: "The plaintiff claims (A) Possession of that piece of land now occupied built and farmed on by the defendants at Orokwu which said piece of land has been adjudged to be the property of the plaintiff by the High Court of the Onitsha Division in an action between the plaintiff and the people of Adazi-Awka Division: . . ."

The reference to this judgment becomes plainer as the matter proceeds. In due course the plaintiff put in his Statement of Claim and again it is important to note what his plea was. The relevant paragraphs are as follows:

"3. The land in dispute has from time immemorial been the property of the plaintiffs.

4. The people of Adazi within recent years made attempts to encroach over the boundary between the plaintiffs and the Adazis which resulted in an action in the High Court of the Enugu-Onitsha Division and a boundary demarcated by the Court the proceedings and plan in the said suit will be founded upon.

5. The defendants who with their townspeople were given a portion of land by the Adazis in settlement of a dispute between themselves and the Adazis have occupied the plaintiffs' land in dispute built houses and farmed and still farming on it."

To this pleading the defendants, now appellants, put in their defence. By paragraph 3 they denied the alleged encroachment by the people of Adazi and further said that "this is not probable since the plaintiffs' land is not contiguous with the land of Adazi. Between the plaintiffs' land and Adazi town lies the defendants' town of Umuori." By paragraph 4 they said that they were not parties to the action referred to in the Statement of Claim and that "the said action was a collusive one and was never contested it being started with a view to oust the defendants and their people from possession of their land wrongly." And they further pleaded that they had not at any time built or farmed on any land belonging to the plaintiffs and that where they built and had always farmed was Umuori land and as such had been in their possession from time immemorial, and finally they relied on "long possession, laches and acquiescence."

Thus issue was joined and, before the further course of the action is examined, the reference to the previous action and certain other facts must be explained.

Whatever might have been their respective rights at a later date in the disputed land, it is clear that at an earlier date the area which embraced it was claimed by the Orokwu and the Adazi, the territory of the former lying to the west of that of the latter, and that these tribes were in dispute as to their boundary as long ago as 1916, at which date the Adazis were suing the Orokwas in the Agulu Native Court. In settlement of this dispute the boundary was in that year settled by the native chiefs of Nobi and Agulu. In this controversy the Umuoris had no part. It was only at a later date, as the respondent sought to establish, that they crossed the Nobi-Adazi road, and squatted north of it. Having crossed it at a date and within an area which, as their Lordships think, have yet to be determined, the Umuoris eventually came into conflict not with the Orokwu but with the Adazi. In 1931 they brought an action against the Adazi, the history of which is set out in the judgment of the West African Court of Appeal in the present case. Unfortunately it does not appear what exactly was the land in dispute. It is said only that the Umuoris claimed "a declaration of title." But, whatever their claim, they were unsuccessful from court to court in West Africa and the Adazis, in celebration of their victory, raided and destroyed houses of the Umuoris on the then disputed land wherever that may have been. This led to further proceedings both criminal and civil and in a civil suit No. 0/65/34 the Umuoris were awarded damages against the Adazis amounting to £1,127 and costs. This sum the latter were unable to pay and in 1938 the parties came to an amicable agreement, creditable alike to themselves and their advisers, under which the Adazis paid a sum of £300 and ceded to the Umuoris a strip of land to the east of the red line marked on plan A. This strip is called in the plan "Land of Adazi allowed Umuori." Part at least of its eastern limit is marked by a dotted line. As to this the Court of Appeal has said "This was allowing the Umuoris to extend considerably further

east than they had ever before claimed to do. The agreement is naturally silent as to the western boundary of the Umuori's land."

During this period of conflict between the Umuoris and Adazi, nothing is heard of the Orokwu. But in 1940 the latter thought it desirable to have the boundary as between themselves and the Adazi once more determined. It is, as their Lordships think, clear that at least by 1940 the Umuoris must have penetrated to the disputed land, and this view is shared by the Court of Appeal who say that before taking action against the Umuoris for their alleged trespass the Orokwu thought it prudent to get their ancient boundary with the Adazis clearly established in the courts. It is supported also by the evidence of the respondent who remembered the action in 1940 between the Orokwu and the Adazi and said "cause of that was Umuori people coming on to our land." At any rate, whatever the reason, in 1940 the action was brought and it was a friendly enough proceeding. The claim was amended to ask for a declaration "that the boundary between the land of Otta Orokwu and the land of Adazi-Nukwu is the boundary demarcated about the year 1916 by 48 chiefs of Nobi and Agulu and marked by a red ink line on plaintiffs' plan now marked by consent exhibit 'A'." The parties agreed that an administrative officer should be appointed as referee to determine what was the boundary demarcated in 1916. The Resident of the Onitsha Province was the appointed Referee. He investigated and reported that the boundary so demarcated was the boundary shown by a red line on plan "A." The Referee's report was not challenged and a consent order was made in the terms of the claim as amended. That it bound the parties is beyond dispute, but it is difficult to see what bearing it can have upon the claim of the Umuoris who were not parties though they would fain have been added as parties. For, perceiving that the dispute between the Orokws and Adazis concerned at least some land of which they claimed to be in rightful possession, they intervened by motion in the action asking that they might be added as defendants to the action in order that their rights might be determined. They alleged that in fact the Orokwu and Adazi had no common boundary, for between them lay the land of the Umuori. Unfortunately, as their Lordships think, in view of subsequent proceedings, their motion was opposed (whether by both or only one of the parties does not appear) and it was dismissed. Yet it is a judgment thus obtained which is the foundation of the respondent's present case. If the appellants sought to rest their claim to the disputed land upon a cession made by the Adazis after the 1940 action, there would be much force in the plea. But this is not and never has been the appellants' case.

Learned counsel for the respondent were constrained to admit that, upon this view of the force and effect of the judgment in the 1940 action, the judgment in the present appeal could not be supported unless it appeared that there were other adequate reasons for affirming it.

Their Lordships would not in a case of this kind, particularly where questions of native tenure have been determined by experienced judges, allow their decision to be deflected by any nice point of pleading. But it appears to them that here both the course of the trial and the judgments in the courts of West Africa have been coloured and distorted by a wrong view of the value to the respondent of the 1940 judgment.

Thus the learned trial judge said "The judgment of this court declaring the Orokwu-Adazi boundary still subsists and that boundary is binding on the parties to the action and their privies. It seems to me to be idle for counsel to criticise that suit as collusive: so long as the judgment remains it must be observed." It is true that the learned judge went on to discuss the

evidence given in the case in a manner not favourable to the appellants, but his conclusion cannot fail to have been influenced by his initial error in thinking that the Umuori were in some way "privies" to the 1940 judgment and were bound by it.

So also in the Court of Appeal. At the conclusion of the narrative of facts that court said of the appellants, "They plead long possession, laches and acquiescence. The learned trial judge made two findings of fact which appear to be conclusive in the decision of the question in issue. They are (1) that suit No. 0/4/40 was not a collusive one: and (2) that the Umuori people have no rights in the land north of the main road except such as they derive from Adazi." With these conclusions of fact the Court agreed. But the first finding of fact becomes, in their Lordships' opinion, irrelevant when it is appreciated that, collusive or not, the judgment in the 1940 action does not in any way affect the appellants. Nor can the second finding of fact be decisive. It is said by the court that this finding "disposes of one of the main contentions of the appellants, viz.: that the learned judge was wrong in applying the 1940 judgment to the present case, since by it the Umuoris become the privies of the Adazis in the 1940 action." But this cannot be. For, even if to a cession of land by the Adazis after 1940 the 1940 judgment might be successfully pleaded (a proposition to be accepted with caution and qualification), it can have no bearing upon a cession made at an earlier date. In the result their Lordships must come to the conclusion that the appellants' substantial plea of possession, laches and acquiescence has not been adequately dealt with and the present judgments cannot be sustained. They do not think it desirable to observe upon any other issue of fact in the case, since in the course of the proceedings which may hereafter be taken the facts will need to be further investigated and ascertained.

Their Lordships have felt some doubt what is the proper course to adopt in order so far as possible to do substantial justice and to end this tribal dispute. It does not appear to them right that the respondent's action should be dismissed out of court without further opportunity of investigation. Therefore, while they think that this appeal should be allowed with costs here and below and the judgments of the High Court and the Court of Appeal set aside, they are further of opinion that the respondent should be at liberty to amend his summons and statement of claim as he may be advised within such time as the High Court of the Enugu-Onitsha Judicial Division may determine and that, if he thinks fit so to do, then the appellants should similarly be at liberty to amend their statement of defence and that the action should then proceed to new trial in the ordinary way. They will humbly advise His Majesty accordingly.

PATTERSON * * * * * APPELLANT

AND

DISTRICT COMMISSIONER OF ACCRA
AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1948] A.C. 341

1948 Mar. 3 Lords Simonds, Morton of Henryton and Sir Madhavan Nair

West Africa—Proclaimed district—Cost of additional police—Assessment—Ministerial act—Execution—Attachment—Prohibition—Peace Preservation Ordinance (Laws of the Gold Coast, 1936 Revision, c. 40), s. 9.

By section 9 of the Peace Preservation Ordinance (Laws of the Gold Coast, 1936 Revision, c. 40):

“ Where additional constabulary or police have been sent up to or stationed in a proclaimed district the Governor in Council may order that the inhabitants of such proclaimed district be charged with the cost of such additional constabulary or police.

A District Commissioner within whose district any portion of a proclaimed district is shall, after inquiry, if necessary, assess the proportion in which such cost is to be paid by the said inhabitants according to his judgment of their respective means. All moneys payable under this section may be levied under the law for the time being in force for the levying of moneys ordered by a Court to be paid.”

The appellant, an inhabitant of a “ proclaimed district ” in respect of which an order for the cost of additional police had been made, failed to pay two sums assessed on him by the District Commissioner, and writs of attachment were issued by the District Magistrate for the levying of the sums out of his property. A motion by the appellant for an order calling on the District Magistrate and the District Commissioner, the respondents, to show cause why an order of a writ was dismissed.

Held:—that there was nothing irregular or unlawful in the proceedings complained of by the appellant and the application for the writ of prohibition was rightly dismissed.

Section 9 of the Ordinance contemplates a simple and ministerial proceeding on the part of the District Commissioner. He has to form an honest opinion as to how the sum prescribed ought fairly to be borne by the inhabitants, acting on the principle that the greater a person's means, the greater the sum which he should be called on to pay. The wording of the section, and in particular the phrases “ after inquiry, if necessary ” and “ according to his judgment of their respective means ” are quite inconsistent with the view that the District Commissioner is to be bound to hold anything in the nature of a judicial inquiry, and there is nothing in the section which compels him to give each inhabitant, on whom he proposes to make an assessment, an opportunity of being heard before the assessment is made.

Further, there is no ground for the suggestion that the appellant should have been given an opportunity of showing cause against the issue of the writs of attachment. The assessments having been made, the respondents were entitled to proceed exactly as they would have proceeded had orders of a competent court been obtained for payment by the appellant of the two sums, and in such a case the appellant would not have been entitled to be heard before the issue of writs of attachment. There was nothing irregular in the proceedings up to and including the issue of the writs of attachment and the provisions of section 9 had been carried out.

Since, as held above, the section did not contemplate any judicial proceeding, a decision against the appellant, who had admittedly been deprived of part of his property without having had an opportunity of being heard by either of the respondents, did not infringe the principles stated in *Bonaker v. Evans* (1850) 16 Q.B. 162, 171.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 2 of 1945) from a judgment of the West African Court of Appeal (March 7, 1944) which had dismissed, with costs, an appeal from a judgment of the Supreme Court of the Gold Coast (June 22, 1943), rejecting a motion by the appellant for writs of prohibition directed to the District Commissioner, the District Magistrate, and the Sheriff, all of Accra, in connection with proceedings taken to levy execution under an assessment. At the opening of the present appeal, counsel for the appellant intimated that he was not pursuing the claim for a writ of prohibition against the Sheriff.

The following provisions of the Peace Preservation Ordinance, and the statement of the facts, are taken from the judgment of the Judicial Committee.

“ 2. In this Ordinance, unless the context otherwise requires

‘ Proclaimed district ’ means and includes any specified part of the

Gold Coast as to which any proclamation under section 3 has been made so long as such proclamation is in force.

3. Whenever it shall appear to be necessary for the preservation of the public peace in any part of the Gold Coast, the Governor may declare by proclamation that it is unlawful to have or carry arms or ammunition that it is specified part of the Gold Coast after the date specified in such proclamation and subject to any exceptions in the said proclamation provided for.

9. Where additional constabulary or police have been sent up or stationed in a proclaimed district the Governor in Council may order that the inhabitants of such proclaimed district be charged with the cost of such additional constabulary or police.

A District Commissioner within whose district any portion of a proclaimed district is shall, after inquiry, if necessary, assess the proportion in which such cost is to be paid by the said inhabitants according to his judgment of their respective means.

All moneys payable under this section may be levied under the law for the time being in force for the levying of moneys ordered by a Court to be paid."

On September 27, 1942, the area within a radius of one mile from the Labadi Market in the Accra District became a "proclaimed district" by reason of a proclamation made on that date by the Governor of the Gold Coast under section 3 of the Ordinance. On November 30, 1942, the Governor made the Peace Preservation (Labadi) Order under section 9 of the Ordinance. By that order the inhabitants of the proclaimed district were ordered to be charged with £321 16s. 11d., being the cost of additional police who had been sent up to and stationed in that district. On January 14, 1943, the District Commissioner at Accra gave notice of his assessment of the proportion which each person should pay, and required payment to be made within seven days. In a schedule was set out a list of houses in the proclaimed district with the name of the owner or occupier of each house and the amount to be paid by such owner or occupier. The appellant was assessed in respect of two houses, and was required to pay £3 18s. 9d. in respect of one and £1 10s. 6d. in respect of the other. The notice was posted at the District Commissioner's office in Accra, and copies thereof were posted at conspicuous places at Labadi, including the Chief's house. The appellant and ten other assessed persons failed to comply with the notice requiring payment. On May 10, 1943, on the application of the District Commissioner, the District Magistrate, Accra, issued two writs of attachment to the Sheriff, Accra, for the levying of the sums of £3 18s. 9d. out of the property of the appellant. Other writs were issued in the cases of the other ten persons who had failed to pay, but it was agreed that the appellant's case should be treated as a test case.

On May 18, 1943, the appellant gave notice of motion in the Supreme Court for an order calling on the respondents and the Sheriff, Accra, to show cause why an order for writ of prohibition should not issue to prohibit them from attaching the appellant's property. In an affidavit in support of the motion the appellant alleged that he had not attended, or been invited to attend, or given the opportunity of attending, any inquiry; that there had been no valid and lawful assessment; that he had not been served with any order or decree for payment; and that the execution proceedings were illegal. The appellant did not allege that he had not seen the notice. The District Commissioner swore an affidavit in answer on June 3, 1943, setting

out the steps which had been taken by him. On June 22, 1943, Lane J. dismissed the motion, with costs. The appellant appealed to the West African Court of Appeal (Kingdon C.J., Nigeria, Paul, C.J. Sierra Leone, and Doorly Ag. C.J. Gold Coast), and the appeal was dismissed with costs.

1948. Feb. 4, 5. Rewcastle K.C. and L. M. Minty for the appellant. The fundamental question is as to the meaning to be given to section 9 of the Peace Preservation Ordinance. It would appear that the way in which in fact the District Commissioner made his assessment was to take the local rating list and proceed to levy the entire sum on the people appearing in the list. That is not in any way a compliance with the section. It is essential under section 9 that the sum to be paid should be charged on all the inhabitants of the proclaimed area. For the meaning of "inhabitants" see *Burrows' Words and Phrases*, Vol. 3, p. 108. It is not disputed that the appellant was at the time an inhabitant, but when an allocation has to be made among the inhabitants obviously if some are omitted who ought to have been included a heavier burden is automatically placed on the others. The omission is sufficient in law to invalidate the assessment: *Rex v. Overseers of Maddern* (1787) 1 Term Rep. 625. This is all on the assumption that this is a judicial and not a ministerial act: it is submitted that the District Commissioner in making the assessment was plainly acting in a judicial capacity: *Rex v. Inhabitants of Darlington* (1795) 6 Term Rep. 468. If the District Commissioner in fact did what is suggested—made use of the rating list—he obviously did not act "according to his judgment." The next submission on section 9 is that the District Commissioner must hold an inquiry. In this case there was no inquiry at all; the appellant was given no notice and no opportunity of going to the court on any aspect of the matter. However difficult the task may be, an inquiry must be held. The courts below took the view that it is unnecessary to hold an inquiry, and that under this section the District Commissioner was not performing a judicial or quasi-judicial duty, but a ministerial function. With regard to the last paragraph of section 9, it would be against the fundamental principles of justice that a man should have execution levied on his goods without having been afforded any opportunity of being heard: *Tracy v. Talbot* (1704) 2 Salk. 532; *Rex v. North ex. p. Oakey* [1927] 1 K.B. 491; *Rex v. Benn and Church* (1795) 6 Term Rep. 198; *Happer v. Carr* (1797) 7 Term Rep. 270; *Rex v. Martyr* (1810) 13 East 55; *Rex v. Hughes* (1835) 3 Ad. & E. 425; and *Reg. v. Tones Union* [1937] A.C. 898.

It was said by the Supreme Court below that "the enactment which is brought into play by the latter part of section 9 of c. 40 is Ord. 43, r. 5, of c. 4, which says, 'if the decree be for money, it shall be enforced by the attachment and sale of the property of the party against whom the decree is made'." "Decree" there is a decision in a civil suit, and if the District Commissioner is to be regarded as an administrative officer his decision could not be regarded as a decree. Further, these are quasi-criminal proceedings, and Ord. 43, r. 5, has no application at all; they should have proceeded, if at all, under section 305 of the Criminal Procedure Code, and if they had, certain conditions should have been satisfied which were not. If it was a criminal matter clearly there must have been a hearing, otherwise the appellant would have been punished without an opportunity of being heard. Lastly it is submitted that the view of the Court of Appeal below that a further "reason for refusing a writ directed to the District Commissioner" was that he was *functus officio*, was wrong: *Estate and Trust Agencies (1927), Ltd. v. Singapore Improvement Trust* [1937] A.C. 898.

Gahan for the respondents. The District Commissioner was doing only ministerial acts in respect of which the writ will not issue. Liability is imposed by the order of the Governor fixing the charge, and then the District Commissioner has to make the assessments. That is not any judicial or quasi-judicial proceeding, but only a ministerial duty. The words "after inquiry, if necessary," do not mean that there shall be anything in the nature of a public inquiry; the District Commissioner can seek information and act on it; it is all ministerial. He has to endeavour to apportion according to his own knowledge; he is the judge. "Respective means" would mean their ability to bear the burden. With regard to the last clause of section 9, the legislature was directing its mind to what is to happen after the District Commissioner has ministerially apportioned the burden among the inhabitants, and is saying that once that act is performed the collection is to proceed as if there was a regular judgment of a court of law. There can be no question of any further hearing of the parties at that stage. It was argued for the appellant that this ought to have been under section 305 of the Criminal Procedure Code. It is contested that there is anything criminal in that at all, but if there were, there would simply be two methods of levying the money, that is all. Everything that was done by the District Commissioner and the District Court was properly exercised in this case. Once there is what is equivalent to an order of a court there is machinery for execution exactly as if there were the order of the court, and the only duty on any person is to apply the machinery. The proceedings for the writs of attachment brought into operation judicial actions which were regularly and judicially performed. The general proposition of English law that in judicial proceedings a person cannot be affected in his absence and without an opportunity of being heard is not challenged, but it is essential in that regard that there should be judicial proceedings: *Bonaker v. Evans* (1850) 16 Q.B. 162, 171, and the cases there mentioned. In all these cases in the last resort it must be seen whether the legislature intended to impose judicial duties or merely ministerial: *Harper v. Carr*, 7 Term Rep. 270. The District Magistrate had full power to issue the writs of attachment, and the decision of the Court of Appeal below was right. [Reference was also made to *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] A.C. 878, 917.]

Rewcastle K.C. replied. It would be very surprising if there were to be found in an enactment power given to a District Commissioner to select particular people to bear this burden—a burden which, on any view, is one for the benefit of every inhabitant—without any regard to any question of justice and equity between one individual and another. If it had been intended to make a provision of that kind one would have expected such language as "in his discretion," or "the inhabitants of some of them"; here the language is inapt for that. Further, there could be no inquiry in those circumstances. The Ordinance is in essence a criminal and penal statute—the courts below regarded it as plainly punitive legislation—and before an order for execution is made there must be an inquiry.

March 3. LORD MORTON OF HENRYTON stated the facts and the terms of the Peace Preservation Ordinance set out above and continued: The argument of counsel for the appellant before their Lordships' Board proceeded on the following lines. He submitted that by the order of 1942 all the inhabitants of the proclaimed district were charged with the sum of £321 16s. 11d., and that it was the duty of the District Commissioner first to ascertain who were the inhabitants of the district at the time when the

additional police were stationed there, secondly, to conduct a judicial inquiry as to the respective means of these inhabitants and, thirdly, to apportion the £321 16s. 11d. among such of these inhabitants as possessed any means, according to the amount of their respective means. He further submitted that if even one inhabitant with means was excluded from the assessment the whole assessment would be invalid, and in support of this submission he cited *Rex v. Churchwardens and Overseers of Maddern*, 1 Term Rep. 625 and *Rex v. Inhabitants of Darlington*, 6 Term Rep. 468. While conceding that the appellant was an inhabitant of the proclaimed district at the material time, counsel contended that the purported assessment on the appellant was invalid and illegal because he was given no opportunity of attending an inquiry or of showing cause why he should not be assessed. Counsel finally submitted that before the District Magistrate issued the writs of attachment he should have given the appellant an opportunity of showing cause against their issue.

Their Lordships take the view that this appeal must fail, on the ground that the proceedings whereof the appellant make complaint were lawful and regular throughout. The appellant did not seek to challenge the proclamation of September 27, 1942, or the order of November 30, 1942. As to the assessment made by the District Commissioner their Lordships cannot accept the argument that section 9 of the Ordinance imposes on the District Commissioner the burden of carrying out the elaborate procedure outlined in counsel's argument. It seems to their Lordships most unlikely that those who framed the Ordinance ever contemplated any such procedure for the purpose of spreading, amongst the inhabitants of a proclaimed district, the cost of providing additional constabulary or police; apart from the difficulty of ascertaining exactly what persons were "inhabiting" the proclaimed district at the time when the additional police were stationed there, and assessing persons who might have left the district shortly afterwards, it is difficult to see how the District Commissioner could conduct a judicial inquiry into the respective means of the inhabitants without having any power of compelling parties to attend and disclose their means. Moreover, the wording of section 9 and in particular the phrases "after inquiry, if necessary" and "according to his judgment of their respective means" are, in their Lordships' opinion, quite inconsistent with the view that the District Commissioner was to be bound to hold anything in the nature of a judicial inquiry. In their Lordships' view, section 9 of the Ordinance contemplates a simple and ministerial proceeding on the part of the District Commissioner. He has to form an honest opinion as to how the sum prescribed by the Governor ought fairly to be borne by the inhabitants, acting on the principle that the greater a person's means, the greater the sum which he should be called on to pay. It is contemplated that the District Commissioner may carry out this duty without making any inquiry, but if, for instance, he has been recently appointed, he may think it right to supplement his knowledge by questioning persons more familiar with the district. Their Lordships can find nothing in the section which compels the District Commissioner to give each inhabitant, on whom he proposes to make an assessment, an opportunity of being heard before the assessment is made.

Counsel suggested that the reference to "moneys ordered by a Court to be paid," in the concluding sentence of section 9 indicated that the proceedings of the District Commissioner were of a judicial nature, but in their Lordships' view this suggestion is ill founded. The sentence in question in no way indicates that the moneys payable under the section are moneys

ordered by a court to be paid. They clearly are not. All that the sentence does is to apply, to the levying of moneys payable under the section, the law for the time being in force for the levying of moneys ordered by a court to be paid. This is no doubt a convenient method of avoiding the necessity for setting out at length special rules which are to be applicable to the levying of moneys payable under the section.

Turning now to the issue of the two writs of attachment by the District Magistrate, their Lordships can see no ground for the suggestion that the appellant should have been given an opportunity of showing cause against their issue. The assessment having been made, the District Commissioner and the District Magistrate were entitled to proceed exactly as they would have proceeded had the former obtained orders of a competent court for payment by the appellant of two sums of £3 18s. 9d. and £1 10s. 6d. Had there been such orders, the appellant would not have been entitled to be heard before the issue of writs of attachment, and their Lordships can find nothing irregular in the proceedings up to and including the issue of the writs of attachment. These proceedings appear to have been, in all respects, the appropriate proceedings for the levying of moneys ordered by a court to be paid, and, this being so, the provisions of section 9 of the Ordinance have been carried out. On this part of the case, counsel suggested that the provisions of section 9 were in the nature of a "mass punishment," of the inhabitants of the proclaimed district, and he relied on the well-known passage from the judgment of the court in *Bonaker v. Evans*, 16 Q.B. 162, 171 "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without the necessary preliminary. This is laid down in (here a number of cases are mentioned) and many other cases, concluding with that of *Capel v. Child* (1832) 2 C. & J. 558 in which Bayley B. says he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard."

Their Lordships realise that if this appeal fails the appellant will be deprived of a part of his property without having had an opportunity of being heard either by the District Commissioner or by the District Magistrate, but this unusual situation arises from legislation couched in unusual terms and designed to meet what is, their Lordships hope, an unusual situation. The Ordinance contemplates that a riot has broken out in a particular part of the Gold Coast and that it has become necessary to send additional police to that part in order to quell the riot and protect the persons and property of the inhabitants. In placing the cost of this protection on the inhabitants of that part of the Gold Coast, the Ordinance does not inflict anything in the nature of a mass punishment. It merely provides a rough and ready method of securing that, in substance, the burden shall be borne by those who are best able to bear it, and who, in all probability, had the most property to be protected. Their Lordships have already indicated that, in their view, the section does not contemplate any judicial proceeding and thus a decision against the appellant does not infringe the principles stated in *Bonaker v. Evans*, 16 Q.B. 162. As their Lordships can find nothing irregular or unlawful in the proceedings whereof complaint is made by the appellant, it follows that the courts in West Africa were right in dismissing the appellant's application for a writ of prohibition. It is therefore unnecessary to consider the further reasons

against the issue of such a writ which were put forward by counsel for the respondents.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

Solicitors for appellant: *A. L. Bryden & Co.*

Solicitors for respondents: *Burchells.*

NKWANTAHENE NANA KWAME BOAKYE TROMU II APPELLANT

AND

BECHEMHENE NANA FOSU GYEABUOR II RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1948 July 5

Lords Simonds, MacDermott
and Sir Madhavan Nair

Land—Ownership—Claims governed by previous agreement of parties entered in "Boundary Book"—Case based on fact—No question of law arises.

By virtue of section 3 (1) of the Boundary Land, Tribute and Fishery Disputes (Executive Decisions Validation) Ordinance 1929 (see 1936 Revision c. 120) where a relevant agreement of parties is recorded as an executive decision in the "Boundary Book," that agreement becomes "invested with full and definite legal force and effect for all purpose whatsoever as against all persons whomsoever the rights of the Crown alone being reserved."

LORD MACDERMOTT. The matter for determination in this appeal is the ownership of a tract of land in the Crown Colony of Ashanti which is claimed by the plaintiff and appellant on behalf of the Stool of Nkwanta and by the defendant and respondent on behalf of the Stool of Bechem. The parcel in dispute is shown edged in yellow on the map prepared by Mr. Ernest S. S. Wood, a licensed surveyor, which is exhibit "B1." Its boundary on the south-east is portion of a river line which traverses the district and flows from north-east to south-west. Going down-stream this line is formed as follows: the Buakukruwa (Obukruwa) to where it joins the Adrenko (Adingkra), the Adrenko to where it joins the Bua (Boa), the Bua to where it joins the Kwaso (Kosu) and then the Kwaso. Above the confluence of the Bua and the Kwaso (hereinafter called the river junction) this line crosses the Kumasi road. The south-eastern boundary of the parcel in question starts at or near the river junction and runs downstream along the course of the Kwaso. The parcel thus lies on the right or north-west bank of the Kwaso. Its north-east boundary runs north-west from the river junction and does not follow any natural feature. The boundaries on the north-west and south-west follow an irregular course which eventually reaches the Kwaso again near the south-western corner of the parcel.

Above the river junction the river line just described forms the boundary between the Nkwanta land to the north-west of it and the Bechem land to the south-east. That was determined in 1913 in the course of an earlier dispute between the parties. The present controversy turns on whether the river line below the river junction (that is to say the Kwaso from its confluence with the Bua) is also the boundary between the rival claimants.

The appellant says that it is. The respondent, on the other hand, contends that this part of the river line flows through the Bechem land with the area in dispute on one side and the remainder of the Bechem territory on the other.

The earlier dispute to which reference has just been made was settled by an agreement in writing made by the representatives of both Stools on the 22nd May, 1913, before District Commissioner A. W. Norris. The material portions of this document, which will be spoken of as the 1913 agreement, read as follows:

“ 1. The boundary between Bechem and Nkwanta to be the thalweg of the Obukruwa-su to where it joins the Adinkra-su thence to the Boasu following the thalweg of the Boa to the point where the Kosu joins it.

Bechem people to have full use of all farms and hunting Huts at present used by them on Nkwanta land without tribute from any rubber or cocoa grown or manufactured on that land.

2. The only claim Nkwanta reserves is—if any gold or other mineral is found thereon, or a concession of any sort granted.”

It would appear that this settlement was reached after the dispute had been investigated by District Commissioner T. E. Fell and his note, dated the 17th April, 1913, of the parties' statements was put in evidence as an annexure to the 1913 agreement. No objection was taken to the admissibility of this note which runs thus:

“Chief of Nkwanta <i>vers.</i> Chief of Bechem	Claims land from where Obuokrukrua River crosses the Kumasi Road till it joins the Kosu River.
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NKWANTA—Obuokrukrua river after crossing the road flows to Adinkra River, then flows to Boa river and then to Kosu river. The land on the right bank is mine given by the Chief Commissioner in 1906. The Boa river joins the Kosu river near to Kosu village: There are three camps on this land: They are called Adesua, Yao Kokwa Esuboi, Anwiafutu.

The last camp was made by Kosu people—long ago—before the rubber trade.

They are Bechem people and made the camp for hunting. I take the leg of the game.

When the Rubber came I did not claim rubber tribute from them. The dispute started with the building of Yao Anto's village. He took plantain trees to plant at his village and Bechem people threw them away.

It was just a few trees near a camp.

Only one camp was occupied by Bechem people. It was on account of this I began to take tribute on rubber.

I always took tribute on game.

In the olden days of the Kings of Coomasie Kosu was my boundary—Ancestral Boundary.

So far as Bechem acknowledge this land in [*sic*] mine they can stay there.

CHIEF OF BECHEM.

In the Ashanti days we met road cleaning at Obuokrukruwa River. This was made the Boundary by the Chief Commissioner. We have a boundary with Bomaa, a stream named Grunyah. It runs into Kosu River near Bosankro.

The Chief of Nkwanta has also a part there. We have no settled boundary with Nkwanta in the bush. A camp Acheremosu was built by my grandfather who has a hunter—near Josu River. No tribute has been paid from it. Now Nkwanta has been claiming it.

Adjourned for inspection of land.”

Their Lordships were informed in the course of the hearing that the 1913 agreement, without the annexure of the 17th April, was officially recorded as an executive decision in a volume known as a “ Boundary Book ” for the purposes of the Boundary, Land, Tribute and Fishery Disputes (Executive Decisions Validation) Ordinance enacted by the Governor of the Gold Coast in 1929 (1936 Revision Cap. 120), and it was conceded that in consequence the 1913 agreement had, by virtue of section 3 (1) of the Ordinance, become “ invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved.”

In the long course of the litigation arising from the present dispute the parties have already appeared before four courts. It is, however, unnecessary for the purposes of this judgment to give more than a brief summary of the proceedings. By a civil summons dated the 19th August, 1937, the appellant's predecessor, as plaintiff, brought the respondent before the Asantehene “ B ” Court to show cause why he had started farming on the Nkwanta-Kwasu land without permission and why he had prohibited the plaintiff's tenants from farming thereon. Witnesses were called by both sides and the plaintiff put in evidence the 1913 agreement and the annexed note of District Commissioner Fell. The Court then deputed five messengers to view the land and report. After they had reported in favour of the respondent the Court, on the 28th November, 1938, held that the parcel did not belong to the plaintiff and gave judgment against him. From the terms of its judgment it appears that this Court read the 1913 agreement as not relating to the area below the river junction. On appeal to the Asantehene “ A ” Court further evidence was heard and messengers were again appointed to inspect the *locus*. They having failed to agree in their findings, the Court sent Mr. Ernest S. S. Wood to survey the land and prepare a map. This is the exhibit “ B1 ” already mentioned. On the 19th August, 1940, the “ A ” Court delivered judgment allowing the appeal. The present respondent then appealed to the Court of the Chief Commissioner who, on the 5th October, 1940, dismissed his appeal.

It is apparent from the judgments of the “ A ” Court and the Chief Commissioner that they both regarded the 1913 agreement as extending to the area below the river junction so as to embrace the parcel now in dispute and that they were influenced in reaching this conclusion by the terms of District Commissioner Fell's note. The present respondent next appealed to the West African Court of Appeal. On the 3rd June, 1941, it gave judgment in his favour, holding that the 1913 agreement did not rule the dispute and that on the other evidence there was ample material to justify the finding of the “ B ” Court. Its judgment was therefore restored with the addition of a declaration that the land in dispute was as shown in Mr. Wood's map, exhibit “ B1.” It is from this decision that the Nkwantahene now appeals.

A procedural point taken on behalf of the appellant may conveniently be disposed of first. It was to the effect that the messengers appointed by the " B " Court had gone beyond their province by examining witnesses instead of confining themselves to a scrutiny of the locus and the results of their own observation and that this vitiated the judgment which was founded in part upon their report. In their Lordships' opinion this contention is ill-founded. The messengers appear to have discharged their task in a reasonable manner. The parties were present during the investigation and the plaintiff not only co-operated with the messengers in their activities but refrained from objection or complaint of any kind when their report was submitted to the Court.

It is clear that if the 1913 agreement be left out of account the other evidence is amply sufficient to support the conclusions of the " B " Court and the Court of Appeal; and it is equally clear that if the 1913 agreement fixed a boundary for the parcel now in dispute the other evidence cannot prevail against it and the decisions of the " A " Court and the Chief Commissioner must stand. The appeal therefore hinges on the meaning of the 1913 agreement. Two submissions were advanced on behalf of the appellant in this connection. First of all it was said that on the true construction of the 1913 agreement the boundary therein described did not stop at the river junction but continued below it along the line of the Kwaso and so along the border of the parcel in question. Secondly, and in the alternative, it was contended that a doubt or question arose as to the correct interpretation of the 1913 agreement and that in consequence of this and of the provisions of section 3 (3) of the Ordinance of 1929 the " B " Court, being a Native Court, lacked jurisdiction to fix the boundary and thus determine the dispute.

In the opinion of their Lordships the first sentence of paragraph (1) of the 1913 agreement describes a boundary in terms which leave no room for doubt as to its down-stream terminus. The boundary is to be the thalweg, or middle line, of the rivers named " to the point where " the Kwaso or Kosu joins the Bua or Boa. There is nothing ambiguous about that and if this part of paragraph (1) stood alone the boundary so described would plainly stop short of the parcel in dispute. It was urged, however, that the second part of paragraph (1) justified a construction favourable to the appellant as the provision thereby made for the benefit of Bechem people using farms and hunting huts on Nkwanta land could only be explained on the basis that the boundary fixed bordered the land which is now in dispute and on which, admittedly, some of the Bechem people have settled. Their Lordships are unable to attach any weight to this argument which is quite inconclusive. The provision in question is not inconsistent with the natural meaning of the earlier part of paragraph (1) and, on the evidence, it may well have been directed to a state of affairs existing in 1913 in respect of an area quite distinct from the parcel with which this appeal is concerned. The appellant also relied upon the annexure to the 1913 agreement as supporting his interpretation. It was contended that District Commissioner Fell's notes of the statements of the parties showed that in 1913 each was laying claim to an area which included the subject of the present suit and that it should therefore be inferred that the boundary then fixed was intended to settle the whole matter in dispute at that time and so could not be taken as ending at the river junction. Their Lordships do not wish to be regarded as laying down or recognising any general rule to the effect that an annexure of this kind can be examined for the purpose of determining the meaning of a separate and subsequent document which is not in itself ambiguous. But as

no question of admissibility has been raised before the Board and as the annexure was undoubtedly considered by the Courts in Africa their Lordships will proceed on the assumption that its terms may be canvassed for the purpose of ascertaining the scope of the 1913 dispute. When this is done, however, the result does not advance the appellant's case. The heading of the note—"Claims land from where Obuokrukua River crosses the Kumasi Road till it joins the Kosu River"—supports the interpretation favoured by the respondent and there is nothing in what follows to lead to a different conclusion. It indeed seems likely—so far as the localities and rivers mentioned can be identified—that the statement of each Chief, as recorded in the annexure, referred to parts of what is now the area claimed. But in the circumstances that does not appear to their Lordships to be a factor of any great significance. The personal statements of litigants are seldom confined to the precise subject matter in dispute and claims are often buttressed or adorned by a recital of extraneous matter. Their Lordships, therefore, consider that on its true construction the 1913 agreement did not apply to or fix any boundary in respect of the parcel in question.

The second point taken by the appellant may be dealt with shortly and without any detailed consideration of the somewhat difficult terms of section 3 (3) of the Ordinance. That sub-section cannot apply unless some real doubt or question arises as to the interpretation or application of the document recorded in the Boundary Book. In the present case the document is the 1913 agreement without more and for the reasons already stated their Lordships cannot regard it as raising any doubt or question of the kind mentioned.

Their Lordships are accordingly of opinion that the 1913 agreement does not rule the present dispute and that the decision of the " B " Court should not have been disturbed. They will, therefore, humbly advise His Majesty that the judgment of the West African Court of Appeal be affirmed and the appeal dismissed. The appellant will pay the costs of this appeal.

EMMANUEL YAO BOATENG APPELLANT
 AND
 THE KING RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1949) 12 W.A.C.A. 242

1949 June 14

Lords Oaksey, Reid, Sir Madhavan Nair
 and Sir John Beaumont

Criminal Procedure—Gold Coast Criminal Procedure Code, s. 286—Trial with assessors.

At a trial of the appellant with assessors, the trial Judge summed up the evidence to them and gave a proper direction. At the conclusion of the summing up the assessors gave their opinions, all of them holding the appellant to be guilty on both counts on which he was charged. The trial Judge then stated that he accepted the opinions of the assessors, found the appellant guilty on both counts and sentenced him.

Held: That this was a sufficient compliance with the requirements of section 286 (2) of the Gold Coast Criminal Procedure Code.

Joseph v. The King distinguished.

Case referred to: *Joseph v. The King* [1948] A.C. 215.

The following judgment was delivered:

SIR JOHN BEAUMONT. This is an appeal by special leave from a judgment of the West African Court of Appeal dated the 21st November, 1947, dismissing an appeal from a judgment of the Supreme Court of the Gold Coast dated the 9th July, 1947, whereby the appellant was convicted of conspiracy dishonestly to receive stolen goods contrary to sections 49 and 284 (1) of the Criminal Code of the Gold Coast, and of dishonestly receiving 1,360 yards of khaki drill knowing the same to have been stolen, contrary to section 284 (1) of the Criminal Code, and was sentenced to two years' imprisonment with hard labour on each count, the sentences to run concurrently. Three other men were jointly charged with the appellant, Salifu, accused No. 1, and Yaro, accused No. 2, who were also convicted, and Francis, accused No. 3, who was acquitted.

It is unnecessary to set out the sections of the Criminal Code under which the appellant was convicted since nothing depends on their terms. The question in the appeal is whether the appellant dishonestly received the khaki drill in question knowing it to have been stolen.

The trial was conducted before a Judge and three assessors. The relative duties of Judge and assessors in a criminal trial are governed by section 286 of the Criminal Procedure Code of the Gold Coast which is in the following terms:

“ Section 286—(1) When, in a case tried with assessors, the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform with the opinions of the assessors.

(3) If the accused person is convicted, the Judge shall pass sentence on him according to law.”

Two points were taken by the appellant. First, that the learned Judge did not give a judgment as required by section 286 of the Criminal Procedure Code, and secondly, that there was no evidence upon which the appellant could be properly convicted.

The first question can be disposed of shortly. The learned Judge summed up the evidence to the assessors, as he was entitled to do under section 286 (1), explaining the matters for determination. He discussed the evidence in detail pointing out which witnesses should be regarded as accomplices, and warning the assessors of the danger of acting upon the evidence of accomplices without corroboration. At the conclusion of the summing up the assessors gave their opinions, all of them holding the appellant to be guilty on both counts. The learned Judge then stated that he accepted the opinions of the assessors, found the appellant guilty on both counts, and passed sentence upon him. The argument for the appellant is that the learned Judge did not bring his own mind to bear upon the case, but treated the assessors as a jury, and left the decision upon the facts to them, and reliance is placed on the decision of this Board in *Joseph v. The King*. That was an appeal from the Supreme Court of Fiji, and the Criminal Procedure Code of Fiji in section 157 contains a provision, similar to that in section

367 of the Indian Code of Criminal Procedure, that a judgment must contain the point or points for determination, the decision thereon, and the reasons for the decision. No such provision is to be found in the Criminal Code of the Gold Coast, but it is contended that notwithstanding this omission a judgment which does not embrace these three matters is not a judgment within section 286 (2). It is obviously desirable that a judgment in a criminal case should show the points for determination, the decision thereon, and the reasons for the decision, but their Lordships find it unnecessary to determine whether this is compulsory under the Criminal Procedure Code of the Gold Coast since in their view the judgment of the learned Judge did in fact cover these three matters. Their Lordships naturally assume that the trial Judge was familiar with the provisions of the local Procedure Code, that he appreciated that he was not bound by the opinions of the assessors, and that, when he accepted their opinions, he did so because he agreed with them. The summing up of the learned Judge, his acceptance of the opinions of the assessors, and the observations which he made in convicting the accused leave no doubt in their Lordships' minds as to the points which the learned Judge thought arose for determination, his decision thereon, and the reasons for the decision. The facts are quite different from those in the case of *Joseph v. The King* in which the trial Judge treated the assessors as though they were a jury, left the appreciation of evidence to them, and allowed them to bring in a verdict of guilty which he accepted without expressing his own view of the evidence or specifying the sections of the Penal Code under which the accused was convicted.

Upon the second question, it is admitted by the appellant that 1,360 yards of khaki drill were stolen from a government depot at Takoradi in which Salifu, the first accused, was a watchman; that the cloth was taken to Nkontompo where it was under the control of Yaro, the second accused; that Yaro asked Francis, the third accused, if he could find a purchaser for the cloth; that Francis who had worked with the appellant, asked the appellant if he could find a purchaser; that the appellant mentioned the name of Kunadu, a store-keeper at Sekondi where the appellant lived, as a possible purchaser; and that Kunadu purchased the cloth. The appellant's case is that he was merely an innocent medium, that he told Kunadu that he wanted a purchaser for some khaki drill which had been purchased at an auction sale, as he had himself been told, and that he himself took no part in the sale except that he admits having helped to obtain a lorry to bring the goods from Nkontompo to Sekondi. The Crown's case is that the appellant bought the khaki drill from Yaro for £100 and sold it to Kunadu for £279, and that he knew that the goods were stolen.

As already stated, the learned trial Judge dealt fully with the evidence in his summing up to the assessors. On appeal to the West African Court of Appeal the court dealt with the matter shortly. The learned Judges thought there was no substance in any of the grounds of appeal, but they noted that the trial Judge was in error in one point in his summing up in suggesting that Yaro had said that the price obtained for the cloth was £100 and that the appellant re-sold it to Kunadu at more than double what he had paid for it. They thought, however, that this mistake on the part of the learned Judge did not affect the result, and they attached particular importance to an episode which had taken place at the police station when the appellant was being questioned.

The evidence with regard to payment for the khaki drill was this. Kunadu said that he paid the appellant £279 for the cloth, admittedly a fair price. He says that he had £190 in hand and borrowed £89 from one Mensah. The

borrowing was confirmed by Mensah. Yaro in his evidence said that he was paid £100 for the cloth by Kunadu, but in a statement which he had made to the police he had said that the appellant had paid £100 to Francis, who subsequently handed it over to himself, Yaro. Francis confirmed this. The statement of Yaro to the police was not evidence against the appellant, and the Judges in the Court of Appeal seem to have thought that the misstatement in the summing up of the trial Judge was based on Yaro's statement to the police. The statement was, however, properly put to Yaro in cross-examination and in the light of it the learned Judge and assessors may well have disbelieved Yaro's statement that the £100 was paid by the appellant. The trial Judge and the assessors were entitled to believe the evidence of Kunadu, corroborated as it was in an important particular by Mensah, that he paid £279 to the appellant as the price of the goods, and if this evidence be accepted it follows that the £100 paid to Yaro must have been paid by the appellant to enable him to secure the goods for re-sale to Kunadu, and that Yaro was lying when he said that it was Kunadu who paid him £100.

The episode at the police station on which the court of appeal relied was this. Sub-Inspector Amaning said that when the accused was being questioned at the police station he asked if he might put a question to a man who was there. On receiving permission to do so the appellant said to the man "Were you not present when I paid £279 to Yaro and Francis in my office?" The man replied "No I was not present." This episode was confirmed by the evidence of Musa Kado, the man to whom the question was put, and the significance of the episode is twofold. In the first place, it shows that the accused was aware of the exact figure at which the cloth was sold; and secondly it suggests that in the first instance the accused was going to allege that he had paid full value for the cloth, thus negating any suggestion of a guilty knowledge as to its origin, and that it was only when he failed to get a witness to support this story that he denied having sold the goods. The episode is difficult to reconcile with the innocence of the appellant.

Apart from the evidence as to the payment of the purchase money, there is a lot of evidence showing that the appellant took a much more active part in disposing of the goods than he admits having done. There is evidence that it was the appellant who engaged a lorry to fetch the goods from Nkontompo to Sekondi, that the lorry was sent on two occasions and that on each occasion the appellant told the driver of the lorry a false story that the lorry was required to fetch a patient, and that it was the appellant himself who paid for the lorry, a sum considerably in excess of the normal fare. In their Lordships' view there was ample evidence on which the trial Judge could hold that it was the appellant who sold the khaki drill to Kunadu, and that when he did so he knew that it had been stolen.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

NOTE: After this judgment had been prepared their Lordships were informed by the solicitors for the appellant that section 286 (2) of the Code of Criminal Procedure of the Gold Coast had been repealed as from 12th April, 1947, that is before the date of the trial, by Ordinance 8 of 1947, and that there had been substituted therefore a clause substantially in the terms of section 367 (1) of the Indian Code of Criminal Procedure. Their Lordships must express their astonishment that the advisers of the appellant should have failed to discover an amendment of the section of the Code on

a breach of which their case rested, an amendment made shortly before the trial and helpful to the case they desired to raise in appeal.

Their Lordships find it unnecessary to add anything to the foregoing judgment except to note that the judgment of the trial Judge was signed by him and dated.

ODIKRO DANSO ABIAM II APPELLANT
 AND
 OHENE BOAKYI TROMU II RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1949 Nov. 30

Lord Simonds, Sir John Beaumont
 and Sir Lionel Leach

Customary Law—Tribute—Agreement exempting dwellers on land who owe no allegiance to overlord from payment of tribute ineffective.

One Akwamuhene had stated in the Asantehene's "A" Court as follows: "I cannot find out how the plaintiff-appellant should refuse to pay tribute to the respondent's Stool when he lives on his land and when he and his people do not serve his Stool and they do not contribute to his Stool debts."

Held:—The overwhelming consensus of evidence and opinion is that this accords with native law and custom. It is impossible for the appellant to rely on an agreement as exempting him and his people from tribute so long as he and they dwell on the land of Nkwantahene and do not owe allegiance to him.

LORD SIMONDS. In this appeal, which involves the consideration of questions of West African law and custom, the appellant seeks to have set aside the judgments of no less than four Courts of the Colony, two of them the judgments of native Courts and two of them the judgments of Judges experienced in the local law.

The claim of the appellant, who is the Chief of the Tekyimantia people, was, as ultimately formulated, to the effect that he and his subjects were not liable to pay any tribute to the Chief of Nkwanta on behalf of his stool in respect of their occupation of that portion of Nkwanta land which was known as Tekyimantia land. This claim which he preferred against the respondent the Chief of Nkwanta was rejected first by the Asantehene's "B" Court and upon successive appeals by the Asantehene's "A" Court, the Chief Commissioner's Court and the West African Court of Appeal.

It is the appellant's case that at some time before 1896 the respondent's predecessor as Chief of Nkwanta at the instance of the Otumfuo Asantehene ("All-powerful Chief of Ashanti") gave the Tekyimantia people certain land to occupy free so that they might live there and hunt for the Otumfuo Asantehene. This land admittedly belongs to the respondent. Before 1896 the Tekyimantia people were subject to the Etipinhene, but upon the reorganisation of the country by the British in that year they became subject to the Nkwantahene.

On the 11th February, 1919, an agreement was made between the predecessors of the parties, the then Chiefs of Nkwanta and Tekyimantia, upon which alone the appellant relies in support of his claim. It was in these terms:

“ We the undersigned the Chief and Elders of Nkwanta and the Chief and Elders of Tekyimantia agree to and hereby bind ourselves to accept and keep the following conditions with reference to the collection and division of tribute on snails, kola, cocoa, etc. etc.

1. Both parties shall send representatives who shall meet and continue to collect the tribute.

2. The tribute shall be divided into three parts—one-third to be given to the Chief of Tekyimantia and two-thirds to the Chief of Nkwanta.

3. The tribute to be collected from strangers and not from bona fide residents on Tekyimantia land.”

This agreement was duly executed before the then acting Commissioner.

In 1935 the British restored the Ashanti Confederacy and in the result the Tekyimantia people ceased to be subject to the Nkwantahene and became once more subject to the Etipinhene. At the same time a body called a “ Committee of Privileges ” was set up to consider constitutional questions arising out of the restoration of the Confederacy, and it was before this Committee that in the first place the Nkwantahene asserted that, though he had not charged the Tekyimantia people with tribute while they were subject to his Stool and contributed to his Stool debts, he proposed to do so now that they had become subject to the Etipinhene. The Committee of Privileges appears to have accepted this view as correct, being unaware, as the appellant alleges, of the agreement of the 11th February, 1919, and their decision was confirmed by the Otumfuo Asantehene. Accordingly the appellant commenced the proceedings out of which this appeal arises. In the Asantehene “ B ” Court the ruling of the Committee of Privileges was regarded as decisive and on this ground the appellant’s claim was dismissed. It was observed that, if the agreement had been produced before that Committee the decision might have been reconsidered. It is, however, noticeable that the Court referred without dissent to the finding of the Committee that “ so long as the people of Tekyimantia occupying and using the Nkwantia Stool land were no longer under the Nkwantahene they were bound by custom to pay tribute to the Nkwantahene.” So also the Court referred without dissent to the evidence of Mr. Appiah, the Chief Registrar of the Asantehene’s Court and Secretary of the Confederacy Council, to the effect that when the Tekyimantia were placed under the Stool of the Nkwantahene they contributed to his stool debt, therefore he charged them no tribute; but now they were going to their former place, that is, to be subject to the Stool of the Etipinhene, he would charge them tribute.

The Asantehene “ A ” Court, to which the appellant first appealed, took the same view. Of the three native Chiefs who sat in this Court, the Kyidomhene placed some reliance on the ruling of the Committee but he used these significant words, “ Since the Tekyimantia is now not serving the respondent’s Stool and since he and his subjects do not contribute to the payment of the respondent’s Stool debts, while he and his people live on respondent’s land it is only equitable that the plaintiff appellant should pay tribute to defendant respondent’s Stool.”

The same view was expressed with equal emphasis by the other Judges, the Oyokohene and the Akwamuhene, who clearly thought, though they did not expressly deal with it, that the agreement of 1919 did not in the changed circumstances displace native law and custom.

The appellant next appealed to the Chief Commissioner’s Court at Kumasi. His appeal was dismissed by the Assistant Chief Commissioner

who dealt precisely with the agreement upon which alone the appellant relied and relies. He observed that, when the agreement was made, the appellant was serving Nkwanta and was therefore not a stranger on the land and could not by native custom be called upon for tribute, and went on to point out that, as he was now serving the Etipihene while living on Nkwanta land he became a "stranger" and liable to pay tribute to the land owner. And he expressed the opinion that on account of the changed conditions the agreement was no longer valid and would violate the custom of land tenure.

Once more the appellant appealed to the West African Court of Appeal, which unanimously dismissed his appeal. The learned judge of that Court attached no direct importance to the ruling of the Committee of Privileges, since it was not a judicial tribunal, but found that the agreement upon which the appellant relied did not support his claim. They too emphasised that it was essential to bear in mind the relationship of the parties at the date of the agreement. Then the Tekyimantia people were not "strangers" and it was because they were not strangers that they were exempted from payment of tribute. But it was clear that, if and when they became "strangers," then by the very terms of the agreement they would no longer be exempted, and it was clear too that when by the action of the Government through the Committee of Privileges they were taken from the Nkwantahene and put back under the Etipihene, they did become "strangers" to the former in the terms of the agreement. The agreement, therefore, so far from supporting the appellant's claim, in this view implicitly at least imposed the burden of tribute upon him and his people so soon as he ceased to be subject to the Nkwantahene.

From the conclusion to which the Courts of the Colony have unanimously come their Lordships see no ground for dissent. It may be the case, as counsel for the appellant pointed out, that the reasons for rejecting his claim have in the course of the proceedings been stated in somewhat varying terms. But throughout the underlying reason has been that which was well stated by the Akwamuhene in the Asantehene's "A" Court "I cannot find out how the plaintiff-appellant should refuse to pay tribute to respondent's Stool when he lives on his land and when he and his people do not serve his Stool and they do not contribute to his Stool debts." The overwhelming consensus of evidence and opinion is that this accords with native law and custom and it is against this background that the agreement of 1919 must be interpreted and its effect measured. It matters little whether, as the West African Court of Appeal determined, the agreement is to be regarded as in effect providing that, when the Tekyimantia people became "strangers," they would be liable to tribute, or, as the Assistant Chief Commissioner appears to have decided, the agreement was under the changed conditions no longer valid, or whether (as it might be put) that it was an implied term of the agreement that it should operate only so long as the Tekyimantia people were subject to the Nkwantahene. In any view it is in their Lordships' opinion impossible for the appellant to rely on the agreement as exempting him and his people from tribute so long as he and they dwell on the land of Nkwantahene and do not owe allegiance to him.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of this appeal.

CHIEF KWAME ASANTE APPELLANT
 AND
 CHIEF KWAME TAWIA RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1949] W.N. 40

Lords Simonds, Uthwatt, Morton of Henryton and Reid

West Africa—Jurisdiction—Whether trial court validly constituted—Plea that its judgment was a nullity—Duty of appellate court to entertain plea as to jurisdiction at any stage.

APPEAL (No. 24 of 1944), by special leave, from a judgment of the West African Court of Appeal (November 22, 1940).

This appeal related to the ownership of a considerable tract of land in the Kumasi State or Division of Ashanti which was claimed on the one hand by the appellant, the Chief Kwame Asante Tredenehene, on behalf of his Stool, and on the other by the Chief Kwame Tawia on behalf of the Asafu (or Akwamu) Stool of Kumasi. The dispute since it related to the ownership of land in the Kumasi State of Ashanti, was properly and solely cognisable by a Native Court, the Asantehene's Divisional Court, a Court of the "B" Grade, which was constituted under the Native Courts (Ashanti) Ordinance 1935. On July 1, 1937, after hearing the case, Court B decided in favour of Chief Asafu. The appellant appealed to Court A, which on December 16, 1937, dismissed his appeal; thence to the Chief Commissioner's Court, which on November 14, 1939, dismissed his appeal and finally to the West African Court of Appeal which in turn on November 22, 1940, dismissed his appeal.

T. B. W. Ramsay for the appellant.

Gahan for the respondent.

The Judicial Committee of the Privy Council (Lords Simonds, Uthwatt, Morton of Henryton and Reid) remitted the case to the West African Court of Appeal.

LORD SIMONDS, delivering the judgment, said that their Lordships did not at this stage express any opinion on the merits of the case. But a question had been raised both in the West African Court of Appeal and before their Lordships which must be disposed of before a final judgment could be given. It arose in this way. When this case reached the West African Court of Appeal it was for the first time suggested, and made a ground of appeal, that the trial court, Court B, was not validly constituted for the hearing of the case in that certain chiefs had sat as judges in that court who were not qualified to sit, and that the proceedings before that court must accordingly be regarded as *coram non iudice* and its judgment as a nullity. On that the West African Court of Appeal observed that that additional ground of appeal was filed without the necessary leave of the court, and that it was too late in the proceedings to raise a point of that nature, which was not raised in any of the three courts below or at the beginning of the hearing of the appeal in that court. Their Lordships of the Board could not assent to that view. If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction, it could never be too late to admit and give effect to the plea that the order was a nullity. The West African Court of Appeal, however, went on to say " In any case, having heard all that the appellant had to urge

in support of the ground, we are not satisfied that there is any substance in it." It was clear that that was not in form or content such a judgment as the learned judges would have pronounced, if they had not (wrongly as their Lordships held) thought that the point was not open to the appellants. Before their Lordships the question was fully argued, and they had come to the conclusion that there was at least a *prima facie* case which required investigation. But, in order that they might have all the necessary material for a final decision, they thought it proper that the case should be remitted to the West African Court of Appeal.

When the West African Court of Appeal had considered and pronounced on that matter of jurisdiction, the parties were to be at liberty to apply to restore the present appeal, confining it, so far as any further hearing was concerned, to that single question, on which either party might challenge the decision of the court. As already stated, in the circumstances their Lordships did not think it expedient yet to express any opinion on the substantial merits of the case. They would deal with that and with the question of costs at a later stage.

Solicitors for appellant: *A. L. Bryden & Co.*

Solicitors for respondent: *Sole, Sawbridge & Co.*

AKISATAN (APENA OF IPORO) AND OTHERS . . . APPELLANTS
 AND
 AKINWANDE THOMAS AND OTHERS . . . RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1950) 12 W.A.C.A. 90

1950 Feb. 13

Lords Greene, Simonds
 and Morton of Henryton

Nigeria—Supreme Court—Native Courts—Jurisdiction—Supreme Court Ordinance, s. 12.

The Supreme Court Ordinance, by which the present Supreme Court of Nigeria was established, contemplates that there may be concurrent jurisdiction in the Supreme Court and a Native Court—which is inconsistent with the vesting of exclusive jurisdiction in the Native Courts where, *ex facie*, the Supreme Court would have jurisdiction. The opening words of section 12 of the Supreme Court Ordinance, which enact that, "subject to" such jurisdiction as may for the time being be vested by Ordinance in Native Courts, the Supreme Court shall have the thereafter defined jurisdiction, are equivalent to "without prejudice to," and are not to be construed as ousting the jurisdiction of the Supreme Court and vesting exclusive jurisdiction in a Native Court in any matter in respect of which jurisdiction had been vested by Ordinance in that Native Court.

The proviso to section 12 is conclusive on the question, for if it were the correct view of the substantive part of the section that it enacted that in all cases in which a Native Court has jurisdiction that of the Supreme Court is ousted there would be no sense in providing by a proviso that in certain of such cases the Supreme Court should not exercise jurisdiction. Further, there is nothing in the previous history of the legislation by which courts were established in the Colony and Protectorate of Nigeria, or in the context of the Ordinance of 1943, which would suggest that in 1943 so drastic a measure would be taken as substantially to limit the jurisdiction of the Supreme Court in favour of the Native Court.

Accordingly, in a suit which did not raise any issue in respect of which it was specifically enacted by the proviso to section 12 that the Supreme Court should not exercise original jurisdiction, and there was a Native Court—a Grade A Court—of competent jurisdiction, the Supreme Court had jurisdiction to entertain the suit.

LORD SIMONDS. This appeal, which is brought from a judgment of the West African Court of Appeal varying a judgment of the Supreme Court of Nigeria, raises an important question in regard to the jurisdiction of the latter Court.

The suit, in which the appeal arises, was instituted by the respondents (other than a formal respondent), who claimed to be representatives of a certain section of the Iporo community in Abeokuta, against the appellants and the formal respondent claiming a declaration that the installation by the first appellant of the second and third appellants in the offices of Oluwo of Iporo and Balogun of Iporo, respectively, was contrary to native law and custom and for an appropriate injunction.

It was conceded by learned counsel for the appellants that, in view of concurrent findings by the Supreme Court and the Court of Appeal, the only contention now open to him was that the Orders of which he complained were made without jurisdiction, and that, if that question was decided against the appellants, the appeal must be dismissed. Their Lordships therefore think it unnecessary to state the facts which are fully set out in the judgments under review and deal only with the question of jurisdiction.

The present Supreme Court of Nigeria was established by Ordinance No. 23 of 1943 Laws of Nigeria and its jurisdiction was conferred and defined by section 12 in the following terms:

“ Subject to such jurisdiction as may for the time being be vested by Ordinance in native courts, the jurisdiction by this Ordinance vested in the Supreme Court shall include all His Majesty’s civil jurisdiction which at the commencement of this Ordinance was, or at any time afterwards may be exercisable in Nigeria, for the judicial hearing and determination of matters in difference, or for the administration or control of property and persons, and also all His Majesty’s criminal jurisdiction which at the commencement of this Ordinance was, or at any time afterwards may be there exercisable for the repression or punishment of crimes or offences or for the maintenance of order; and all such jurisdiction shall be exercised under and according to the provisions of this Ordinance and not otherwise.

Provided that, except in so far as the Governor may by Order in Council otherwise direct and except in suits transferred to the Supreme Court under the provisions of section 25 of the Native Courts Ordinance 1933, the Supreme Court shall not exercise original jurisdiction in any suit which raises any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of a native court nor in any matter which is subject to the jurisdiction of a native court relating to marriage, family status, guardianships of children, inheritance or disposition of property on death.”

It was not contended before their Lordships that the present suit raised any issue in respect of which it was specifically enacted by the proviso to the section that the Supreme Court should not exercise original jurisdiction. But it was contended that the effect of the opening words of the section

“ subject to such jurisdiction as may for the time being be vested by Ordinance in Native Courts ” was to oust the jurisdiction of the Supreme Court and to vest exclusive jurisdiction in a Native Court in any matter in respect of which jurisdiction had been vested by Ordinance in that Native Court. It does not appear that the learned Acting Judge, who heard the cases, dealt with this broad proposition. He had the mistaken impression that there was no Native Court of competent jurisdiction: it was therefore unnecessary for him to do so. But the Court of Appeal, being correctly informed that there was such a Court (of which their Lordships also are satisfied by the production of a certified copy of the Warrant establishing it), fully considered the contention and in a judgment, with which their Lordships are in complete agreement, rejected it.

The importance of the question led their Lordships to a review of the whole of the antecedent legislation by which Courts were established in the Colony and Protectorate of Nigeria. They thought it desirable to survey this background in order to appreciate the relative positions of the Supreme Court and the Native Courts. Having done so, they can entertain no doubt that the reasons given by the learned Judges of the West African Court of Appeal for rejecting the appellants' contention are unimpeachable. There is nothing in the previous history of such legislation or in the context of the relevant Ordinance which would suggest that, in 1943, so drastic a measure would be taken as substantially to limit the jurisdiction of the Supreme Court in favour of the Native Court. The question then is what is the plain meaning of section 12 of the Ordinance.

Upon this question it appears to their Lordships that the language of the proviso is decisive. If it was the correct view of the substantive part of the section that it enacted that in all cases, in which a Native Court had jurisdiction, that of the Supreme Court was ousted, there would be no sense in providing by a proviso that in certain of such cases the Supreme Court should not exercise jurisdiction. If it were otherwise, then (as the Court of Appeal said in words which cannot be improved) “ the Legislature by the proviso intended to limit a jurisdiction which the Supreme Court could not in any event exercise.” But their Lordships would not have it thought that the effect of the proviso is to wrest the language of the section from its natural meaning. The opening words, upon which the appellants rely, do not necessarily bear the meaning for which they contend, which is in effect to read them as if they ran “ Except in those matters in respect of which jurisdiction may from time to time be vested in Native Courts.” On the contrary they would, even without the proviso, be fairly susceptible to the meaning which is given to them by the Court of Appeal and which might perhaps be very briefly stated by saying that the words “ subject to ” are equivalent to “ without prejudice to.” Nor are there lacking other considerations which point to this as the correct interpretation of the section. It is of major importance that, under section 42 of the Ordinance, there is a power to transfer a suit from the Supreme Court to a Native Court at any stage of the proceedings. This makes it clear that the Ordinance contemplates that there may be concurrent jurisdiction in the two Courts, for the generality of the language of section 42 makes it impossible to confine its operation to the cases which fall within the exception to the proviso to section 12. But, if it is clear that the Ordinance contemplates concurrent jurisdiction, this is inconsistent with the vesting of exclusive jurisdiction in the Native Courts, where *ex facie* the Supreme Court would have jurisdiction. On the other hand, it appears to their Lordships that, since by the terms of the Ordinance the jurisdiction vested in the Supreme

Court was to include *all* His Majesty's jurisdiction, etc., the careful draftsman might well think it desirable to make it clear that this enactment was not to prejudice the Native Courts in the exercise of such jurisdiction as might from time to time be vested in them. Accordingly the section opens with words which are apt to provide that safeguard.

Further, it may be observed that neither in section 12 of the relevant Ordinance nor in any other Ordinance, to which their Lordships' attention has been called, whether relating to the establishment of Native Courts or to the constitution of the High Court of the Protectorate or of the Supreme Court, is the appropriate word "exclusive" used in relation to the jurisdiction vested in native Courts. Both in the Ordinance of 1943 and in earlier Ordinances where it is intended to vest exclusive original jurisdiction in such Courts this result is achieved by a limitation of or exception from the jurisdiction of the High Court or Supreme Court.

For these reasons their Lordships are of opinion that the decision of the West African Court of Appeal was correct, and will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

ABDUL KARIM BASMA APPELLANT
AND
GLADYS MURIEL WEEKES AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1950) 12 W.A.C.A. 316

1950 May 3

Lords Simonds, MacDermott, Reid,
Sir John Beaumont, and Sir Lionel Leach

Contract—Sale of house—House owned by three tenants in common—One tenant without power to contract—Purchaser named in Agreement agent for known principal—Sufficient memorandum to satisfy Statute of Frauds—Specific performance against two vendors in respect of their shares—Statute of Frauds 1677 (29 Car. 2, c. 3), s. 4.

By an agreement, dated 29th November, 1946, the first three respondents agreed to sell two houses in Freetown, Sierra Leone, of which they were tenants in common, to W, who was acting, with the knowledge of the respondents, as agent for the appellant, but the agreement contained no reference to the appellant or to the fact that W was purchasing as an agent. On 2nd December, 1946, the first three respondents, with the concurrence of the first respondent's husband, conveyed the property to the fourth respondent, who already had notice of the agreement of 29th November. In an action by the appellant for specific performance of the agreement of 29th November, the first three respondents contended *inter alia* (a) that the appellant had no right of action against them as the agreement was not a sufficient memorandum within the Statute of Frauds, 1677, s. 4, and (b) that, under the law of Sierra Leone, the first respondent, being a married woman, had no power to enter into a contract without the concurrence of her husband, and, therefore, as the contract could not be performed in its entirety, there could be no order for specific performance against the other respondents.

Held: (i) An agent, who contracted in his own name, did not cease to be contractually bound because it was proved that the other party knew, when the contract was made, that he was acting as agent, and the agreement which was made in his name did not cease, in that event, to contain the names of the

contracting parties so as to satisfy the Statute of Frauds; the terms of the agreement of 29th November, 1946, were such that W was contractually bound; and therefore, the agreement satisfied section 4 of the Statute of Frauds, and, as W. could have sued thereon, so could the appellant, as his principal.

Higgins v. Senior (2) and *Calder v. Dobell* (5), applied.

Dictum of Luxmoore L.J. in *Smith-Bird v. Blower* (1), disapproved.

(ii) Although the first respondent had no power to convey her interest, there were no special circumstances which would make it wrong to grant specific performance of the contract in regard to the interests which belonged to the second and third respondents, and, therefore, the appellant was entitled to enforce the contract against the second and third respondents so as to require conveyance to him of their two one-third shares, with abatement of the purchase price in respect of the interest of the first respondent.

Horrocks v. Rigby (10), applied.

Lumley v. Ravenscroft (12), distinguished.

Cases referred to:

(1) *Smith-Bird v. Blower* [1939] 2 A.E.R. 406.

(2) *Higgins v. Senior*, 11 L.J. Ex. 199; 151 E.R. 1278.

(3) *Jones v. Littledale*, 6 L.J.K.B. 169; 112 E.R. 186.

(4) *Magee v. Atkinson*, 6 L.J. Ex. 115; 150 E.R. 830.

(5) *Calder v. Dobell*, 40 L.J.C.P. 224; 25 L.T. 129.

(6) *Lovesy v. Palmer* [1916] 2 Ch. 233; 85 L.J.Ch. 481 114 L.T. 1033.

(7) *Filby v. Hounsell* [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 370.

(8) *Rossiter v. Miller* (1878) 3 A.C. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804.

(9) *Jarrett v. Hunter* (1886) 34 Ch.D. 182; 56 L.J.Ch. 141; 55 L.T. 727; 51 J.P. 165.

(10) *Horrocks v. Rigby* (1878) 9 Ch.D. 180; 47 L.J.Ch. 800; 38 L.T. 782.

(11) *Att. Gen. v. Day*, 27 E.R. 992.

(12) *Lumley v. Ravenscroft* [1895] 1 Q.B. 683; 64 L.J.Q.B. 441; 72 L.T. 382; 59 J.P. 277.

(13) *Price v. Griffith*, 21 L.J.Ch. 78; 18 L.T. (O.S.) 190; 42 E.R. 482.

(14) *Thomas v. Dering*, 6 L.J.Ch. 267; 48 E.R. 488.

(15) *Hexter v. Pearce* [1900] 1 Ch. 341; 69 L.J.Ch. 146; 82 L.T. 109.

Wilberforce for the Appellant (plaintiff at first instance).

O'Connor for the Respondents (defendants at first instance).

LORD REID. This is an appeal from a judgment of the West African Court of Appeal dated 8th April, 1948, which set aside a judgment of Wright J. in the Supreme Court of Sierra Leone dated 24th May, 1947. The appellant who was plaintiff in the action alleged that by an agreement dated 29th November, 1946, the first, second and third defendants and respondents agreed to sell to him two houses in Freetown for £1,900 and that thereupon the sum of £633 6s. 8d. was paid to each of these defendants in full satisfaction of the purchase price. The plaintiff further alleged that by deed of conveyance dated 2nd December, 1946, these defendants purported to convey the two houses to the fourth defendant and respondent. The plaintiff's claim was to have specific performance of his agreement. At the opening of the trial the defendants were allowed without objection to amend their defence by adding the words "If at all there was such an agreement, which is not admitted, the alleged agreement does not comply with the requirements of the Statute of Frauds." Evidence was then led and the plaintiff's case closed. At that stage the defendants' counsel, after having made an unsuccessful submission that there was no evidence of the alleged agreement, sought to amend the defence further by adding "The defendant Gladys Muriel Weekes and the defendant Ettie Spaine are married women." Objection was taken but the amendment was allowed and the defendants' evidence was then led.

The plaintiff's case was based on a document in the following terms:

" No. 2 and 2A, Kissy Street, Freetown.

We, the undersigned, the owners of the above premises hereby agree that we have today sold the above premises Nos. 2 and 2A, Kissy Street, Freetown, to Mr. C. B. Rogers Wright, of 27 Liverpool Street, Freetown, at the price of £1,900 which he has completely paid in three separate sums of £633 6s. 8d. to each of us. We also hereby agree that we will execute the deed of conveyance to the said premises whenever it is prepared and that in the meantime Mr. Wright shall be in possession of the said premises as from the date hereof.

Dated this 29th day of November, 1946.

(Sgd.) GLADYS WEEKES.

(Sgd.) HENRIETTA SPAINE.

(Sgd.) JOHN KABIA WILLIAMS."

Their Lordships will refer to this document as the agreement of 29th November. The defendants did not deny that they had signed this document. They relied on three different defences: first, that the property had already been sold by the first three defendants to the fourth defendant before 29th November; secondly that the agreement of 29th November was not a sufficient memorandum to enable the plaintiff to sue on the contract; and thirdly, that the defendant Mrs. Weekes had no power to enter into the contract and that, as the contract could therefore not be performed in its entirety there could be no order for specific performance against the other defendants. The first of these defences is not now maintained. On this matter Wright J. did not accept the defendants' evidence: he held that the agreement of 29th November had been made and signed before the first three defendants agreed to sell the property to the fourth defendant and that when this agreement was made the fourth defendant had notice of the earlier agreement to sell to the plaintiff. These findings have not been challenged. With regard to the second defence, it appears from the judgment of Wright J. that it was argued for the defendants that the only agreement proved was an agreement between Mr. Wright and the first three defendants. Wright J. rejected this argument holding that oral evidence had sufficiently proved that Mr. Wright was acting as agent for the plaintiff and that there was sufficient proof of a contract with the plaintiff. The third defence was founded on the fact that before 1932 the law of Sierra Leone with regard to the capacity of a married woman was the same as the law was in England before the passing of the Married Women's Property Act 1882, and that the Imperial Statute (Law of Property) Adoption Ordinance of 1932 preserved any right which a husband had acquired before that date. Wright J. found himself unable to deal with this defence because the evidence was insufficient and he therefore allowed further evidence to be called. In fact no further evidence was called: it is not clear what further submissions were made by the parties at that stage but in his reasons for his final judgment Wright J. said " Counsel for the plaintiff having agreed to accept judgment for specific performance the court therefore declares that the plaintiff is entitled to specific performance of the agreement dated 29th November, 1946, mentioned in the pleadings to the extent of the interests of Mrs. Spaine and John Williams with an abatement of one-third of the purchase price in respect of the interest of Mrs. Weekes." The argument before their Lordships proceeded on the footing that the respondents Mrs. Weekes, Mrs. Spaine and John Williams were tenants in common of the

property in question, that Mrs. Weekes who was married in 1931 had no power to enter into the agreement of 29th November, but that Mrs. Spaine who was not married until 1944 was under no such disability. It was admitted that the sums paid to these three respondents by the appellant had been repaid to him and that if the appellant is to have specific performance of the agreement to the extent of the interests of Mrs. Spaine and John Williams he must pay the sum of £1,266 13s. 4d. It was not disputed that this sum should in that event be paid to the fourth respondent who has taken a conveyance of the property from the first three respondents with the concurrence of Mrs. Weekes' husband, and has paid to them the price of the property.

The second, third and fourth respondents appealed to the West African Court of Appeal. That Court allowed the appeal on the ground that the agreement of 29th November was not a sufficient memorandum within the Statute of Frauds. Against that decision the present appeal is taken.

The agreement of 29th November apparently satisfies the requirement of the Statute of Frauds. It names the vendors and the purchaser; it specifies the subjects sold and the price; and it is signed by the vendors, the parties to be charged. Further, it states that Mr. Wright, who is named as the purchaser, has paid the price and is entitled to immediate possession. Mr. Wright is a solicitor and admittedly it was proved by oral evidence that he was acting in this matter as agent for the appellant. But there is nothing in the document to suggest that Mr. Wright was acting otherwise than as principal. The first question in this case is whether it is relevant to inquire whether the vendors when they made the agreement knew that Mr. Wright was acting as agent for the appellant, and whether, if such knowledge is proved, the fact that the agreement does not identify the appellant as purchaser makes it insufficient to satisfy the Statute of Frauds. Wright J. did not deal with this question—probably the point was not taken before him—but the West African Court of Appeal held that the vendors were aware that Mr. Wright was purchasing as agent for the appellant. There is evidence to support this finding and their Lordships will assume that it is correct. After so holding, the judgment of the Court of Appeal proceeds "It follows therefore that the memorandum to enable the respondent (now the appellant) to sue on it must have contained his name either as a principal or in some other way to identify him. As it clearly fails to do so we hold that the document was not a sufficient memorandum within the Statute of Frauds." The authority on which the Court of Appeal rely is the judgment of Luxmoore L.J. in *Smith-Bird v. Blower* (1), and there is in that judgment a passage which is directly applicable to the present case. But before proceeding to examine that judgment their Lordships must refer to certain earlier cases the authority of which has never been doubted but which do not appear to have been cited to Luxmoore L.J. In *Higgins v. Senior* (2) there was an agreement in writing for the sale of goods above the value of £10, which purported on the face of it to be made by the defendant and was subscribed by him: but the defendant sought to avoid liability by proving that he made the agreement as agent for a third person and that this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability. Parke B. in delivering the judgment of the Court stated the principle as follows:

"There is no doubt that where such an agreement is made it is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making the

contract, so as to give the benefit of the contract on the one hand to and charge with liability on the other the unnamed principals and this whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the fact of it it purports to bind; but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such would be to allow parol evidence to contradict the written agreement; which cannot be done: And this view of the law accords with the decisions, not merely as to bills of exchange signed by a person without stating his agency on the fact of the bill but as to other written contracts, namely the cases of *Jones v. Littledale* (3) and *Magee v. Atkinson* (4). It is true that the case of *Jones v. Littledale* (3) might be supported on the ground that the agent really intended to contract as principal: but Lord Denman, in delivering the judgment of the Court, lays down this as a general proposition 'that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility,' and this is also laid down in *Story on Agency*, s. 269."

In *Calder v. Dobell* (5), Cherry, a broker, contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendants on this contract. It was argued for the defendant that there is a distinction between the case where he is aware of that fact but nevertheless the contract is made by the agent in his own name, and that the principal could be sued in the former case but not in the latter. This argument was rejected. It was held that in this respect there is no distinction between the two cases and the authority of *Higgins v. Senior* (2) was fully recognised. Kelly C.B. said "The contract was made in the name of Cherry the agent but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal at their election."

The circumstances in *Smith-Bird's* case were that the defendant wished to sell two houses, that a certain Mr. Brown who had been authorised by the plaintiffs to buy the houses was introduced to the defendant and after some negotiations agreed to buy the houses for £510, and that the document relied on as a memorandum of this agreement contained nothing to indicate that the plaintiffs were the purchasers or that Mr. Brown was acting otherwise than on his own behalf. Luxmoore L.J., having held that there was an oral contract to sell the houses, said:

"the further question arises whether there is a sufficient memorandum of that contract to comply with the requirements of the Statute. In this connection it is necessary to determine whether the defendant was aware that Mr. Brown was acting as agent only, and not as principal, for, if the defendant knew that Mr. Brown was only an agent, the memorandum, in order to comply with the statutory requirements, must either contain the names of the plaintiffs as principals or

otherwise identify them, whereas if the defendant was not aware of the fact that Mr. Brown was acting as agent for anyone, but considered that Mr. Brown was contracting on his own behalf, the position is different, and the plaintiffs as undisclosed principals can rely on any sufficient memorandum in which Mr. Brown's name appears as principal, although there is no reference therein to the plaintiffs."

The learned Lords Justice cited as authority for this proposition the cases of *Lovesy v. Palmer* (6) and *Filby v. Hounsell* (7). In *Lovesy v. Palmer* (6) the plaintiff claimed a declaration that there was a binding contract between the defendants and himself with regard to the lease of a theatre. One question was whether there was any memorandum of the alleged agreement sufficient to satisfy the Statute of Frauds. The facts were complicated and a number of documents were alleged to form together such a memorandum. In these documents the plaintiff's solicitor was named but he only purported to contract on behalf of unnamed "clients." Younger J. (as he then was) held that at no time could this solicitor have sued or been sued on the contract. And there was no reference in the documents to the plaintiff as a contracting party. So it was impossible to identify from the documents any person who could sue the defendants or be sued by them on the alleged contract, and Younger J. held, rightly in their Lordships' judgment, that there was no memorandum sufficient to satisfy the Statute of Frauds. It had been argued for the plaintiff that *Filby v. Hounsell* (7) decided that it was enough that the solicitor purported to act on behalf of "clients" and that the "clients" were identified by parol evidence. With regard to this case Younger J. said "If it was in fact decided in *Filby v. Hounsell* (7) that there could within the Statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound then I do not think that the decision can stand with the other authorities such as *Rossiter v. Miller* (8) and *Jarrett v. Hunter* (9) or with the Statute as I read it. But I think, when one looks carefully at the case of *Filby v. Hounsell* (7), that Romer J. really gave the judgment he did because he assumed that the agent was liable on the contract. I cannot myself see for reasons I have given that the assumption was well founded, but if that was the basis of the learned Judge's decision then the case presents no further difficulty and is in entire harmony with all the authorities."

Their Lordships agree with this interpretation of the case of *Filby v. Hounsell* (7) and they are unable to find either in that case so interpreted or in the case of *Lovesy v. Palmer* (6) anything to justify the distinction stated in the passage quoted from the judgment in *Smith-Bird v. Blower* (1). Those cases decide that to satisfy the Statute the agreement or memorandum must name or identify two parties who are contractually bound to each other. They do not decide that where two such parties are named or identified the Statute ceases to be satisfied if it is proved that one of them was known by the other when the contract was made to be acting as agent for a third party. No doubt that result would follow if it were the law that an agent who contracts in his own name is not contractually bound if the other party knew at the time that he was acting as agent. If that were so the agreement or memorandum would on proof of such knowledge cease to contain the names of two contracting parties and would therefore cease to satisfy the Statute. But it is clear from *Higgins v. Senior* (2) and *Calder v. Dobell* (5) that that is not the law. An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew when the contract was made that he was acting as agent. So the

agreement which is made in his name does not cease in that event to contain the names of contracting parties and therefore does not cease to satisfy the Statute. Their Lordships are satisfied that in the present case the terms of the agreement of 29th November are such that Mr. Wright was contractually bound, and therefore the agreement satisfies the Statute of Frauds. So Mr. Wright could have sued on the agreement and if he could sue so can his principal the appellant.

The other question in this appeal is whether the appellant is entitled to have specific performance of a part of his contract. He agreed to buy two houses which were owned by the first, second and third respondents as tenants in common. He cannot enforce this contract against the first respondent because she had no power to make the contract. Can he enforce it against the second and third respondents so as to require conveyance to him of the two one-third shares which belonged to these respondents? Cases have not infrequently arisen where a single vendor has been unable to give a good title to all that he has contracted to sell. The general rule in such a case has been stated by Lord St. Leonards thus (Sugden, *Vendors and Purchasers*, 14th ed. pp. 316-317): "A purchaser generally although not universally may take what he can get with compensation for what he cannot have . . . In regard to the limits of the rule that a purchaser may elect to take the part to which a title can be made at a proportionate price, it has not been determined whether under any circumstances of deterioration to the remaining property the vendor could be exempted from the obligation of conveying that part to which a title could be made: but the proposition is untenable that if there is a considerable part to which no title could be made the vendor was therefore exempted from the necessity of conveying any part."

In the present case there are three vendors. One cannot convey her interest but there is nothing to prevent the conveyance of the interests which belonged to the others. This type of case is less common but one example is *Horrocks v. Rigby* (10) where two persons agreed to sell a public house and it was found on investigation that one of them had no interest in it but that a moiety belonged to the other. In an action by the purchaser against the latter vendor for specific performance Fry J. said

"I think that where an agreement is entered into by A and B with C and it afterwards appears that B had no interest in the property A may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle for I do not see why a purchaser is to lose his right against a vendor who can complete because from a circumstance of which the purchaser had no knowledge he has no right against persons who cannot complete. But I am very much fortified in that conclusion in a passage in the judgment of Lord Hardwicke in *Att.-Gen. v. Day* (11)."

This passage, which is quoted by Fry J., is

"On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other."

Their Lordships would have no hesitation in following these authorities but for the judgment of Lindley L.J. in *Lumley v. Ravenscroft* (12). In that case the two defendants who appear to have been tenants in common had agreed through their agent to grant a lease of certain premises to the plaintiff. The plaintiff brought an action for specific performance or alternatively for damages and applied for an injunction to restrain the defendants until after the trial of the action from leasing the premises to any other person. It appeared that one of the defendants was an infant. Day J. granted an injunction but an appeal from this order was allowed. Lindley L.J., in the leading judgment of the Court of Appeal, said

“ Specific performance against an infant is out of the question. You cannot get specific performance and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price v. Griffith* (13) and *Thomas v. Dering* (14) but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff’s only remedy is by way of damages.”

Neither *Horrocks v. Rigby* (10) nor *Att.-Gen. v. Day* (11) was cited to the Court: indeed *Price v. Griffith* (13) and *Thomas v. Dering* (14) appear to have been the only authorities cited in argument, the argument for the plaintiff as reported being very meagre. Both *Price v. Griffith* (13) and *Thomas v. Dering* (14) were cases of an unusual character. *Price v. Griffith* (13) was discussed and explained by Farwell J. in *Hexter v. Pearce* (15). In *Price v. Griffith* (13) two tenants in common were alleged to have agreed to grant a mineral lease. The plaintiff failed to prove any agreement at all with one of them and, as Farwell J. points out, the case was really decided on the ground that the agreement with the other was void for uncertainty. But Knight Bruce L.J. said with regard to the claim of the plaintiff to have specific performance against only one of the two tenants in common:

“ If he (the tenant in common) intended to contract at all he intended to contract for a lease of the whole colliery. Cases may be conceived where a person who has contracted to convey more than it is in his power to convey ought to be decreed to convey what he can either with or without compensation to the vendee for such part of the subject matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery.”

That passage might be read as affording support for the general rule stated by Lindley L.J., but Farwell J. read it in a narrower sense. He said with regard to it “ In a sense with great deference to the Lord Justice that is a truism; but the meaning I think is that in that case the intention of the lessor was to grant a lease of the entirety and nothing else. There would have been a certain hardship in compelling him to grant a lease of a moiety only when he did not intend it having regard to the fact that it was a lease of mineral property. I think that is all the Lord Justice meant.” So interpreted *Price v. Griffith* (13) is not an authority for any general rule. In *Thomas v. Dering* (14) there was only one vendor and their Lordships do not think it helpful to examine the case closely as they have found nothing in it to throw light on

the position where there are more than one vendor and one of the vendors cannot complete the contract. Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of Lord Lindley is in this case seriously diminished by the circumstances to which they have adverted and that the decision in *Lumley v. Ravenscroft* (12) cannot be regarded as having impaired the authority of *Horrocks v. Rigby* (10) or of the opinion of Lord Hardwicke in *Att.-Gen. v. Day* (11). In the present case there appear to be no special circumstances which would make it wrong to grant specific performance and their Lordships hold that the decision of Wright J. was correct in principle. It was not argued that the form of the order made by Wright J. should be altered in any way. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of Wright J. restored. The respondents, other than the respondent Mrs. Weekes, will pay the costs of this appeal.

Appeal Allowed.

FREDERICK VICTOR NANKA-BRUCE APPELLANT
AND
TETTEY GBEKE AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1950 July 11

Lords Porter, Oaksey, Radcliffe,
Sir John Beaumont and Sir Lionel Leach

Declaration of title—Plaintiff must succeed on strength of his own title—Concurrent findings of fact.

Held:—(i) The learned trial Judge was far from being impressed by the titles set up by the defendants, but he rightly observed that the plaintiff must succeed on the strength of his own title and not on the weakness of that of the defendants. The position in such cases as this was aptly stated by the West African Court of Appeal in *J. M. Kodilinye v. Mbanefo Odu*, 2 W.A.C.A. 336 where the plaintiff sued for a declaration of title to a piece of land in Onitsha Province. In the course of his judgment in that case, Webber C.J. said:

“ The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. So if the whole evidence in the case be conflicting and somewhat confused, and there is little to choose between the rival traditional stories, the plaintiff fails in the decree he seeks, and judgment must be entered for the defendant.”

(ii) As the Judge's findings of fact were accepted by the Appellate Court their Lordships must follow their usual practice and decline to review the evidence for a third time unless there are some special circumstances which would justify a departure from that practice.

SIR LIONEL LEACH. This is an appeal from a judgment of the West African Court of Appeal, dated the 7th March, 1944, dismissing an appeal by the appellant from a judgment of the Supreme Court of the Gold Coast, dated the 1st December, 1942. The suit out of which the appeal arises was

instituted on the 24th March, 1942, in the Tribunal of the Paramount Chief of the Ga State. The reliefs sought were (I) a declaration that certain land situate some three miles from Accra on the Accra-Nsawam Road belonged to the family of one Okai Tiseh, of which the plaintiff claimed to be the head and (II) an injunction restraining the defendants (the respondents in the appeal), their servants and agents from trespassing on the land. The suit was transferred to the Supreme Court of the Gold Coast, Eastern Province for hearing and determination.

There were no pleadings, but from statements made at the trial the plaintiff's case may be summarised as follows: Some time in the 1850s or 1860s Nii Addu, the then Korle priest, who was the head of the Korle Webii or Korle family, acting within his powers, made an oral grant of the land to Okai Tiseh, the son of one Tego Churu. Okai Tiseh died in the 1860s, having founded a separate family, which is now represented by the plaintiff, who is the grandson of Aranye Dede, a brother of Okai Tiseh. The grantee was in possession of the land and exercised rights of ownership up to the time of his death. Thereafter possession and enjoyment remained with the members of his family without any attempt at interference until 1926. In that year Tetteh Kwei Molai, who was then acting as the Korle priest, brought an action against the plaintiff for the recovery of the land. The action failed, Tetteh Kwei Molai being non-suited. There was no further interference with the rights of the Okai Tiseh family until 1938 when someone removed from the land a watchman employed by them. Later the erection of a modern building was commenced on the land claimed by the second defendant and this precipitated the present action.

The land claimed by the plaintiff lies partly on one side of the Accra-Nsawam Road and partly on the other side. The defendants made no resistance to the claim made in respect of the land to west of the road, but denied that the plaintiff had any right to the part on the east. The first defendant, who is the representative of the Atukpai family of Accra, maintained that the disputed land is part of a larger area belonging to the Atukpai Stool and that consequently any grant made by the Korle priest to Okai Tiseh was invalid. Some of the disputed land had been granted by the Atukpai Stool to one Adams, through whom the second defendant claimed. The second defendant denied that the plaintiff was the head of the Okai Tiseh family and denied that Okai Tiseh or his successors had ever been in occupation of the land. He based his own title on that of the Atukpai Stool.

The action was tried by Mr. Justice Lane, who held that at the time of the alleged grant to Okai Tiseh the land was covered with forest and that the Korle Webii were in charge of it under the Gbese Stool. In practice the Korle priest as the head of that family made dispositions of land, but there was no evidence of a grant to Okai Tiseh, and the plaintiff had failed to prove use and occupation of the land by the family of which he claimed to be the head. The plaintiff had also failed to prove that Okai Tiseh had formed a separate family. The learned Judge accepted the evidence of Tetteh Kobla, the headman of Avenor, a village in the neighbourhood. Tetteh Kobla, who was said to be 90 years of age and is a relative of Okai Tiseh, stated that Okai Tiseh's properties had devolved on Asere Teiko, the present head of the family of Tego Churu, the father of Okai Tiseh. This accords with the evidence of Nii Ayi Ansa, an expert in native law called by the plaintiff, who said that any property acquired by the offspring of a man and his female slave became the property of the man's family and when the child of the union died all his property became his father's family property. Okai Tiseh's mother was a slave.

The result was that the learned Judge non-suited the plaintiff and dismissed the action with costs as regards his claim to the land on the east of the Accra-Nsawam Road.

The West African Court of Appeal agreed with the findings of the Supreme Court and dismissed the appeal, but amended the judgment of the Court below by deleting therefrom the words "and the action dismissed." No objection has been taken to this amendment.

The learned trial Judge was far from being impressed by the titles set up by the defendants, but he rightly observed that the plaintiff must succeed on the strength of his own title and not on the weakness of that of the defendants. The position in such cases as this was aptly stated by the West African Court of Appeal in *J. M. Kodilinye v. Mbanefo Odu*, 2 W.A.C.A. 336, where the plaintiff sued for a declaration of title to a piece of land in the Onitsha Province. In the course of his judgment in that case Webber C.J. said:

"The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. So if the whole evidence in the case be conflicting and somewhat confused, and there is little to choose between the rival traditional stories the plaintiff fails in the decree he seeks, and judgment must be entered for the defendant."

On behalf of the appellant it has been argued that the learned trial Judge misdirected himself, that on a proper appreciation of the evidence there should have been judgment for the plaintiff, and that consequently the Appellate Court erred in concurring in the findings of the Court below. Their Lordships have been taken through the record and can find no indication whatever of misdirection; on the other hand they find that there is evidence which gives direct support to the learned Judge's conclusions. His findings are findings of fact and as they were accepted by the Appellate Court their Lordships must follow their usual practice and decline to review the evidence for a third time unless there are some special circumstances which would justify a departure from that practice. It is manifest that there are no special circumstances here and therefore the concurrent findings of the African Courts must be accepted as being conclusive.

It was suggested by Mr. Ramsay that the Supreme Court had wrongly allowed the second defendant to set up a *jus tertii* in that it had admitted the evidence of Tetteh Kobla with regard to Okai Tiseh's property devolving on Asero Teiko. This evidence was given in the cross-examination of Tetteh Kobla on behalf of the second defendant, but the questions were not put with the object of setting up a title in a third person. They were put with the object of disproving the plaintiff's allegation that he was the head of a separate family founded by Okai Tiseh and that Okai Tiseh's property had devolved on him. In this the second defendant succeeded, but it is certainly no basis for a suggestion that the Court had allowed the second defendant to set up a *jus tertii*.

For the reasons indicated their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must bear the costs of the appeal.

NII ABOSSEY OKAI II AND ANOTHER APPELLANTS
 AND
 NII AYIKAI II RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1950) 12 W.A.C.A. 37

1950 July 24

Lords Porter, Oaksey, Radcliffe,
 Sir John Beaumont and Sir Lionel Leach

Practice of Privy Council in regard to concurrent findings on questions of fact.

Except where there are special circumstances, the Privy Council will not permit a question of fact to be re-opened when there have been concurrent findings thereon.

SIR LIONEL LEACH. This is an appeal from a judgment of the West African Court of Appeal, dated the 15th June, 1946, which affirmed a judgment of the Supreme Court of the Gold Coast, dated the 27th September, 1945, and delivered in a suit brought by the respondent for a declaration of his title to certain land situate on the outskirts of Accra. The plaintiff claimed that, as the Mantse of Akumajay, he was the owner of the land, an area of 1.28 square miles, known as "Obete Kpakpo," which means "The Vultures' Pool." The emblem of the Akumajay Stool is a vulture. The defendants were Nathaniel Tagoe and Korkoi Abossey (the second appellant). They denied the plaintiff's claim and averred that the title to the land was vested in them as the representatives of the Na Adawede family, which they said was a distinct branch of the Akumajay Stool family.

The case was transferred for hearing to the Supreme Court of the Gold Coast, Eastern Province. During its pendency Nathaniel Tagoe died and Nii Abossey Okai II (the first appellant) was made a defendant in his place.

The plaintiff alleged that the land in dispute was first occupied by his ancestors about 200 years ago on their immigration to Accra from Ayawaso and that it had remained throughout in the occupation and undisturbed possession of the Akumajay Stool. The defendants maintained that the land originally belonged to the Obutu Stool, that about 250 years ago the Obutu Stool granted it by way of gift to Na Adawede, a granddaughter of the Mantse of Obutu, upon her marriage to Nii Ayikai I, the first Mantse of Akumajay and that ever since it had been owned and enjoyed by the Adawede family.

As far as is known there have only been two occupants of the Akumajay Stool, Nii Ayikai I and the plaintiff. The plaintiff was enstooled in 1914 at the age of sixteen. In 1925 he abdicated and went to Nigeria where he remained until 1940. He returned to Accra in that year and was again placed on the Stool.

The action was tried by the Acting Chief Justice of the Supreme Court, who found that as far as living memory went the Na Adawede family had been especially associated with the land, that all the persons known to have been in charge of it had been members of that family, that during the past twenty years or so numerous grants of plots had been made for monetary consideration by the persons in charge, especially by Abossey Okai, who had given his name to a township within the area, that the second defendant tended the fetish standing in an ancient grove on the land and that no

persons other than members of the family had been buried in the burial ground. But he went on to hold that these facts could not be accepted as establishing a title in the Na Adawede family because it had repeatedly been asserted by prominent members thereof that they were in occupation as caretakers for the plaintiff's Stool and not as owners.

Kru Tei and R. C. Abossey, the son and nephew respectively of the late Abossey Okai, gave evidence in support of the plaintiff's claim that the land belonged to the Akumajay Stool and it was proved that in 1921 Abossey Okai, who was then the head of the Na Adawede family, told the plaintiff that the land belonged to the Stool.

On the 8th October, 1929, Abossey Okai as the "caretaker and representative" of the Akumajay Stool, and also as the "Head of the Stool family" conveyed a plot of the land to a purchaser. On the 30th May, 1936, Nii Akrong (who was then the head of the Na Adawede family), and the late Nathaniel Tagoe "for themselves and on behalf of the Elders and people of the Stool of Akumajay" executed a lease of another plot. On the 18th November, 1939, Nii Akrong under a similar description conveyed a parcel of the land to the Governor of the Gold Coast.

On the 5th August, 1922, the plaintiff published a notice informing the public that the Obete Kpakpo property was attached to the Akumajay Stool and that no part of it could be lawfully disposed of except by the Mantse with the consent of his councillors. No protest was made by the defendants' family with regard to this notice. A similar notice was issued by the plaintiff when he returned from Nigeria in 1940, and this caused Nathaniel Tagoe to publish a statement alleging that the land was not attached to the Stool and claiming that it was the property of the Abossey Okai family, and fifteen other members of that family, issued to the public a statement in denial of Nathaniel Tagoe's claim. The statement was in these words:

"In the issues of November 28 and December 2, 1940, there appeared a Notice signed by Nathaniel Tagoe, who styles himself as Headman of Obinte Kpakpo village and Head of late Abossey Okai's family, and that lands known as Obinte Kpakpo lands are family lands of the late Nii Abossey Okai of Accra.

The Public is hereby informed that we the undersigned principal members of the said Abossey Okai's family, declare positively that the publication by Nathaniel Tagoe referred to above touching Obete Kpakpo lands is untrue and unfounded, and we hereby affirm that Obete Kpakpo land is a property attached to the Stool of Akumajay Mantse. That the late Nii Abossey Okai was, prior to his death, a member of the Akumajay Stool and had been 'Caretaker.'

The public is hereby further informed that the said Nathaniel Tagoe has never been appointed 'Headman' of Obinte Kpakpoe Village neither has he been 'Head' of Abossey Okai's family."

At the hearing Nii Akrong gave evidence on behalf of the defendants and attempted, but without success, to explain away his action in having signed the notice of the 9th December, 1940.

The Supreme Court held that the evidence relied on by the plaintiff established his title and accordingly granted the declaration sought by him.

The defendants appealed to the West African Court of Appeal on the grounds that the learned Judge had misdirected himself in the matter of, and as to the effect of, the documents and writings produced in evidence, that he had been wrongly influenced by passages from *Reindorf's History*

of the Gold Coast and Ashanti and that his judgment was inequitable. The Appellate Court rejected these contentions and upheld the judgment of the Supreme Court.

The question whether the land in suit was occupied by members of the Na Adawede family as owners or as caretakers for the plaintiff's Stool is one of fact and both the African Courts have held that it was as caretakers. This really disposes of the appeal because there are no special circumstances which would warrant their Lordships departing from their usual practice of not allowing a question of fact to be re-opened when there have been concurrent findings thereon. There has been no misdirection and no erroneous construction placed on the documentary evidence. On the other hand, there is an abundance of evidence, oral and documentary, to support the finding of fact. There is no foundation for the suggestion that the Supreme Court was wrongly influenced by extracts from *Reindorf's History of the Gold Coast and Ashanti*. As the Court of Appeal pointed out, the learned Judge did not base his Judgment on the passages which he quoted from the work, but on the evidence of repeated admissions by members of the Na Adawede family that they were caretakers of the property for the Akumajay Stool. The argument that the judgment was inequitable was based on the evidence that members of the family had been in occupation of the land for a very long time without accounting to the Stool and had exercised acts of ownership, but it ignores the important fact that they were in occupation as caretakers for the Stool.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will bear the costs of the appeal.

Appeal dismissed.

SUNDAY KALA ALAGBA AND OTHERS . . . APPELLANTS
AND
THE KING . . . RESPONDENT

[APPEAL FROM THE SUPREME COURT OF NIGERIA BY SPECIAL LEAVE]

(1950) 19 N.L.R. 128

1950 Dec. 12

Lords Oaksey, Radcliffe, Tucker,
 Sir John Beaumont and Sir Lionel Leach

Criminal Code of Nigeria (c. 42 in Laws of 1948)—Sections 8 and 316: Murder committed in concerted attack—Section 32: coercion not a defence in murder.

The appellants (at the trial Accused Nos. 1 to 9) were convicted of murder. The deceased went in a canoe with his wife and children and a friend; he and the friend disembarked at a place, leaving the wife and children behind. The wife, seeing four canoes coming, sent the children to fetch them, and deceased and his friend came back. Deceased told the occupants of the canoes, who had landed, that they had no business there, whereupon they returned to one canoe, and shouting the war-cry of their tribe, landed, surrounded the deceased, whom they killed, and having also done grievous harm to the other members of his party, took his canoe and left. The deceased's wife testified that it was Accused No. 2 who first struck the deceased with a stick, that No. 3 and No. 4 had spears, and that all the accused had something in their hands. The friend of the deceased said No. 4 was the first to strike the deceased, but could not say which of the accused threw the spear at the deceased. The deceased died of a spear wound; he had other injuries besides.

The deceased and his party belonged to the Kalabari tribe, the accused to that of the Okrikas. While out in the creek Accused No. 1 to No. 6 met No. 7 and No. 8 and two others, who said they had been attacked by Kalabaris, and were joined later by No. 9, a canoe-boy of fifteen, and his master. The trial Judge believed the deceased's wife and friend and rejected the story of the accused; he was of opinion that the accused were furious because Okrikas had been attacked and set out on a punitive expedition against any Kalabaris they might meet, and in view of their acting with a common design he said in his judgment "it does not matter which of the accused did what" and found them all guilty of the murder.

The West African Court of Appeal refused leave to appeal. The appeal to the Privy Council was made by special leave; and the submissions were (a) that the accused were tried and convicted as a body without any attempt to distinguish between them, which vitiated the verdict, and alternatively, that the cases of Nos. 7, 8 and 9, were distinguishable, and (b), that No. 9, a boy of fifteen, who was a canoe-boy, was bound to carry out his master's orders.

Their Lordships' judgment gives the text of sections 8 and 316 of the Nigeria Criminal Code and contains this passage:

"The main issue depends upon the provisions of the Criminal Code set out above from which it is clear that if two or more persons have formed a common intention to attack another or others with intent to kill or do grievous harm or in a manner likely to endanger human life and have in fact taken part together in such an attack on others resulting in death as a probable consequence all are guilty of murder."

(Section 32 of the Code states in (4) thereof the excuse of compulsion and goes on to say, however, "but this protection does not extend to an act or omission which would constitute an offence punishable with death etc.")

Held:—(a) On the evidence believed by the trial Judge the inference was irresistible that there was a common design in all the accused commencing at latest from the moment when they gathered together in one canoe and shouted their tribal war-cry; therefore the Judge in dealing with the attack they made in concert was correct in saying "It does not matter which of the accused did what," and the cases of all the accused were indistinguishable.

(b) There was no real evidence that Accused No. 9 was coerced, and in view of section 32 of the Criminal Code any such defence would not have been open to him on a charge of murder.

Appeals of all the accused dismissed.

LORD TUCKER. On the 30th May, 1949, all the nine appellants were convicted of murder by Mr. Justice Bairamian, sitting without a jury, in the Port Harcourt Judicial Division of the Supreme Court of Nigeria. The first eight were sentenced to death and number 9, being fifteen years of age, was ordered to be detained during His Majesty's pleasure. Leave to appeal was refused by the West African Court of Appeal on 2nd August, 1949. The present appeals are brought pursuant to special leave to appeal *in forma pauperis* granted by His Majesty in Council. The appellants were charged jointly with murder contrary to section 319 of the Criminal Code and the particulars alleged that the appellants on or about 11th day of March, 1949, at Elemiama (Old Shipping) in the Rivers Province murdered Douglas Obene Marian Braide.

Section 319 of the Criminal Code, so far as material to this case, reads as follows: "Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death."

The material provisions of section 316 are:

"Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:

1. If the offender intends to cause the death of the person killed or some other person;

2. If the offender intends to do to the person killed or to some other person some grievous harm;

3. If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

is guilty of murder.

In the second case it is immaterial that the offender did not intend to hurt the person who is killed.

In the third case it is immaterial that the offender did not intend to hurt any person."

Section 8 of the Criminal Code as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The appellants are all members of the Okrika tribe. The deceased was a member of the Kalabari tribe. These tribes had been engaged in hostilities but at some date prior to 11th March, 1949, they had resolved their differences and ceased fighting.

The two principal witnesses for the prosecution were Dora Braide, the widow of the deceased man, and Hamilton George.

According to the evidence of Dora Braide she, the deceased, Hamilton George (known as Douglas) and the Braides' two children were going in two canoes from Bakana to Bile. On the way they stopped at Elemiama, which is in the Kalabaris' territory. The deceased and Douglas landed, Dora stayed with the children in the canoe. She saw four canoes approaching. She sent the children to call her husband and Douglas. The occupants of the four canoes wanted to land and said they wished to cut coco-nuts. The deceased, who had by this time returned, replied "You have not got any coco-nuts here, this is our old town." Whereupon the party consisting of the nine accused and two others, who had already landed, returned to one canoe and shouted the war-cry of the Okrika people. They then landed again and surrounded the deceased. They hit him with a stick, cut him with a knife and threw a spear at him. He died instantly. Dora, Douglas and the two children ran away. Dora was struck down with a club and her head was cut with a knife. Douglas was cut with a knife. The younger of the two children was beaten and lay in the mud. Douglas and the other child swam across the river and escaped. The assailants then took the Braides' canoes and departed. She said accused No. 5 was the one who struck her. She did not see who injured Douglas. Accused No. 2 was the first to strike her husband with a long stick. All the accused had something in their hands. Nos. 3 and 4 had spears.

Hamilton George (Douglas) gave similar evidence as to the preliminary events and as to the attacking party collecting in one canoe and uttering the words Adu Osu Uye (which Dora had described as their war-cry) before landing for the attack. He said the deceased was hit on the head with a big stick. A spear was then thrown at him. He was hit by one spear in the right forearm and another about the left breast. He fell forward on his face. He (Douglas) ran away. He was chased and hit with a small axe in the back and on the head with a big stick. He had three knife wounds in the head and fell in the swamp where he was left for dead. He said No. 4 was the first to strike deceased. He could not identify the man who threw the spear. It was

No. 6 who struck him (Douglas) with a stick. No. 2 struck him on the head with a machet. As the blood poured from his head he could not see who struck him with the axe on the back.

The medical evidence was to the effect that when the body of the deceased was found there were two harpoon-like or spear-like instruments sticking out of the body, one from the inner aspect of the right arm—a little distance from the arm pit, the other from the outer aspect of the left forearm—between elbow and wrist. There was a cut wound about three inches long on the outer aspect of the right forearm and a slight bruise on the left side of the neck. Death was due to the severance of the right brachial artery caused by the harpoon-like spear.

Hamilton George (Douglas) was described as suffering from very serious multiple cut wounds.

The trial Judge after summarising the evidence including that of the accused all of whom gave evidence, said " I have believed Dora and Hamilton George and I have not believed the fabricated story of the accused."

The evidence of the accused had been to the effect that Nos. 1 to 6 inclusive together with two other men named Bereburuka and Godwin Brown were out fishing in four canoes when they were hailed by Nos. 7 and 8 who were in a swamp. They rescued them and two others. The four rescued men said they had been attacked and robbed of their canoes by Kalabaris. Accordingly Nos. 1 to 6 and Nos. 7 and 8 proceeded in order to investigate the reason for this attack on their fellow tribesmen. The two other rescued men being exhausted were taken away by Bereburuka. A short distance further on they met a man named Panga Luke and accused No. 9 who was Luke's canoe boy. They told them what had happened and accordingly Luke and No. 9 joined the party of investigation. When they reached Elemiama they saw a party of Kalabaris, more than five in number and containing no women or children, who fired on them, whereupon they sheltered in the water and then landed and engaged in stick throwing with the Kalabaris who were defeated without serious injury on either side.

This was the account which was described by the Judge as " the fabricated story of the accused " and rejected *in toto*.

The appeal was based on a submission that the accused were tried and convicted as a body without any attempt to distinguish between them and in this connection reliance was placed upon a passage in the judgment of the trial Judge in which he said, " In this case it does not matter which of the accused did what." It was said that the trial Judge was led into an erroneous approach to the case by counsel for the prosecution and by counsel for the defence both of whom presented their cases on the basis that it was impossible to distinguish the individual accused. It was submitted that this vitiates the verdict against all. Alternatively it was argued that on examination of the evidence the cases of accused Nos. 7 and 8 and accused No. 9 are distinguishable from the cases of Nos. 1 to 6 and were not in fact distinguished by the Judge. The main issue depends upon the provisions of the Criminal Code set out above from which it is clear that if two or more persons have formed a common intention to attack another or others with intent to kill or do grievous harm or in a manner likely to endanger human life and have in fact taken part together in such an attack on others resulting in death as a probable consequence all are guilty of murder.

It is plain from the evidence of Dora Braide and Hamilton George (Douglas) set out above in some detail, if believed, that a deliberate and unprovoked attack of a kind likely to endanger human life and resulting as a probable consequence in the infliction of grievous harm on one and the

death of another was carried out in concert by all the accused in circumstances pointing irresistibly to a common design commencing at latest from the moment when they gathered together in one canoe and shouted their tribal war-cry. In fact the trial Judge drew the inference from all the facts and circumstances—as he was perfectly entitled to do—that the common design was formed when Nos. 1 to 6 met Nos. 7 and 8 and the other two men who had been attacked by the Kalabaris and that “ furious at this act of aggression they wanted to have their own back on the Kalabaris and set out with that purpose ” viz., to carry out a “ punitive expedition on Kalabaris whoever they might be,” and that subsequently Panga Luke and No. 9 willingly joined the expedition. Accepting as he did the evidence of Dora Braide and Hamilton George and having come to the conclusion that there was a common design the Judge in dealing with the execution of the common design was correct in saying, “ It does not matter which of the accused did what.”

In deciding whether there was a common design the cases of Nos. 1 to 6 were indistinguishable. It is clear from the judgment that on this aspect of the case the trial Judge appreciated the possible differences in the cases of Nos. 7 and 8 and No. 9. He inferred that 7 and 8 joined in the common design at its inception and that later No. 9 willingly joined in. This was eminently a matter for the Judge at the trial but, whether or not he drew a correct inference as to the moment of time when the common design was formed as already stated the inference of the existence of a common design in all the accused at a later stage is irresistible.

It was urged on behalf of No. 9, who admitted in evidence taking part in the fight, that he was only fifteen years of age and was the canoe boy of Panga Luke and as such bound to carry out his orders. There was no real evidence that he was coerced, and having regard to the provisions of section 32 of the Criminal Code any such defence would not have been open to him on such a charge as this.

For these reasons Their Lordships are of opinion that the main ground upon which the Appellants’ appeals were based is found on examination to be without foundation. One or two subsidiary matters were raised, e.g., the manner in which the trial Judge dealt with the evidence of the witnesses Panga Luke and Godwin Brown who were called for the prosecution and said to be accomplices, but Their Lordships do not consider it necessary to refer to these matters as they were clearly not of such a nature as to bring the case within the principles upon which the Board intervenes in appeals in criminal cases, but in so saying Their Lordships must not be taken to imply that the judgment or trial was in any respect open to criticism.

Their Lordships have accordingly humbly advised His Majesty that the appeals of all the accused should be dismissed.

KOFI SUNKERSETTE OBU APPELLANT
 AND
 A. STRAUSS & COMPANY LIMITED RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1951) 12 W.A.C.A. 281

Principal and agent—Agency contract—Commission—Basis and rate left to discretion of principal—Claim for account and payment of commission—Court incompetent to grant relief claimed.

By an agreement signed by the appellant, who was the agent in West Africa of the respondent company for the purchase and shipment of rubber to the company in London, it was provided, *inter alia*, that "the company has agreed to remunerate my services with a monthly sum of fifty pounds"—subsequently reduced to £20—"to cover my personal and travelling expenses . . . A commission is also to be paid to me by the company which I have agreed to leave to the discretion of the company." The respondents, after the termination of the appellant's employment, having instituted proceedings against him claiming money alleged to be due from him as their agent, he entered a counter-claim for an account to be taken between them of all rubber shipped by him between specified dates, and for commission on all the rubber purchased by him for the respondents. On appeal against the dismissal of his counter-claim:

Held:—That the relief which the appellant claimed by his counter-claim was beyond the competence of any court to grant. The Court could not determine the basis and rate of commission. To do so would involve not only making a new agreement for the parties, but varying the existing agreement by transferring to the court the exercise of a discretion vested in the respondents.

Way v. Latilla (2) considered.

Cases referred to:

(1) *Bryant v. Flight*, 151 E.R. 49.

(2) *Way v. Latilla* [1937] 3 All E.R. 759; 81 S.J. 786.

SIR JOHN BEAUMONT. This is an appeal from the judgment of the West African Court of Appeal (Gold Coast Session) dated the 13th December, 1947, dismissing with costs the appellant's appeal from the judgment of the Supreme Court of the Gold Coast dated the 23rd October, 1945, whereby the learned trial Judge gave judgment for the plaintiffs (the present respondents) for £1,104 19s. 4d. and dismissed the appellant's counter-claim for accounts and commission.

At the dates material to this appeal the appellant was the agent of the respondents in West Africa for the purchase and shipment of rubber to the respondents in London.

The suit out of which this appeal arises was commenced on the 19th June, 1945, in the Supreme Court of the Gold Coast, Ashanti, by the respondents as plaintiffs against the appellant as defendant claiming money alleged to be due from the appellant as such agent. On the 20th July, 1945, the appellant put in a counter-claim in the suit which was in the following terms:

"Please take notice that at the trial of the above-named case the defendant will counter-claim and he hereby counter-claims against the plaintiffs for an account to be taken between them of all rubber shipped by the defendant to the plaintiff company in Europe from August, 1942, to January, 1945, inclusive and for the Court to order payment of what is found due to the defendant on the taking of the said account; and the defendant further claims commission on all the rubber purchased by him for the plaintiff company."

Why the appellant claimed an account on all rubber shipped (which would be after it had been processed) and a commission on all rubber purchased is not apparent.

At the trial oral and documentary evidence was given on behalf of both parties. A Mr. Lewis, who was a member of the firm of accountants employed by the respondents in the Gold Coast, gave evidence that he had a

statement of accounts from the respondents showing a profit in London on sales of rubber shipped by the appellant of £1,553 16s. 0d. but that the local account showed a loss of £4,954 17s. 11d. showing a total loss of over £3,000. This evidence was not challenged by the appellant when he gave evidence, though the result of the local trading was within his special knowledge. The learned trial Judge on the 23rd October, 1945, gave judgment for the respondents for part of the sum claimed by them and dismissed the counter-claim of the appellant.

The appellant appealed from the said judgment to the West African Court of Appeal and on the 13th December, 1947, the appeal was dismissed. This appeal is brought from the said judgment of the West African Court of Appeal.

The only part of the judgment of the West African Court of Appeal which was challenged before the Board was the dismissal of the appellant's counter-claim.

The facts therefore which are relevant are those relating to the counter-claim for an account and payment of commission.

Business relations between the parties commenced in August 1942, and at first such relations were governed by certain cables and letters. It is not necessary to refer in detail to these documents, suffice it to say that under them the appellant was to receive a payment of £50 per month and it was contemplated that he would also receive a commission to be fixed by the respondents.

Subsequently it was thought desirable that the relations between the parties should be embodied in a formal agreement, and on the 19th April, 1943, an agreement (Exhibit 4) was signed by the appellant. By clause 1 of that agreement the appellant agreed faithfully to serve the respondents in the capacity of agent in the business of purchasing, manufacturing and exporting rubber in and from the Gold Coast for the account and to the order of the respondents, and during the continuance of the said agreement to give his time and attention to the management, conduct and superintendence of the said business. Clause 6 of the agreement dealt with the remuneration of the appellant and was in the following terms: "The company has agreed to remunerate my services with a monthly sum of fifty pounds to cover my personal and travelling expenses for the time being which I have accepted. A commission is also to be paid to me by the company which I have agreed to leave to the discretion of the company." Subsequently the sum of £50 per month was reduced to £20 per month, but nothing turns upon this. The employment of the appellant was terminated as from 31st May, 1945.

The question in this appeal is as to the right of the appellant to commission. The appellant points out that clause 6 of the agreement contemplates that he is to get some remuneration by way of commission in addition to the £50 per month, and he contends that as the respondents have refused to pay any commission he is entitled to a reasonable commission by way of *quantum meruit* for services rendered. The appellant relied on the authority of such cases as *Bryant v. Flight* (1) and a decision of the House of Lords in *Way v. Latilla* (2). Only the latter case dealt with remuneration by way of a share in business introduced, and in their Lordships' opinion the earlier cases are of no assistance to the appellant. In *Way v. Latilla* (2) the agent claimed that there was an agreement to give him an interest in a concession obtained by him which by custom, or on a reasonable basis, the court was asked to define as one-third.

The House of Lords rejected this claim on the ground that there was no

concluded contract between the parties as to the amount of the share which the agent was to receive and it was impossible for the Court to complete the contract for the parties. The House, however, held that, whilst there was no concluded contract as to the amount of remuneration, it was plain that there existed between the parties a contract of employment under which the agent was engaged to do work for the plaintiff in circumstances which clearly indicated that the work was not to be gratuitous, and that the agent, therefore, was entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit*, and the House fixed the amount to be paid. This case again, in their Lordships' view, does not help the appellant, and indeed is rather against him. The right of the appellant to remuneration is governed by clause 6 of the agreement. The sum of £50 per month was to remunerate the services of the appellant though it was to cover his personal and travelling expenses; there is therefore no question, as in *Way v. Latilla* (2), of the services of the appellant being rendered gratuitously. Clause 6 does not provide for the payment of any further sum by way of additional remuneration for the services of the appellant upon which a claim of *quantum meruit* might be founded. The only additional remuneration was to be a commission in the discretion of the respondents. The appellant claims a commission on rubber purchased or rubber shipped but it is clear that the respondents would have to fix, not only the rate, but the basis, of the commission, and such basis might be a share of profits. The correspondence between the parties before the date of the agreement shows that it must have been in the mind of the appellant that his commission might be based on profits. In a letter from the respondents to the appellant dated the 7th October, 1942, the respondents said: ". . . your interests will be fully protected and your share of the total net profits of the entire enterprise will be made retrospective."

Again, in a letter written by the solicitors for the respondents to the appellant dated the 2nd February, 1943, when the solicitors were seeking from the appellant material on which to base the formal agreement which they were about to prepare they said this: "You further informed us that you receive a monthly remittance of £50 for expenses and that it was agreed you should share in the profits arising from the sale of rubber but that no percentage had been fixed, this percentage was in the company's discretion."

A commission based on profits would be rendered nugatory by the absence of profits. In their Lordships' opinion the relief which the appellant claims, namely an account and payment of commission based on rubber purchased or shipped, is beyond the competence of any Court to grant. The Court cannot determine the basis and rate of the commission. To do so would involve not only making a new agreement for the parties but varying the existing agreement by transferring to the Court the exercise of a discretion vested in the respondents. If the appellant is not entitled to any commission it is conceded that he cannot claim an account. For these reasons their Lordships think that the judgments of the Courts in West Africa were right.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

Appeal dismissed.

ATTA KOJO (SINCE DECEASED) NOW REPRESENTED BY
 KOJO NYAMI AND ANOTHER APPELLANTS
 AND
 CHIEF KWEKU DADZIE, NKYIDOMHENE OF BREMAN
 (SINCE DECEASED) NOW REPRESENTED BY
 CHIEF KOFI ANSAH RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1951 Apr. 3

Lords Simonds, Morton of Henryton, Radcliffe
 and Tucker

Customary law—Ownership of land—Effect of lapse of time.

It is well established native law and custom that rights of ownership of land are not extinguished by lapse of time.

LORD TUCKER. On 10th February, 1939, Chief Kweku Dadzie, Nkyidomhene of Breman, for himself and on behalf of the Anona Stool and Family of Breman in Eguafu State instituted a suit by civil summons in the Native Tribunal of Eguafu State, Central Province, Gold Coast, against Atta Kojo of Essaman as defendant claiming a declaration of title to " all that piece or parcel of land attached to the Stool of the said Anona family of Breman and commonly known as and called ' Eborhu ' in Eguafu State " the boundaries of which were described by reference to adjoining Stool lands, an account of " all rents due and owing by the defendant in respect of Warababa Cocoa Farm formerly the property of Kweku Mensah deceased and now owned by the defendant on ' Eborhu ' land, and also all rents collected by the said defendant Atta Kojo from other tenants on the said ' Eborhu ' land from 1918 to date of judgment herein and payments by the defendant to the plaintiff of any sum or sums found due upon taking such accounts the said land being the property of the plaintiff's Stool and family ", and an injunction " restraining the said Atta Kojo the defendant herein his agents or servants from collecting any more rents from tenants occupying the said land." On 14th March, 1939, on the application of the defendant his brother Kojo Apenya was joined as co-defendant.

Since the present appeal was entered the plaintiff and the first defendant have died and there have been substituted for them by Order in Council, Chief Kofi Ansah in place of the original plaintiff and Kojo Nyami in place of the original first defendant Atta Kojo.

The original parties are hereinafter referred to as plaintiff and first defendant respectively.

Before the Native Tribunal the plaintiff obtained the relief claimed in his summons. On appeal to the Provincial Commissioner of the Central Province of the Gold Coast Colony, the judgment of the Native Tribunal was reversed. The plaintiff appealed to the West African Court of Appeal who on 25th May, 1940, allowed the appeal and restored the judgment of the Native Tribunal so far as the declaration of title and injunction are concerned but omitted therefrom the order for the taking of an account as to which counsel for the plaintiff in the Court of Appeal had not pressed.

From this judgment the present appeal is brought by the defendants pursuant to leave granted by the West African Court of Appeal on 13th May, 1941.

On the hearing before their Lordships the appellant-defendants were represented by counsel. The respondent-plaintiff was not represented.

In paragraphs 2 and 3 of their written "Case" the appellants state, "The main question for decision in this appeal is whether the respondent who was the plaintiff in the case has established a title over certain land, superior to that of the first appellant, who has been long in possession by virtue of purchase by public auction. The land in dispute is cocoa farm land known as Warababa Cocoa Farm. The boundaries of the area were ascertained by inspection in the case, and the only dispute as to their position is whether they are or are not in what is known as the Eborhu land appertaining to the respondent's Stool."

This appears to be an accurate summary of the proceedings in the Courts below where neither of the parties seem to have concerned themselves with the precise language of the relief claimed in the summons or the scope of the injunction as granted which were the matters mainly dealt with in argument before the Board.

The plaintiff claimed that the land in question had been attached to the Stool of Breman from time immemorial and formed part of "Eborhu" land. The case for the defendants was that the land belonged to Opanyin Ekow Frow and Kwamina Nketria the ancestors of Kweku Mensah deceased who in turn succeeded thereto, and that they had acquired his interest therein by purchase at public auction held on 13th February, 1918, under a Writ of Fi.Fa. and evidenced by a Certificate of Purchase dated 29th April, 1918, which was produced at the trial. This document certified that Atta Kojo had been declared the "purchaser of the right title and interest of Kweku Mensah in the messuages lands and tenements hereinafter mentioned that is to say: all that plaintiff's land called 'Wadababa' situate and being at Assamang or thereabouts in the District of Elmina" bounded by or abutting the lands of certain persons whose names are set out. The authenticity of this Certificate was not in dispute, but its effect depended upon the nature of the right title and interest of Kweku Mensah in the lands in question. This in turn depended upon questions of fact determined by the Native Tribunal in favour of the plaintiff. They accepted the plaintiff's evidence that the lands had always formed part of his Stool lands and that his predecessor Kwamina Assankuma had given permission to Kobina Essan the father of Kweku Mensah to farm on the land on condition of paying a yearly rent, and that this was the only right acquired by the defendants by the purchase at auction.

The Provincial Commissioner allowed the defendants' appeal on the ground that the judgment of the Native Tribunal gave rise to doubts as to whether its findings of fact were not perverted and erroneous and that in any event the plaintiff having slept on his rights for more than 8 years, the limit allowed by Native Customary law, his claim could not now be entertained.

The West African Court of Appeal pointed out that this was not an action to recover possession and that it was well established Native Law and Custom that rights of ownership are not extinguished by lapse of time. They further considered that there being ample evidence to support the findings of fact of the Native Tribunal its judgment, modified as previously stated, should be restored.

Neither of the grounds on which the West African Court of Appeal allowed the plaintiff's appeal was seriously challenged before their Lordships, but it was said that a perusal of the evidence showed that the injunction as granted exceeded the relief to which the plaintiff was entitled

and might be interpreted as interfering with rights of the defendants to allow sub-cultivators or licensees to farm lands within the area of the Wadababa Cocoa Farm, and to collect rents from such sub-cultivators or licensees.

No point of this kind was taken in the West African Court of Appeal and their Lordships do not feel they have sufficient material to justify any expression of opinion on their part on this aspect of the case.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

TAMIM AND ANOTHER APPELLANTS
AND
COMPTROLLER OF CUSTOMS RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1951) 12 W.A.C.A. 253

1951 June 27

Lords Simonds, Normand
and Oaksey

Customs (Gold Coast)—Prohibited goods brought to premises for purpose of being exported—Intention to export abandoned—Liability—Jurisdiction to try suit without pleadings—Import, Export and Customs Powers (Defence) Ordinance, No. 29 of 1939, s. 5 (1) (b)—Export (Restriction) Order No. 35 of 1940, s. 1—Customs Ordinance (Gold Coast, 1936 Rev., c. 4) Sched. 3, Ord. 25, r. 1.

Where the respondent instituted proceedings by writ of summons against the appellants claiming forfeiture of goods alleged to have been brought by them to certain premises for the purpose of being exported without the necessary licence, the Magistrate had jurisdiction to try the suit on the writ of summons without pleadings, and there was nothing in section 145 (1) and (3) of the Customs Ordinance of the Gold Coast which made it irregular for him to do so.

A person is liable to the penalty prescribed by section 5 (1) (b) of the Import, Export and Customs Powers (Defence) Ordinance 1939, and to forfeiture of the goods if he takes part in bringing prohibited goods to a place for the purpose of export even if before seizure of the goods he abandons his intention to export them. No case was cited to the Board deciding that in such a case as the present the person intending to export prohibited goods has a *locus poenitentiae*.

Case referred to:

(1) *Att.-Gen. for Palestine v. Fakhry Ayyas* [1947] A.C. 332; [1947] L.J.R. 879.

LORD OAKSEY: This is an appeal from the judgment of the West African Court of Appeal which affirmed a judgment of the Supreme Court of the Gold Coast which reversed a judgment of the Court of the District Magistrate, Accra, dismissing the claim of the respondent for the forfeiture of certain textile goods, and the imposition of penalties.

All three courts have found as a fact that the appellants were guilty of bringing certain cotton goods to a place for the purpose of export from the Gold Coast without a licence. The district Magistrate dismissed the case against the appellants on a construction of the Import, Export and Customs Powers (Defence) Ordinance 1939, which is no longer contended for by the

appellants in view of the decision of their Lordships' Board in *Att.-Gen. for Palestine v. Fakhry Ayyas* that export by land as well as by sea is prohibited.

Mr. Blackledge in an able argument has contended, on behalf of the appellants, firstly that the magistrate had no jurisdiction to try the case as he did without pleadings; secondly, that the goods were not at the time of seizure being exported within the meaning of section 5 (1) (b) of the Import, Export and Customs Powers (Defence) Ordinance 1939; thirdly, that in any event at the time of seizure the appellants had abandoned any intention of exporting the goods and that in such circumstances the seizure was illegal; and lastly, that the concurrent findings of fact that the appellants intended to export the goods and were exporting them without a licence were not justified by the evidence.

The material sections of the Ordinance in question are as follows:

“ The Import, Export and Customs Powers (Defence) Ordinance 1939, No. 29 of 1939.

Section 3—(1) The Governor may by order make such provisions as he thinks expedient for prohibiting or regulating, in all cases or any specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the importation into or exportation from the Gold Coast or any specified part thereof, or the carriage coastwise or the shipment as ship's stores, of all goods or goods of any specified description.”

“Section 5—(1) If any goods—(a) are imported, exported, carried coastwise or shipped as ships' stores in contravention either of an order under this Ordinance or of the law relating to trading with the enemy, or (b) are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped in contravention either of an order under this Ordinance or of the law relating to trading with the enemy, those goods shall be deemed to be prohibited goods and shall be forfeited; and the exporter of the goods or his agent, or the shipper of the goods, shall be liable, in addition to any other penalty under the enactments relating to customs, to a customs penalty of £500.”

“ The Export (Restriction) Order (No. 35), 1940.

(1) No goods of any description whatsoever other than passengers' baggage shall be exported from the Gold Coast except under licence granted by the Comptroller of Customs. It shall be within the absolute discretion of the Comptroller of Customs to grant or withhold such licence and to impose such terms and conditions as he may think fit in respect of the grant thereof.”

“ The Customs Ordinance.

145—(1) All duties, and all pecuniary penalties not specifically designated fines, and all forfeitures incurred under or imposed by the Customs Law, and the liability to forfeiture of any article seized under the authority thereof, may be sued for, determined, enforced, and recovered by suit or other appropriate civil proceeding in a Magistrate's Court which Court is hereby invested with the necessary jurisdiction for the purpose, in the name of the Comptroller as nominal plaintiff; and all such proceedings shall be deemed to be civil proceedings and, except as otherwise herein or hereunder provided, the ordinary civil procedure of the Gold Coast shall apply thereto. And the fact that the duties of Customs have been secured by bond or otherwise

shall not be pleaded or made use of in answer to or in stay of any such proceedings.

(3) When any person shall be brought before a Court in the exercise of its civil jurisdiction for any offence against the Custom laws in respect of which the duty-paid value of the articles liable to forfeiture and sought to be forfeited does not exceed, in the case of potable spirit fifty pounds, or in the case of any other articles twenty-five pounds, the Court may proceed to hear and determine the cause or matter summarily and without a writ of summons or other formal process, but otherwise in accordance with the provisions of the Customs law ordinarily applicable to such offence, as well with respect to forfeiture as otherwise; Provided that in such case the pecuniary penalty imposed by the Court shall not exceed, in the case of potable spirits, fifty pounds, or in the case of any other articles twenty-five pounds."

" The Courts Ordinance. Third Schedule. Order 25.

1. Suits shall ordinarily be heard and determined in a summary manner without pleadings; but, where it appears to the Court (for reasons recorded in the minutes) that the nature and circumstances of any case render it expedient in the interests of justice to do so, the Court may order the plaintiff to file a written statement of his claim (called the petition), and may likewise order the defendant to file a written answer or statement of his defence. The filing of a petition shall not necessarily involve, unless the Court so directs, that an answer shall also be filed. The order may be made at any stage of a suit, either before or at the hearing."

Their Lordships do not find it necessary to state the facts in detail. They are satisfied that there was ample evidence to support the findings of the three courts that the appellants were engaged in exporting the goods in question without a licence and they see no reason to differ from those findings.

Their Lordships are also of opinion that there is no substance in the appellants' other contentions.

By Order 25 of the third Schedule to the Courts Ordinance suits shall ordinarily be heard without pleadings, and by section 145 of the Customs Ordinance fines and forfeitures may be sued for, determined, enforced and recovered by suit in a Magistrate's Court and the ordinary civil procedure shall apply to such proceedings. It was therefore the ordinary and regular procedure for the Magistrate in the present case to try the suit against the appellants upon the writ of summons without pleadings as he did, and there is nothing in section 145 (1) and (3) which made it irregular for him to do so.

Mr. Blackledge also argued that, in having the goods moved from Zacca's warehouse to Sassine's premises, there was no evidence of exportation but as the courts below were all of opinion that the goods were moved to Sassine's premises for the purpose of being exported their Lordships are of opinion that the goods were brought to that place for the purpose of being exported within the meaning of section 5 (1) (b) and that the appellants, who both took part in bringing them there, were exporters within the meaning of the section.

Lastly, their Lordships are of opinion that a person is liable to the prescribed penalty and to forfeiture of the goods if he takes part in bringing prohibited goods to a place for the purpose of export even if before seizure of the goods he abandons his intention to export them.

No case was cited to their Lordships deciding that in such a case as the

present a person intending to export prohibited goods has a *locus poenitentiae*.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

DR. AKINOLA MAJA APPELLANT
AND
CHIEF SECRETARY TO THE GOVERNMENT RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 12 W.A.C.A. 395

1952 Apr. 30

Lords Normand, Radcliffe
and Asquith of Bishopstone

Compulsory Acquisition of land—Factors to be taken into account in assessing compensation—Public Lands Acquisition Ordinance, s. 15—Comparison with English legislation—Whether “disturbance” should be taken into account in assessing compensation.

The principles whereon compensation for land acquired under the Public Lands Acquisition Ordinance should be assessed are laid down in section 15 of that ordinance and no account should be taken of “disturbance”, or for a claimant's outlay in the past or for interference with his plans for the future in regard to the land acquired.

LORD NORMAND. This is an appeal by special leave from an order of the West African Court of Appeal affirming an order of the Supreme Court of Nigeria which determined the amount of compensation to be paid to the appellant in respect of the compulsory acquisition of certain land by the respondent.

The relevant Nigerian Ordinances relating to compensation for the compulsory acquisition of land are the Public Lands Acquisition Ordinance of Nigeria (c. 88) hereinafter referred to as the Principal Ordinance and the Public Lands Acquisition (Amendment) Ordinance of Nigeria (No. 6 of 1945) hereinafter referred to as the Amendment Ordinance. The Amendment Ordinance came into force on 19th April, 1945, more than a year after the service on 13th May, 1944, of the notice of intention to acquire the land.

The principal contentions of the appellant were that the judgments appealed against were erroneous in law in two respects: First, they had wrongly applied to the assessment of the compensation the Amendment Ordinance which was not in force at the date of the notice of intention to acquire, instead of the Principal Ordinance which was then in force in its unamended form; and second, by a misconstruction of the Amendment Ordinance, they had wrongly excluded the appellant's claim in respect of disturbance and in respect of the potential value of the land to him. The appellant further, and alternatively, submitted that a claim in respect of disturbance or in respect of the potential value of the land was competent even under the provisions of the unamended Principal Ordinance. The first of these contentions would raise the question whether the appellant is

entitled to resile from what is described in his case as an agreement of parties that for the purposes of determining the amount of the compensation the principles to be applied were those enacted by the Amendment Ordinance, and that is a question which might in turn depend on whether the so-called agreement was not merely a joint submission of law made to the Court, from which either party might withdraw.

The legal questions involved in the appellant's submissions are of some difficulty. But there is first the question whether, assuming that under the relevant and appropriate Ordinance a claim lies in respect of disturbance or potential value, there are any facts on which such a claim could in this case be founded. If there are not it is unnecessary to consider the provisions of either of the Ordinances or to determine any of the legal questions argued for the appellant.

The land acquired by the respondent is situated at Victoria Beach near Lagos. Its area is approximately eight acres. On 21st November, 1941, it was leased to the appellant and his partner, Nicholas Diamantopulos, for a period of twenty-five years with an option to renew for a further period of twenty-five years. Immediately after the grant of the lease the appellant and his partner proceeded to construct upon the land buildings, salt pans, ovens, sheds and other structures, and to bring upon it engines and other machinery for the purpose of the commercial extraction of salt from sea water. The partners expended on this venture about £10,000, and to begin with they had the approval of the Government. Yet the venture was not successful. By June 1943, when operations finally ceased there had been produced only two tons of salt which were sold for about £26. The appellant and his partner, however, considered that, with larger engines and other improved plant, success might yet be attained. They therefore applied to the Government for licences to enable them to import additional plant. That was in April 1943. By that time the Government had come to hold an adverse view about the feasibility of extracting salt from sea water at Lagos and accordingly the import licences were refused on 26th May, 1943.

Mr. Diamantopulos had gone to Great Britain before May 1943, in order to obtain the necessary machinery, and he died there in November 1943. There is no evidence that his attempts to obtain new machinery had made any progress. After his death the appellant decided to go to England. He left Nigeria on 10th January, 1944, taking with him a sample of the salt water and of the coal which had been used in the salt extraction process. He obtained a not unsatisfactory report of an analysis of the salt water and a less encouraging report on the coal, but there is no evidence that he had even entered into negotiation for the acquisition of any machinery. While he was in England he received a cable from his brother informing him that the Government had served notice of intention to acquire his land. The appellant thereafter returned to Nigeria and tabled his claim for compensation.

In the proceedings before the Supreme Court evidence was given by the Acting Assistant Commissioner of Lands and by the Chief Executive Engineer of the Public Works department about the condition of the salt pans, engines and other plant, which they inspected in July 1944. This evidence was accepted by the learned Judge who sums it up in findings that the salt works had depreciated considerably, having for all purposes been left derelict; that they were never a profitable undertaking and that, as they stood, it was clear that no one would purchase them with a view to using them as salt works. The Court of Appeal concurred in these findings. No other conclusion was indeed possible on the evidence, and their Lordships

see no justification for the submission of the appellant's counsel that these, or any of the findings of fact, were coloured or in any way affected by the opinion of the learned Judge that the Amendment Ordinance did not admit of a claim for disturbance.

The project of the appellant and his partner, which had never been more than an unsuccessful pioneer venture, had thus become a total loss. The appellant claims for disturbance of his business, but there was no business in being at the time of service of notice on which such a claim could rest.

The appellant's claim considered under the head loss of potentialities is in no better case. The learned Judge in the Supreme Court pointed out that there is no evidence that the land possessed any unusual features, and he mentioned and appears to have accepted evidence given by the Government Chemist that it was impossible that salt production would be a profitable undertaking at Lagos. In addition to this, there is the refusal of the Government to grant import licences for new machinery, and the absence of any evidence that any effective step had been or could have been taken either by the appellant's partner or by the appellant himself to obtain new machinery. There is accordingly no reliable evidence that the land had any potentiality or future value as the site of a salt works, and there is much evidence to the contrary.

Their Lordships therefore hold that the claims in respect of disturbance and potentialities fail on the facts, and that an award which takes account of break up value of the structures on the land is all that the appellant is entitled to. On that basis the Supreme Court assessed the compensation due to the appellant at £800. The Court of Appeal affirmed the award and it must stand.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The respondent is entitled to payment by the appellant of the costs of the appeal.

Appeal dismissed.

MEMUDU LAGUNJU APPELLANT
AND
OLUBADAN-IN-COUNCIL AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 12 W.A.C.A. 406

1952 May 5

Lords Normand, Radcliffe
and Asquith of Bishopstone

(Nigeria)—Chief—Appointment—Whether in accordance with native law and custom—Governor the sole Judge—Jurisdiction of Courts excluded—"Due inquiry"—Duties of Governor—Appointment and Deposition of Chiefs Ordinance, s. 2 (1) (2).

By section 2 (2) of the Appointment and Deposition of Chiefs Ordinance of Nigeria: "In the case of any dispute the Governor, after due inquiry and consultation with the persons concerned in the selection, shall be the sole Judge as to whether any appointment of a Chief has been made in accordance with native law and custom."

The above subsection commits to the Governor exclusively the duty of judging whether an appointment has been made in accordance with native law

and custom, and the jurisdiction of the Courts to decide that question is absolutely and unconditionally excluded by the subsection.

The requirement that there shall be due inquiry and consultation with the persons concerned in the selection is not a condition precedent to the Governor's jurisdiction as sole Judge or to the exclusion of the Court's jurisdiction, but it is a condition of the Governor's valid exercise of his function of sole Judge. If he comes to a decision without having made due inquiry or consultation then in an appropriate action it would be competent for the Courts to set his decision aside. In no circumstances, however, could the Courts assume to themselves jurisdiction to decide that an appointment had or had not been made in accordance with native law and custom, and accordingly, when an action was so framed as to submit that question to the Court's decision the action was incompetent.

"Due inquiry" was not necessarily public inquiry, but it implied that the parties to the dispute should be given an opportunity of being heard by the Governor as Judge between them, and in intimating a decision under section 2 (2) the Governor should unambiguously declare that the appointment had (or had not) been made in accordance with native law and custom.

Cases referred to:

- (1) *Board of Education v. Rice* [1911] A.C. 179
- (2) *Local Government Board v. Arlidge* [1915] A.C. 120; 111 L.T. 905; 84 L.J.K.B. 72; 79 J.P. 97; 30 T.L.R. 672.
- (3) *Errington v. Minister of Health* [1935] 1 K.B. 249.

LORD NORMAND. This is an appeal from an Order of the West African Court of Appeal dated the 4th December, 1948, allowing an appeal from an Order of the Supreme Court of Nigeria dated the 7th February, 1948, and entering judgment for the respondents, the defendants in the action. The Order of the Supreme Court had granted an injunction restraining the second defendant and respondent from performing the duties of the Timi of Ede and from receiving the salary attached to the office of Timi, a declaration that the selection of the second respondent and his subsequent installation as Timi of Ede were contrary to the native law and custom governing the selection of a Timi of Ede and were therefore null and void, a second declaration that the appellant is the person qualified and entitled by native law and custom to hold the post and enjoy the office and title of Timi of Ede, and a third declaration that the appellant was duly selected by the Ede Kingmakers as Timi of Ede in April 1946, and that the selection was in accordance with native law and custom. The injunction and declarations granted by the Supreme Court are in precise accordance with the relief sought in the appellant's summons and statement of claim so far as now insisted in. In the statement of claim an additional declaration was sought, but it was refused by the Supreme Court and was thereafter abandoned. The Court of Appeal held that the Courts had no jurisdiction to entertain the suit.

In his pleadings the appellant alleged that he had been selected by the persons entitled by native law and custom to select the Timi of Ede and had been unanimously recommended by them for approval of the Governor through the Olubadan-in-Council, the first defendant and respondent, but that the Olubadan-in-Council contrary to native law and custom appointed the second respondent to fill the vacant office of Timi. There were also allegations that the first respondent acted in bad faith in appointing the second respondent and that the Resident of Oyo province, in which the town of Ede is situated, had also acted in bad faith in approving the appointment of the second respondent as Timi of Ede. The Supreme Court acquitted the Resident of bad faith and the appellant has acquiesced and does not now allege bad faith against the Resident. The respondents in their pleadings denied the material allegations of the appellant, and they further

averred that the selection and approval of the second respondent was based on a public inquiry held at Ede in May 1946, when it was discovered that the majority of the Chiefs and people of Ede were strongly in favour of the appointment of the second respondent as Timi. Both respondents pleaded to the jurisdiction of the Court without specifying the grounds of the plea.

On the merits, therefore, it is apparent that the dispute between the parties concerned the right of succession to the office of Timi of the town of Ede vacant by the death of the previous Timi on the 24th January, 1946, and that conflicting claims to the office were made by the appellant and the second respondent. It should be explained that the Timi of the town of Ede is the Head Chieftain of the town, and that if he is approved by the Governor or his delegate he becomes also the president of the District Council or local authority of Ede and that as such he is entitled to a stipend. The town of Ede is within the area of the Ibadan Native Authority known as the Olubadan-in-Council, presided over by the Olubadan, and the Ede District Council is subordinate to the Olubadan-in-Council.

The evidence taken in the Supreme Court disclosed that the dispute between the parties covered a wide field, including the questions whether the second respondent was eligible for the office of Timi, who were the parties within the town of Ede entitled to nominate a candidate, who were the parties within the town of Ede entitled to make a final selection, whether their selection must be unanimous, and whether their choice could be overruled by the Olubadan-in-Council. All these questions depend on the proper ascertainment and application of the relevant Native law and custom. It is for this reason that the issue of jurisdiction assumes a special importance and becomes the determining issue in the appeal, for the Appointment and Deposition of Chiefs Ordinance (c. 12) of Nigeria, makes special provision for preserving native law and custom in the appointment of a Chief or Head Chief, and this ordinance admittedly applies in this case. The text of the Ordinance is as follows:

“ AN ORDINANCE TO PROVIDE FOR THE APPOINTMENT
AND DEPOSITION OF CHIEFS

1. This Ordinance may be cited as the Appointment and Deposition of Chiefs Ordinance and shall apply to the Colony and Protectorate (including the Cameroons under British Mandate).

2. (1) Upon the death, resignation or deposition of any Chief or of any Head Chief, the Governor may approve as the successor of such Chief or Head Chief, as the case may be, any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom; and if no appointment is made before the expiration of such interval as is usual under native law and custom, the Governor may himself appoint such person as he may deem fit and proper to carry out such duties incidental to the Chieftaincy as it may be necessary to perform.

(2) In the case of any dispute the Governor after due inquiry and consultation with the persons concerned in the selection, shall be the sole Judge as to whether any appointment of a Chief has been made in accordance with native law and custom.

3. The Governor may grade Head Chiefs as first, second, third, fourth or fifth class according to their importance.

4. The Governor, after due inquiry and consultation with the persons concerned in selection, may depose any Chief or any Head Chief whether appointed before or after the commencement of this

Ordinance, if after inquiry he is satisfied that such deposition is required according to native law and custom or is necessary in the interests of peace or order or good government.

5. For the purposes of sections 2 and 4 of this Ordinance, the words 'Chief' and 'Head Chief' mean a Chief or a Head Chief who has been appointed to the office of native authority under the provisions of the Native Authority Ordinance or which office is deemed to be constituted thereunder or who is a member of a native authority constituted or deemed to be constituted under the provisions of that Ordinance or, where the office of native authority so appointed or deemed to be constituted, is a Chief associated with a council, any Chief or Head Chief who is a member of that council and any Chief or Head Chief who is a member of an advisory council."

It is of importance to note that section 2 (2) originally read: "The Governor shall be the sole Judge as to whether any appointment of a Chief or Head Chief, as the case may be, has been made in accordance with native law and custom," and that it was by an amendment made by the Ordinance No. 20 of 1945 that the words "in the case of any dispute" and the words "after due inquiry and consultation with the persons concerned in the selection" were added. The Governor, it should be said is entitled to delegate his functions under this Ordinance, and he did in fact delegate them to the Resident of the province on this occasion. It was proved in evidence before the Supreme Court that the Resident was present at a meeting of the Olubadan-in-Council of the 5th December, 1946, when the Olubadan-in-Council decided to present the second respondent for approval as Timi and that he then said that everybody knew the facts from the start, that no further inquiry was necessary and that in due course he would communicate his decision. His decision was intimated in a letter of the 7th December, 1946, addressed to the Senior District Officer, Ibadan. It was in the following terms:

"Timi of Ede: Appointment of

With reference to the special meeting of the Ibadan Inner Council on Thursday, 5th December, I am entirely satisfied that by Native Law and Custom Mr. Adetoyese Laoye is eligible to succeed to the Stool of the Timi of Ede and that he is a fit and proper person by past record to assume the office of the Head of the Ede and Ede District Subordinate Native Authority, and to take his seat on the bench of the Native Court. I am also entirely satisfied that the large majority of the Chiefs of Ede eligible to take part in the selection of a Timi of Ede support the candidature of Mr. Adetoyese Laoye. That being so, I convey approval of the recommendation submitted by the Ibadan Inner Council that the selection of Mr. Adetoyese Laoye as the new Timi of Ede should be recognised."

A copy of this letter was sent to the Olubadan-in-council for information and necessary action.

The effect of the Ordinance and of the Resident's letter will be considered at a later stage. But first it is necessary to turn to the proceedings in the Courts including proceedings which have not yet been mentioned.

The case first came before Jibowu J. in the Supreme Court in August 1947, when it was submitted by Crown Counsel appearing for the

respondents that the jurisdiction of the Court had been ousted by the Ordinance because the Governor was the sole Judge whether the selection of the Timi had been in accordance with native law and custom. The learned Judge gave effect to this contention, holding that it was for the Governor or his delegate to satisfy himself that the appointment of the Timi had been properly made, and that the Resident's letter of the 7th December, 1946, showed that he was satisfied that due inquiry had been made according to native law and custom by those who made the selection. An appeal was taken to the Court of Appeal, which by a judgment of the 10th November, 1947, reversed the order of the Supreme Court. The judgment was delivered by the learned President, who said that if it could be shown that no due inquiry or consultation had taken place then the condition precedent to the Governor's being vested with the powers of sole Judge had not been fulfilled, and that the Courts would certainly have the power to set aside the order approving the appointment of the second respondent. The learned President also held that the Resident's letter did not show that due inquiry had been made by him. By the formal order of the Court of Appeal, the case was returned to the trial Judge to determine the issues before him after hearing evidence tendered by both parties, in the light of the interpretation placed by the Court of Appeal on the Ordinance. When the case came for the second time before the Supreme Court, Crown Counsel submitted for the respondents that the only issue then to be tried was whether due inquiry had been made by the Resident before he gave his approval of the second respondent's appointment as Timi. But the appellant's Counsel persuaded the learned Judge to deal with the whole issues raised by the pleadings. After hearing evidence, some of which has been referred to above, the learned Judge held that there had been no due inquiry by the Resident and therefore that the Governor could not claim to be the sole Judge, since one of the conditions precedent to his assuming the role of a sole Judge had not been fulfilled. He further held that the jurisdiction of the Court had not been ousted and proceeded to consider whether the second respondent had been appointed in accordance with native law and custom. Having done so, he came to the conclusion that native law and custom had been disregarded in several ways which need not now be particularised. He granted, as has already been said, the essential part of the relief sought by the appellant. In the Court of Appeal the argument was limited by direction of the Court to the issue of jurisdiction. The first judgment was delivered by Lewey J.A., who had not been a party to the earlier judgment. He held that the provisions of section 2 (2) of the Ordinance so far as relating to due inquiry were merely directions as to the manner in which the Governor ought to proceed and that the Court was entirely precluded from entertaining in any way or in any action the question whether due inquiry had been made. Verity C.J., who had been a party to the previous decision, did not agree with this construction of section 2 (2) of the Ordinance. He held that if it is alleged that no due inquiry had been held it was open to the proper party to come to the Court and seek the appropriate relief, and he held also that the form of action adopted in this case was inappropriate and that the remedy sought was misconceived. Blackall P., who was not a party to the previous decision, while agreeing with the conclusions of Lewey J.A. and Verity C.J., said that even if the Governor failed to comply with the requirements of section 2 (2) of the Ordinance that would not confer jurisdiction on the Courts to decide whether the appointment of a Chief had been made in accordance with native law and custom.

Their Lordships have heard argument upon the question of jurisdiction

only and, with reference to that question, upon the construction of the Ordinance. They are of opinion that subsections (1) and (2) of section 2 must be read together and as parts of one section. The first part of section 2 (1) provides for what may be considered the normal case, where no dispute has emerged at the time when the appointment of a candidate is submitted to the Governor. But it may happen that after the date of approval a dispute arises whether the appointment was in accordance with native law and custom, and it is in that event that the words " by those entitled by native law and custom so to appoint in accordance with native law and custom " have their importance and value in this subsection. Section 2 (2) provides for the case where a dispute has emerged either before approval is given or after it is given. It is then the function of the Governor as sole Judge to decide whether the appointment has been made in accordance with native law and custom. If the Governor decides that native law and custom have not been observed, an approval already given would *eo ipso* fall. But though the non-approval disqualifies the appointee from exercising any of his local authority functions his appointment as Timi is not invalidated unless the Governor takes further action under section 4 to depose him. For the election of a Chief is valid though no approval of it is given (*Taiwo v. Sarumi*) (1913) 2 N.L.R. 103). Section 2 (2) in terms commits to the Governor exclusively the duty of judging whether an appointment has been made in accordance with native law and custom and the jurisdiction of the Courts to decide that question is absolutely and unconditionally excluded by this subsection. The requirement that there shall be due inquiry and consultation with the persons concerned in the selection is not a condition precedent to the Governor's jurisdiction as sole Judge or to the exclusion of the Courts' jurisdiction, but it is a condition of the Governor's valid exercise of his function of sole Judge. If he comes to a decision without having made due inquiry or without having consulted with the persons concerned in the selection there can be no doubt that in an appropriate action it would be competent for the Courts to set his decision aside. But in no circumstances can the Courts assume to themselves jurisdiction to decide that an appointment has or has not been made in accordance with native law or custom, and an action framed as this action is framed in order to submit that question to the Courts' decision is incompetent.

It is manifest that the Ordinance, and particularly the amendment made in 1945, are designed to ensure the observance of native law and custom in the appointment and deposition of Chiefs, and it is of the highest importance for the welfare and contentment of the native population that the Governor should strictly adhere to the requirements attaching to the exercise of his exclusive jurisdiction. The subsection imposes two requirements, due inquiry and consultation. Due inquiry is not necessarily public inquiry, but it does imply that the parties to the dispute should be given an opportunity of being heard by the Governor as Judge between them, and therefore that the date on which the inquiry is to take place should be intimated to them and that they should be invited to attend and state their case. Without that the substantial requirements of justice would not be fulfilled. (*Board of Education v. Rice* [1911] A.C. 179, Lord Loreburn L.C., p. 182; *Local Government Board v. Arlidge* [1915] A.C. 120; 111 L.T. 905; 84 L.J.K.B. 72; 79 J.P. 97; 30 T.L.R. 672, Lord Haldane L.C., p. 132; *Errington v. Minister of Health* [1935] 1 K.B. 249, Roche L.J., p. 280.) In intimating a decision under section 2 (2) it is important also that the Governor should unambiguously declare that the appointment has (or had not) been made in accordance with native law and custom. The

Ordinance does not in terms impose this form in giving a decision, but the proper performance of the Governor's judicial duty requires that there should be in a matter of such importance to the native population a clear public intimation that the judicial duty expressly laid on the Governor has been exactly fulfilled. The Resident in this case in his intimation of approval declared that he was satisfied that by native law and custom the second respondent was eligible for the office of Timi of Ede. But the dispute between the parties had covered a far wider area than that, and there was a pointed absence of a declaration that on the other matters in dispute the Resident was satisfied that native law and custom had been observed.

Counsel for the first respondent submitted that the letter of the 7th December, 1946, intimated a decision given not under section 2 (2) but under section 2 (1), and before the Resident became aware of the existence of a dispute. This submission is in their Lordships' opinion unmaintainable. The Resident was fully aware that there was a dispute for he had been present at meetings when the Olubadan-in-Council had discussed the points in issue and in his evidence he did not attempt to make the case that his Counsel tried to make for him. His position was that an inquiry had been held on the 19th July, 1947. On that date there took place one of the meetings of the Olubadan-in-Council at which the dispute was discussed in the Resident's presence. But the Resident held no inquiry on that date. It was not till five months later that the second respondent's name was submitted for approval. It was then that an inquiry by the Resident should have been held, and admittedly there was none.

Their Lordships might accordingly have had little difficulty in finding that the requirements of the Ordinance had not been fulfilled. But whether they were fulfilled or not the Courts have no jurisdiction to grant the only relief sought in this action. There may be cases in which this Board, finding itself unable to grant the specific relief claimed, would yet be disposed to grant some other relief if equity and justice warranted it. But the appellant ought to have appreciated the weakness of his case at latest by the date of the first judgment of the Court of Appeal and he should then have reframed his action by amendment, or abandoned it and brought another action in competent form. He did neither and when the case came before the Supreme Court on return from the Court of Appeal his Counsel insisted that the Court should entertain and decide the question whether native law and custom had been violated. He has never deviated from that position till the last stages of the hearing of this appeal, and it would now be unfair to his opponents to allow him to change his ground or to grant him a relief which he has till this last moment never sought.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. Each party will bear his own costs of the appeal.

Appeal dismissed.

YESUFU ABIODUN, CHIEF ONIRU APPELLANT
AND
THE CHIEF SECRETARY TO THE GOVERNMENT RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 12 W.A.C.A. 530

Compulsory Acquisition of land—Assessment of compensation.

On a claim for compensation for land acquired by the Government of Nigeria under the Public Lands Acquisition Ordinance, the trial Judge awarded a total sum of £52,505 19s. 4d. The West African Court of Appeal reduced this figure to £30,656.

Held:—That, while the West African Court of Appeal erred on the side of generosity to the appellant, there being no cross-appeal by the respondent, the figure arrived at by the West African Court of Appeal should be upheld.

LORD ASQUITH OF BISHOPSTONE. This is an appeal from a judgment of the 22nd November, 1949, of the West African Court of Appeal, which varied a judgment of the 28th February, 1949, of the Supreme Court of Nigeria. The appellant, Chief Oniru, had certain of his lands compulsorily acquired by the respondent representing the Government of Nigeria; and as the result of proceedings taken by the latter in the Supreme Court, was awarded a certain sum by the trial Judge as compensation under the statutory provisions agreed to be applicable in such a case. On appeal by the present respondent the West African Court of Appeal varied the judgment of the Supreme Court by reducing the award of compensation made by that Court. The appellant appeals from the decision of the West African Court of Appeal and prays that the judgment of the Supreme Court should be restored.

The relevant provisions of the Public Lands Acquisition Ordinance of Nigeria (c. 88) and of the Public Lands Acquisition Amendment Ordinance of Nigeria (No. 6 of 1945) are as follows:

“ PUBLIC LANDS ACQUISITION ORDINANCE (c. 88)

[Laws of Nigeria 1923, Vol. 1]

10. If for six weeks after the service and publication as aforesaid of such notice no claim shall be lodged with the Secretary in respect of such lands, or if the person who may have lodged any claim and the Governor shall not agree as to the amount of the compensation to be paid for the estate or interest in such lands belonging to such person, or which he is by this Ordinance enabled to sell and convey, or if such person has not given satisfactory evidence in support of his claim or if separate and conflicting claims are made in respect of the same lands, the amount of compensation due, if any, and every such case of disputed interest or title shall be settled by the Supreme Court, which shall have jurisdiction to hear and determine in all cases mentioned in this section upon a summons taken out by the Lieutenant-Governor or any person holding or claiming any estate or interest in any lands named in any notice aforesaid, or enabled or claiming to be enabled by this Ordinance to sell and convey the same.

* * *

15. In estimating the compensation to be given for any lands or any estate or interest therein or for any mesne profits thereof, the Supreme Court shall—

- (a) assess the same according to what it shall find to have been the value of such lands, estate or interest or profits at the time when the Lieutenant-Governor served notices to acquire the same, and without regard to any improvements or works made or constructed thereafter on the said lands.”

* * *

- “ (c) have regard not only to the value of the lands required for public purposes but also to the damage, if any, to be sustained

by the owner by reason of the severance of such lands from other lands belonging to such owner or other injurious [*sic*] affecting of such other lands by the exercise of the powers conferred by this Ordinance.”

“ PUBLIC LANDS ACQUISITION (AMENDMENT) ORDINANCE
(No. 6 of 1945)

5. Section 15 of the principal Ordinance is hereby repealed and the following substituted therefor:

“ 15. In estimating the compensation to be given for any lands or any estate or interest therein or for any mesne profits thereof the Court shall act on the following principles:

- (a) no allowance shall be made on account of the acquisition being compulsory;
- (b) the value of the land, estate, interest or profits shall, subject as hereinafter provided be taken to be the amount which such lands, estate, interest or profits if sold in the open market by a willing seller might be expected to realise;

* * *

- (d) the Court may have regard not only to the value of the lands, estate, interest or profits to be acquired but also to the damage, if any, to be sustained by the owner by reason of the severance of such lands from other lands belonging to such owner or other injurious circumstances affecting such other lands by such acquisition;

Provided that the Court in estimating such compensation shall assess the same according to what it finds to have been the value of such lands, estate, interest or profits at the time when notice of intention to acquire was served and without regard to any improvements or works made or constructed or to be made or constructed thereafter on such lands:”

Though, as will be seen from the dates which follow, the Principal Ordinance (c. 88) was in force at what was admittedly the material time, viz., 22nd May, 1944, when notice of intention to acquire was served on the appellant—yet their Lordships were informed during the hearing that the Amendment Ordinance of 1945 had by consent been treated as governing the assessment of compensation. The differences between the languages of these two enactments are for some purposes important. For the present purpose they are, in their Lordships' view, immaterial and no argument was founded on them by either party.

The lands compulsorily acquired in this case consisted of the greater part of a swampy peninsula in the environs of Lagos. Most of the region is actual swamp, or land submerged by the sea water at “ high water ordinary spring tides.” The patches of dry land and the morass above which they rise, often to the extent of a few feet only, are shown on the principal plan, collectively, as an area verged in pink. This area consists in all (omitting fractions) of 1,074 acres, of which 684 acres are swamp and 390 acres dry land. The dry areas are classified on the plan under five categories: A1, A2, B, C and D; C being sub-divided into ten parts and D into six. In the first instance, the expropriated appellant claimed an equal rate per acre for all these areas. But this contention was plainly unmaintainable, and the descent in the alphabetical scale from land classified as “ A ” to land classified as

“ D ” admittedly corresponded with a progressive diminution in eligibility for purposes of development, or (what amounts for valuation purposes to much the same thing) in the eligibility of those purposes themselves. High in the scale of such purposes came the building of bungalows, and similar dwellings. Lands A1, A2 and B were thought suitable for this purpose, and according to some of the evidence, C10. At the lower end of the scale lay a number of uninhabited knolls, rising barely above swamp or sea levels, but such that there was a speculative chance of establishing fishing villages on them. Lands D1–6 fall mainly if not wholly in this category. Many of lands “ C,” intermediate between these extremes, are the sites of existing fishing villages. The above summary deliberately eschews details immaterial to the real issues raised.

The notice of acquisition, dated the 13th May, 1944, was published in the *Nigerian Gazette* on the 18th and served on the 22nd of that month. *Ex concessis*, this last date is the material one for the assessment of compensation. On the 8th September 1947, the respondent issued a writ of summons in the Supreme Court of Nigeria for such assessment, the initiative in this matter resting with the acquiring authority. In this document it was stated that the Governor was prepared to pay £23,503 for the land. On the 15th October, 1947, the appellant filed an answer rejecting this offer and claiming a flat rate of 1s. 6d. per square yard—*viz.*, £363 per acre—for the area so far as it consisted of dry land, and £10 an acre so far as it consisted of swamp. The total claim under these heads amounted to £147,000, plus £6,500 for loss of income on mangrove trees for five years ahead.

The learned trial Judge rejected this last claim—for £6,500—on the ground that it was wholly unproved. In so doing he was upheld by the Court of Appeal for Western Africa. On the first two items he awarded £52,505 19s. 4d. in all, on the following basis:

		£	s.	d.
Area A1	112.5 acres at £153 17s. 0d. per acre	17,308	2	6
Area A2	7.7 acres at £153 17s. 0d. „	1,184	12	10
Area B	115.7 acres at £121 0s. 0d. „	13,884	0	0
Area C1–C10	123.9 acres at £121 0s. 0d. „	14,868	0	0
Area D1–D6	30.4 acres at £60 10s. 0d. „	1,839	4	0
Area Swamp	684.4 acres at £5 0s. 0d. „	3,442	0	0
	Total	<u>52,505</u>	<u>19</u>	<u>4</u>

Their Lordships will examine the computation on this basis hereinafter. The respondent appealed to the Court of Appeal which reduced the award from £52,505 to £30,656. For the time being their Lordships also defer consideration of the manner in which this total is built up. It is against this reduction that the appellant now appeals, asking that the trial Judge’s figure may be restored.

The main evidence on which both counts proceeded was evidence of the price which lands more or less comparable in quality and situation, and sold at roughly the same time, fetched in the market. The most full and detailed evidence under this head was given by a Mr. W. B. Hewett, Acting Commissioner of Lands at Lagos. Mr. Hewett submitted three tables (Record, pp. 77, 78) relating to sales of lands in some degree comparable to the material land. The first table covered sixteen sales before 1943 (at an average price of £106 10s. 0d.); the third, four sales in the year 1944, at an average price of £153 17s. 0d. All of these sales, except one, were of land in “ Chief Oniru’s Layout, Victoria Beach ” an area adjacent to lands A1 and

hatched in yellow in the main plan. The only "comparable" plot not in this area was an indentation in the western boundary of A1. Mr. Hewett, though in one passage in his evidence he purports to have taken into account an average of sales over ten years, appears (p. 71) in the end to have based his average on the (sixteen) sales of 1943 and 1944; this average was £115 5s. 0d. and he seems to have computed the value of the material land or the price which the Government would have offered for it, at a figure which if the land had been "ripe" for development would have been £120 an acre, and then to have made deductions from this gross figure in respect of (a) "deferment" (measured by the degree of "unripeness" of the land and the probable expense of maturing it); and (b) "road reservation." The result of this calculation was to yield a net figure for land A1 of £80 per acre, and for land A2 of slightly more, *viz.*, £90 per acre. He valued B, C and D in the main by applying percentages to the value of A1; *e.g.*, area B was valued at half the value per acre of A1, and so on. The two courts in West Africa both disagreed with him in so far as he differentiated between the value of A1 and A2; they thought no appreciable difference existed between the value of these areas; but they embraced his method in so far as it involved reckoning the values of B, C and D by way of percentages of that of land "A" and adopted the same percentages. As has been indicated, the total at which Mr. Hewett arrived for the 390 acres of dry land was £20,189, and for the 684 acres of swamp (at £5 an acre) £3,422; making a total compensation of £23,611. There was, in their Lordships' opinion, nothing appreciable in the other evidence to discredit or displace the evidence of Mr. Hewett, which in substance held the field.

In the Court of first instance Mr. Justice Jibowu did not follow Mr. Hewett's method of basing the average price of comparable land on the sixteen sales of 1943 and 1944, but based it solely on the four sales of 1944, two in May and two in June of that year. The two sales occurring in May (to which the Judge attached special significance because notice to acquire the material land was served in that month) were attended by abnormal circumstances, which tended to divest them of a representative character. For instance, both of the lots sold in May abutted directly on the Victoria Beach Road, the main thoroughfare leading to Lagos; and had, in addition, some other exceptional advantages in respect of their site including proximity to the sea and its breezes. Their Lordships share with the West African Court of Appeal the view that no informative or helpful average can be based on so narrow a range of transactions, including as it does amongst its four items two abnormal peak figures. A wider range, if resorted to, would have yielded very different results. Nor would the learned trial Judge appear to have been justified in his assumption that the "value of the land near Lagos had been mounting steadily for some years back." As the Appellate Court point out average prices for such land for the four years preceding the material transaction were £103, £123, £110 and £106 per acre. This is not evidence of a "steady rise." However, applying his own basis the learned Judge arrived at an average of £153 17s. 0d. for areas "A1" and "A2"; and at certain values for "B," "C" and "D" by applying percentages to the value of "A."

Many familiar authorities were cited by Counsel for the appellant commending caution and reserve on the part of any Appellate Court dealing with the findings of fact of a Judge of first instance who has seen and heard the witnesses. No one questions these authorities, but nothing in the proceedings before the trial Judge in the present case turned on the demeanour or veracity of the principal witnesses, and their Lordships

consider that the Court of Appeal for Western Africa was fully justified in drawing from facts in the main uncontroversial inferences differing from those drawn from the same facts by the trial Judge. The Court of Appeal as has been seen arrived at the total for compensation of £30,656. This total was built up as follows:

		£	s.	d.
Area A1	112.5 acres at £120 per acre	13,500	0	0
Area A2	7.7 acres at £120 „	924	0	0
Area B	115.7 acres at £60 „	6,942	0	0
Area C	123.9 acres at £40 „	4,956	0	0
Area D	30.4 acres at £30 „	912	0	0
Area Swamp	684.4 acres at £5 „	3,422	0	0

These figures are arrived at by accepting Mr. Hewett's gross figures without any deduction, such as he made, to allow for the developmental immaturity of the land or for road reservations. In these respects their Lordships are of opinion that the Court of Appeal erred on the side of generosity to the expropriated appellant. However, there is no cross-appeal by the respondent. In these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal and to uphold the figure arrived at by the West African Court of Appeal. The appellant must pay the costs of the appeal to this Board.

Appeal dismissed.

CHIEF KOFI OWUSU AND ANOTHER . . . APPELLANTS
 AND
 CHIEF KWAME DAPAAH . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1952 July 3 Lords Normand, Tucker, Asquith of Bishopstone
and Cohen

Boundary—Effect and validity of executive decisions under Boundary Land, Tribute and Fishery Disputes (Executive Decisions Validation) Ordinance 1929.

An “ executive decision ” given or confirmed by the Chief Commissioner (and entered in the “ Boundary Book ”) provided it is not ambiguous or hard of interpretation, is in respect of title to lands, conclusive. If it is hard of interpretation, then it may be construed by the Chief Commissioner or the Supreme Court.

LORD ASQUITH OF BISHOPSTONE. This is an appeal from a judgment of the West African Court of Appeal dated 21st February, 1949. The second appellant can for the purposes of the present appeal be ignored. He has an unappealed decision in his favour and seems to have been joined as appellant by an oversight. The effective parties to the appeal to this Board are the first appellant and the respondent. Both of these are chieftains in Ashanti. The first appellant—Chief Owusu—occupies the “ Toase ” Stool, and the respondent the “ Aferi ” Stool in that country; and the issue in substance is, whether certain lands, to be specified hereafter, belong to the

one Stool or the other. Before coming within their Lordships' purview the litigation followed a somewhat tortuous course and it may be convenient, by way of proem, to indicate its successive phases in chronological order.

The plaintiff was throughout Kwame Dapaah, the present respondent. When the litigation started the second appellant, Yaw Tarku, was the sole defendant. But the first appellant, Kofi Owusu, was then at his own instance, joined, and became the first defendant. The claim against Yaw Tarku put forward in a Writ of Summons, dated 28th January, 1941, had been for £240 claimed as arrears of land and cocoa tribute for 24 years. This claim was in the first instance put forward in the Supreme Court of the Gold Coast, Ashanti (Divisional Court, Kumasi). Yaw Tarku by affidavit traversed the claim. Then the first appellant—Owusu—filed an affidavit deposing that Yaw Tarku was one of his subjects and that the lands occupied by Yaw Tarku were the lands of his—Owusu's Stool—the Toase Stool. He claimed to be made co-defendant.

By this time it had become obvious that the case raised issues of title to land involving questions of native tenure and custom: and Doorly J. of the Supreme Court, acting in conformity with decisions binding on him, on 5th May, 1941, renounced seisin of the case and referred it to the "Asantehene's Divisional Court 'B'"—a native court specially charged with the decision of such matters, as a Court of First Instance.

The title to the lands occupied by Yaw Tarku, upon which his liability to pay tribute (or his freedom from that liability) depended, had been originally the sole issue. But after Kofi Owusu intervened as a co-defendant with Yaw, and the proceedings were remitted to the Native Court "B," the original issues were greatly widened when they came to be framed before that Court.

Dapaah, the plaintiff, in claiming that Yaw was his subject and liable therefore for tribute or mesne profits payable to him, did not limit his claims to the land farmed by Yaw—a small plot indicated on the plan (at square 1.6) as "Yaw Tarku village": but in effect asked for a declaration that a very much larger area (including that village) belonged to the Aferi Stool. The extent of the claim is defined in the first of the three issues formulated by the Native Divisional Court "B" as being for its decision, in the following language:

"The plaintiff claims:

1. As against both defendants that he as representing the Aferi Stool is the owner of all that piece or parcel of land situate lying and being at Nkakuom and bounded on the north by Nerebehin and Akrofuomhene's lands on the south by Esuowinsu and Moduasu stream on the east by Aboabo stream and Wherekesiom and on the west by Kobri stream known as Kobri.

2. As against the 2nd defendant damages or mesne profits for the use of portion of the said plaintiff's land for the last 24 years for the cultivation of cocoa, and

3. For an injunction to restrain the defendants from committing any acts of trespass on or entering upon the said land in the absence of payment of recognised native customary tribute by the defendants to the plaintiff for their occupation and use of the said plaintiff's Stool land."

The Native Court—Divisional Court "B"—took a large volume of evidence as well as a "view," relating to matters of pure fact. (The order

for the "view" is at p. 36, line 40 of the Record and the plan of the area involved is Exh. "L".) But Court "B" ended by basing its decision on a point of law. To explain how this point of law arose, it is necessary (a) to record certain "executive decisions" (a term to be elucidated) made in 1917; (b) to call attention to the provisions of an Ordinance of 30th April, 1929, giving conclusive effect and validity to such past executive decisions under certain conditions [1936 Revision: Boundary Land, Tribute and Fishery Disputes (Executive Decisions Validation) (Ashanti)];

It may be convenient to deal with the second topic first. The long title of this enactment is "An Ordinance to validate and invest with legal force and effect certain executive decisions given, confirmed, or approved by the Chief Commissioner, with respect to certain disputes and matters relating to boundaries, land, tribute and fishery rights." The material provisions are the following:

"2. In this Ordinance the expression 'Boundary Book' means and refers to any volume containing particulars of executive decisions made with respect to disputes and matters relating to boundaries, land, tribute and fishery rights, being a volume certified by the Chief Commissioner to be a 'Boundary Book' for the purposes of this Ordinance.

3. (1) Any executive decision in a dispute or matter relating to the ownership or boundaries of any land or to tribute or fishery rights in Ashanti given, confirmed, or approved by the Chief Commissioner prior to the commencement of this Ordinance, and officially recorded in a 'Boundary Book' is hereby validated and invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved.

3. (3) If in any case relating to the boundary of any land any doubt or question shall arise as to the correct interpretation or application of any such executive decision as aforesaid, the Court (which expression does not include a Native Court) may cause the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable. Where a boundary is, either as of first instance or on appeal, so fixed by the Supreme Court, no appeal shall lie from the Court's judgment with respect to such fixing. (Amended by 14 of 1935, s. 4.)

4. If any person shall seek to assert or maintain any right in pursuance of any such aforementioned executive decision the production by such person of a copy of the appropriate entry in the 'Boundary Book' purporting to be signed and certified by the officer of the Government for the time being having the custody and possession of the 'Boundary Book' as being a true copy of such entry in the 'Boundary Book' shall be sufficient and conclusive evidence in all Courts and Native Tribunals that the executive decision was in fact given, confirmed, or approved by the Chief Commissioner."

It will therefore be apparent that as a matter of law an "executive decision" given or confirmed by the Chief Commissioner (and entered in the "Boundary Book"), provided it is not ambiguous or hard of interpretation, is in respect of title to lands, conclusive. If it is hard of interpretation, then it may be construed by the Chief Commissioner or the Supreme Court.

Reverting now to (a) above, their Lordships note that there had been certain "executive decisions" in 1917 including one by a District Commissioner, Mr. Wheatley: this last a decision which might or might not have been given in relation to the lands now in issue, and which might or might not have been "confirmed" by the Chief Commissioner—at that time—Sir Francis Fuller. These decisions (and one of Sir J. Maxwell, Sir F. Fuller's successor, made in September, 1928) are fully set out below. Divisional Court "B," basing itself solely on the construction which it placed on the decisions of Mr. Wheatley and Sir F. Fuller, held (a) that Mr. Wheatley had on 17th January, 1917, adjudged that the land now in dispute or land including it, belonged to the Stool of Aferi, *viz.* to Dapaah, the present plaintiff-respondent; (b) that the Chief Commissioner, Sir F. Fuller, on appeal had reversed this decision and consequently decided that the land in dispute (whatever it may have been) belonged to the Toase Stool, *viz.* to Owusu. (The language of Court "B" at some points suggests that it decided the case on *res judicata*, but it is also consistent with the conclusion that the Court based itself on the Ordinance and the validation it confers, and it is difficult to suppose that it did not proceed on this basis, whether it misconstrued Sir F. Fuller's decision or not.)

Propositions (a) and (b) above both appear to their Lordships assailable: and both were in fact challenged on appeal from Divisional Court "B" to Divisional Court "A," also a Native Court. In particular (1) it is not clear that the award of Mr. Wheatley, the District Commissioner, decided anything in reference to the particular lands now in question; (2) it was not clear that Sir F. Fuller's decision on appeal reversed the decision of Mr. Wheatley. On the contrary, it would seem plainly to have confirmed that decision in relation to the lands covered by it. (3) So far as section 3 of the Ordinance is concerned, there is no evidence that Sir F. Fuller's decision was ever recorded in the "Boundary Book", and unless it was, the terms of the Ordinance (section 3 (1)) do not make it conclusive.

However, as will appear, Sir J. Maxwell, a successor of Sir F. Fuller as Chief Commissioner, did make an entry in the "Boundary Book" which confirmed, as on 8th September, 1938, Mr. Wheatley's award. It is a reasonable conjecture that his motive was (a) to secure that a Chief Commissioner's decision should figure in the "Boundary Book"; and (b) to secure that it should be in unambiguous terms.

It is necessary at this point to set out:

- (1) the executive decision of Mr. Wheatley;
- (2) the decision of Sir F. Fuller;
- (3) Sir J. Maxwell's decision of September, 1928.

" (1)

Chief Kwame Anapah	}	Plaintiff claims £100 damages for trespass, receiving tribute and the stirring of the inhabitants of Inkwa Krome against Plaintiff.
Vs. Chief Akwesi Jewu		

* * * * *

Finding:

That the village of Inkwa Krom belongs to the Stool of Aferi and that his boundary with the Nkawe Panin lands shall be as follows:

From the Essuawinsu to the source of the Moduasu thence to its junction with the Kobiri thence the Kobiri.

(Sgd.) L. H. WHEATLEY,
District Commissioner.

17th January, 1917.

(Vide Palaver Book 71.)

(2)

JUDGMENT OF CHIEF COMMISSIONER

Case Appealed to the Chief Commissioner by Chief Akwesi Jewu of
Tuasie. M.P. 50/1917.

Final Decision of C.C.A.:

“ Plaintiff has no right to the Nkawe Penin lands this case is
therefore dismissed.”

(Sgd.) F.C. FULLER,
C.C.A.
17.4.1917.

(3)

17th January, 1917.

I hereby certify that the above is a copy of Executive Decision made
by L. H. Wheatley District Commissioner on the 17th day of January,
1917, and approved by me on the 6th day of September, 1928.

Dated at Kumasi this 22nd day of October, 1929.

(Sgd.) JOHN MAXWELL,
Chief Commissioner Ashanti.”

(1) Mr. Wheatley's decision, while it purports to decide a question
between the present plaintiff Dapaah (= “Anapah”) the holder of the
Aferi Stool, and one Jewu the holder of the Toase Stool (1st defendant's
predecessor in title) only plainly decides what is the southern boundary as
between the Aferi Stool lands and the Panin lands. This frontier is indicated
in yellow on the plan. That decision is consistent with the boundary between
the Aferi Stool lands and the Toase Stool lands being anywhere. The award
decides nothing as to the northern and eastern boundary to the Aferi's Stool
lands; it decides nothing as to the depth to which the hinterland, north and
east of the yellow line which marks the southern frontier of the Aferi lands,
belongs to the Aferi as opposed to the Toase Stool. The award does indeed
say that the village of “Inkwa Krom” belongs to the Stool of Aferi and
the map shows a village at “Ahinkwakrom” (a place allocated by every
court to the first defendant): but there has been much dispute as to whether
this means what it appears to say—or means Inka Kuom or Nkakuom and,
if so, what precisely is covered by the latter term.

(2) Whatever Mr. Wheatley's decision precisely means it seems clear (a)
that it was *not* reversed, as Court “B” thought, by the Chief
Commissioner, Sir F. Fuller, (b) that it was confirmed by Sir J. Maxwell,
whose confirmation of it was entered, as Sir F. Fuller's was not, in the
“Boundary Book”, (a) is clear *inter alia* from the award of costs to the
plaintiff. It seems plain that for “plaintiff” one must read “appellant”
and for “case”, “appeal”.

Only so is it possible to explain why Dapaah—the plaintiff before Mr.
Wheatley and the respondent in the appeal to Sir F. Fuller, was granted his
costs of the appeal. Their Lordships are satisfied that on this particular
point amongst others Divisional Court “B” was wrong and Divisional
Court “A” was right.

The proceedings on appeal from Court “B” to Court “A” (the

hearing of which began on 1st April, 1943) may be summarised as follows: Court "A" heard a certain amount of additional oral evidence, which is of some importance. This is at pp. 44 and 45 of the Record. It seems to have been common ground between the parties that the so-called "Nkakuom" lands belonged to the Stool of Aferi and the so-called "Nburan" lands, to the Stool of Toase: the problem for the court was to discover what land was covered by each of these designations: either on the evidence, or on the basis of an "executive decision" made conclusively by the Ordinance of 1929: if such a decision could be established.

The gist of Court "A"'s decision is as follows:—First, the Court pointed out that Court "B"'s judgment had been based on the misconception that Sir F. Fuller's decision in 1917 reversed that of Mr. Wheatley, whereas in truth it affirmed that decision. Their Lordships are in entire agreement with Court "A" on this point. It is obvious, as stated earlier, that by the "plaintiff" the Chief Commissioner meant the appellant (defendant) before him, and that by "Case" he meant appeal, and costs were awarded on this basis (£13 14s. 0d.—Exh. "N"). Secondly Court "A" dismissed as definitely untrue certain evidence given by the plaintiff Dapaah in the proceedings before them, which evidence alleged a grant to his grandfather, of the land in dispute by Asantehene Otumfuo Oti Akenten. On this point again their Lordships concur with Court "A". The chief in question lived too long ago to have made such a grant to the plaintiff's grandfather.

Thirdly Court "A" holds that Mr. Wheatley's award which it rightly, but contrary to Court "B." held to have been affirmed by Sir F. Fuller, was in substance an award as to the frontier between Aferi lands and Panin lands, and therefore irrelevant to the frontier between Aferi lands and Toase lands, or Nkakuom lands and Nkuran lands.

The Court set aside the decision of Court "B." It defined the boundary between the Nkakuom lands and the Nkuran lands by reference to a line indicated in green on the main plan (Exh. "L"). This line runs more or less north to south from Obotanso through Obuoho to Essuowinso, everything to the left or west of this line being adjudged to be Nkakuom lands and to belong to the Stool of Aferi, and everything to the right or east of it being adjudged to be Nkuran lands and to belong to the Stool of Toase: until the river is reached which divides these last lands on the east from those of the Odikro of Wiredu.

From this decision it would seem necessarily to follow that the cottage or farm at Yaw Tarku of the second (originally the only) defendant Yaw, was adjudged to belong to the Toase Stool of Owusu, since it is situate to the east of the green line; and Court "A" expressly so decided in the last two paragraphs of its judgment.

The plaintiff appealed from this decision of Court "A" to the Chief Commissioner's Court, as he was entitled to do.

The only relevant ground of appeal, as the Chief Commissioner in their Lordships' view rightly held, was ground "B." which reads as follows:

"Whether the new boundary made by 'A1' Court does not destroy or interfere with the old boundary demarcation made or laid down by Mr. Wheatley in his judgment? And if it does not, was the 'A1' Court justified upon the evidence adduced to lay" (= fix) "the boundary so as to give a portion of the appellant's land to the first respondent?"

After argument heard the Chief Commissioner in giving judgment

answered the first of these questions in the negative, and the second in the affirmative. That was a victory so far as it went for the first defendant respondent in those proceedings, namely Owusu.

From this judgment the plaintiff appealed to the Court of Appeal for Western Africa.

Their Lordships have had occasion to refer above to the principal plan of the lands in dispute (Exh. " L "). This was prepared by a surveyor, Mr. Newman, on 18th June, 1947, and by him tendered in evidence in August, 1947, before Divisional Court " A. " The plan bears now upon it the green line running north and south which that Court found to be the boundary between the lands of the Aferi and Toase Stools. The area allocated to the Toase Stool is an oval shaped strip on the right of the plan bounded on the left or west by the green line, and on the right or east by a river which bears at least four names, but will be referred to as the Asimbopan. In the " legend " inserted in the left hand corner of this plan appears *inter alia* the statement that the blue line which appears on the plan is the boundary between Nkakuom and Nkuran lands as pointed out by Owusu to the maker of the plan. This blue line bisects from west to east the waist of the oval area awarded to the Toase Stool and divides it roughly in half. This entry in the " legend " was relied on strongly as an admission by Owusu that within the lands allotted by Court " A " to the Toase Stool the lands north of the blue line were wrongly so allotted being in fact Nkakuom and Aferi land, and that this conical area should be subtracted from the Toase lands. The proceedings in the West African Court of Appeal are both as regards notes of the argument, and notes of the judgment, reported with extreme concision. Indeed no reasons are given for the judgment. The ratio on which the West African Court of Appeal proceeded must therefore remain a matter of conjecture. Although in his grounds of appeal to that Court Dapaah seems to have relied solely on the supposed binding character of Mr. Wheatley's award and the supposed inconsistency therewith of Divisional Court " A " decision, yet his counsel at the hearing of the appeal seems to have relied on the " blue line " argument, and that may well have determined or influenced the conclusion: which was that the area north of that line, previously included in the lands awarded to Owusu (Toase), was now held to belong to Dapaah, as representing the Aferi Stool. Dapaah, through his counsel, had offered a compromise in terms of his having the area north of that line. Owusu had refused it. The judgment affirmed the position embodied in this rejected offer. The judgment runs as follows:

" Appeal allowed. Judgment of Court ' A ' varied by deleting the words ' *and from that point to Abutanso* ' and substituting therefor the words ' *and thence from Obuohu eastward along the Blue Line on Plan Exhibit " L " to the Stream Asubompan alias Anyankama and thence northward along the said Stream to Obotanso* ' and deleting the words ' *the latter having his easterly boundary with the Odekro of Wiredu.* ' The Judgment of Court ' A ' to be read throughout in the light of this variation.

Judgment of Chief Commissioner of Ashanti's Court to be set aside with costs to appellant to be taxed therein.

Costs of this Appeal to appellant assessed at £53 16s. 6d."

Their Lordships while regretting that the West African Court of Appeal did not give reasons for their judgment, could not accede to the contention

that this mere omission by the court, without more, was a sufficient ground for reversing its decision.

The position however in their view was this:

- (1) Divisional Court " B " arrived at a decision based entirely on a point of law which it decided erroneously. Most (though not all) of the evidence was given before that court; which however did not decide the issue as one of fact on the evidence.
- (2) Divisional Court " A," rightly in their Lordships' view, reversed Court " B " on the legal point by holding that there was no executive decision—neither that of Mr. Wheatley, nor that of Sir F. Fuller, nor that of Sir J. Maxwell—which concluded, or indeed was relevant to, the title to the particular lands now in dispute; and proceeded to determine that title on the evidence *viz.*:
 - (i) evidence given before Court " B "
 - (ii) evidence given before itself.

The result was the " green line " demarcation.

It is impossible in their Lordships' view to say that it was not open to Court " A " on the evidence to find this boundary proved or that such a finding was unreasonable.

- (3) The Chief Commissioner on appeal in effect upheld Divisional Court " A " on both points: at least he held, as Court " A " had, that Mr. Wheatley's award did not conclude the question or fetter Court " A's " liberty to decide it on the evidence, and that on the evidence Court " A " was entitled to decide as it did.

Thus when the matter came to the West African Court of Appeal there were concurrent conclusions in the two preceding courts, and so far as these were conclusions of fact there was ample evidence to support them. In these circumstances their Lordships are of opinion that the West African Court of Appeal should either have accepted these findings, or explained its reasons for rejecting them, and they do not consider that the unexplained variation imposed by that Court on the boundary found by Divisional Court " A " and the Chief Commissioner, can be supported. They would therefore allow the appeal and restore the judgments of the Chief Commissioner and Court " A."

In conclusion their Lordships now wish to deal with two arguments:

- (a) it is objected that the green line frontier cannot reflect faithfully the distribution of the lands in point of title as between the rival Stools because it is a straight line, or to be exact consists of two straight lines enclosing a very obtuse angle at Obuoho. This objection seems baseless. An ideally exact demarcation would have no doubt to be life-size, and to show the ownership of every blade of grass. To ask a court to define a boundary in this way is to ask it to do the impossible. The court is bound in such a case to " paint with a broad brush," and cannot be blamed if it has.
- (b) it was also argued that the alleged admission on the part of Owusu to Newman, the framer of the survey plan Exh. " L ", embodied in the " legend " to that plan, to the effect that the blue line on that plan was the frontier between Nkakuom and Nkuran lands, ought to be treated as conclusive. It was in fact a piece of evidence to be considered and weighed along with others, by the relevant tribunals of fact.

There was nothing conclusive about it, nor about the plan itself, which is packed with inconsistencies. It is agreed on all sides that Obuoho marked the material frontier, *videlicet* the frontier between Nkakuom and Nkuran lands (Aferi lands and Toase lands). There is much controversy as to whether the dividing line which runs through Obuoho, runs north and south (as suggested by the green line), or west and east, as suggested by the blue line, relied on by the respondent. It is said that this west and east line was admitted by Owusu to Newman, the map-maker: if so, how comes it that this map-maker placed large areas of what is described as Nkuran land in the disputed triangle north of the blue line which the West African Court of Appeal has allotted to Dapaah? The fact is that statements of the witnesses cannot be reconciled with each other, nor those of individual witnesses with other statements of the same witnesses. It would be easy to multiply examples of such contradictions.

This is the exact situation in which any tribunal which has seen and heard the witnesses—and Court “A” saw and heard some of the most important—and besides all this knows the topography and the customs of the country, has an incalculable advantage on any Appellate Court sitting perhaps 1,000 miles away and denuded of these advantages, which are often all the greater, the more confused and self-contradictory is the evidence in cold print.

Their Lordships in these circumstances are of opinion that the conclusions of Divisional Court “A” and of the Chief Commissioner confirming those conclusions should not have been disturbed, and will humbly advise Her Majesty that they should be affirmed, that the conclusions of the West African Court of Appeal should be disaffirmed and the appeal allowed. The respondent must pay the costs of this appeal and of the appeal to the West African Court of Appeal.

KWESI ENIMIL AND OTHERS APPELLANTS
AND
KWESI TUAKYI AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 13 W.A.C.A. 10

1952 July 15

Lords Porter, Tucker and Cohen

Effect on claim to possession or occupation of land of a Judgment against claimant that he is liable to pay tribute to one of those against whom he claims such possession or occupation—Term “owner” frequently not used in its strict sense in West Africa.

The facts are fully set out in the judgment.

Held: A judgment against a claimant to possession or occupation of land that he is liable to pay tribute in respect of such land is no bar to a claim to possession or occupation.

Held: further that the word “owner” is frequently used loosely in West Africa and is not necessarily to be construed in its strict legal sense.

Cases referred to:

- (1) *Chief Kobina Angu v. Kojo Attah*, Privy Council Judgment, 23rd June, 1916.
- (2) *Amodu Tijani v. Secretary, Southern Nigeria* (1921), 2 A.C. 399 at page 404.

Appeal from the West African Court of Appeal, W.A.C.A. Civil Appeal No. 56/49.

The following judgment was delivered:

LORD COHEN. The lands which are the subject matter of this appeal from a decision of the West African Court of Appeal dated the 3rd February, 1950, are known as Bortogina lands and are situate in the Chama District of the Gold Coast Colony. They have been the subject matter of much litigation.

According to a certificate of purchase issued to one Jobson on the 22nd October, 1903, Jobson became the purchaser of the right title and interest of a number of persons in the Bortogina lands and other lands which right title and interest had been sold by order of the Supreme Court of the Gold Coast Colony dated the 10th August, 1900. Prior to the issue of this certificate Jobson commenced proceedings to establish his title to the Bortogina lands against Cudjoe Aryarpah and eleven others but on the 26th August, 1903, his action was dismissed on the ground that the endorsement on the writ of summons disclosed no cause of action against the defendants to that action and that the certificate of purchase by which Jobson sought to establish his title was not then in existence. Jobson was ordered to pay, the defendant costs amounting to £260 7s. 4d.

On the 6th November, 1903, Jobson commenced proceedings against Kwesi Pon and others claiming to eject the defendants from the Bortogina lands and other lands and claiming damages for mesne profits. Kwesi Pon was the headman or Odikro of Bortogina village and was therefore predecessor in title of the defendant Kwesi Enimil, the first defendant in the suit which is now before this Board.

The plaintiff Jobson was non-suited on the 25th November, 1903. The effect of the judgment is, in their Lordships' opinion, correctly stated by the learned Trial Judge in the present case where he said that the Court came to the conclusion in the 1903 case that the plaintiff did not know the exact situation, or area, or boundaries, of the lands to which he sought to establish his title and accordingly declined to give the plaintiff possession of the land concerned of which he could give no reliable information.

On the 10th April, 1904, Jobson mortgaged various pieces of land including Bortogina, to one Ogden as security for £100. The deed provided that the loan should be repayable on the 9th April, 1905, and contained the usual power of sale, either by auction, or otherwise, in the event of failure to pay the loan on the due date. The Bortogina land was in due course sold by public auction by the orders of the mortgagee and there is in the notes in the present suit a receipt dated the 26th October, 1906, for £144 expressed to be paid by one Kojo Attah for lands bought and sold under the said mortgage deed. In the ejectment action the defendants had recovered payment for £260 7s. 0d. against Jobson for costs and they sought to levy execution on the Bortogina lands to satisfy that judgment. Kojo Attah claimed the same lands as purchaser from Ogden with the result that interpleader proceedings were directed. Judgment in those proceedings was given on the 17th May, 1909, by Gough, J. He gave judgment for Kojo Attah with costs.

On the 4th November, 1909, Kojo Attah commenced proceedings against Kwesi Pon and others claiming possession of the Bortogina lands and £150 rent or damages for use and occupation thereof. On the 15th May, 1911, Gough, J. gave judgment in favour of Kojo Attah for possession. He based his judgment on the rights acquired by Kojo Attah as a result of his

purchase of the rights of Jobson in the sale by the mortgagee under the deed of 1904. But he refused to decide as to the extent of those rights saying "As to what those rights are I have not sufficient data to give a decision." His judgment was affirmed by the Full Court on the 30th November, 1911.

On the 29th October, 1912, a motion by Kojo Attah for a writ of possession for the Bortogina lands came before Watson J. Chief Kobina Angu, the second defendant in all the actions consolidated in the proceedings now before this Board, applied for leave and was granted permission to oppose that motion. He did so, but an order was made for the issue of the writ of possession. On the next day Chief Kobina Angu issued a writ against Kojo Attah to establish his title to tribute as against Kojo Attah in respect of the Bortogina lands. On the 30th April, 1913, Hawtayne, J. gave judgment in favour of Chief Kobina Angu. His decision was reversed by the Court of Appeal but was restored by order of this Board dated the 23rd June, 1916. It is, their Lordships think, clear from the judgment in that case that this Board held that the Bortogina lands formed part of the property of the Stool of Manso of which Chief Kobina Angu is the present chief, but that Kojo Attah had rights over the whole Bortogina lands which rendered him liable to tribute in respect thereof.

What happened subsequently to the Privy Council decision is not altogether clear. Kojo Attah died soon after the decision was given and the present respondents are his successors in title according to native law. It seems that they remained in possession of part of the Bortogina lands, but that other parts were occupied (a) by the head man of the village and the villagers of that village, and (b) by strangers let into possession by the Odikro acting on behalf of Chief of the Stool of Manso.

On the 21st November, 1946, the present respondents issued three writs:

(1) against Kwesi Enimil, headman of the Bortogina village, for himself and as representing the people of that village in which the respondents, as successors in title according to native customary law, claimed possession from the defendant of Bortogina lands at present occupied by the defendant and his people, and £300 for the use and occupation of the said lands;

(2) against Kwodwo Mankradu claiming £200 by way of mesne profits for the use and occupation of portions of the Bortogina lands;

(3) against Busumafi claiming £150 by way of mesne profits for the use and occupation of other portions of Bortogina lands.

According to the evidence given in the proceedings Mankradu and Busumafi had been let into possession by Enimil or his predecessor, as Odikro, and paid tribute to the Odikro for the time being as representing the Chief of the Manso Stool.

On the 31st January, 1947, the second defendant, Chief Kobina Angu applied to be added as party to the first suit and was so added on the 12th February, 1947. On the 2nd April, 1947, he made similar applications in the other two suits and those applications were granted on the 9th April, 1947.

On the 6th March, 1947, the respondents delivered their statement of claim, in all three suits. They alleged that they were the successors in title of Kojo Attah, and that his title had been upheld in the interpleader proceedings and by the Full Court in the ejectment action in which the judgment of Gough, J. in favour of the plaintiff was affirmed by the Full Court on the 30th November, 1911. They also relied on the order for the issue of writ of possession dated 29th October, 1912. The statements of

claim in the action against Enimil further contained the following paragraphs:

" 2. Plaintiffs' predecessor Kojo Attah was the owner of Bortogina lands the same having been purchased by him at a public auction.

" 5. The defendant and his people are occupying parts of Bortogina lands, and have cultivated farms thereon and are otherwise using the said Bortogina lands without paying tribute to the plaintiffs wherefore plaintiffs claim as per their writ of summons issued herein."

Similar paragraphs are to be found in the statements of claim delivered against Mankradu and Busumafi. Defences to all three actions were put in on the 13th and 15th April, 1947. In substance each of the defences denied the allegations of the plaintiff, and the last paragraph of each reads as follows:

" The said Chief Kobina Angu pleads that the plaintiffs if successors of Kojo Attah are estopped by the judgment of Mr. Justice Hawtayne delivered on the 30th April, 1913, in the Divisional Court, Sekondi, between the said Chief Kobina Angu and the said Kojo Attah relating to a claim by the said plaintiff Angu to tribute in respect of the said Bortogina land and affirmed by the Judicial Committee of the Privy Council on the 23rd June, 1916. The Divisional Court, Sekondi, was the Court of competent jurisdiction over the said action and the parties thereto."

All three cases came on for hearing before Hooper, J. on the 23rd February, 1948. By consent of the parties he consolidated the three actions. Mr. Blay, who appeared for the respondents, after reading the statements of defence, said that he agreed that the concluding paragraph of each of the defences, to which their Lordships have already referred, correctly represented the true position and that his clients were prepared to pay the tribute in question to the defendant, Chief Kobina Angu.

The evidence called by the plaintiffs was mainly documentary, but dealt with the position since the conclusion of the above-mentioned proceedings before this Board. Kwesi Arhin Akwa, who was called on their behalf, deposed that the defendant Enimil's people were still on the land, that they had farms on the land, and so had the respondents.

All the defendants were called and after hearing their evidence the learned Judge gave judgment on the 24th April, 1948.

He summarised the evidence and the effect of the earlier judgments to which their Lordships have already referred. He came to the conclusion with which their Lordships respectfully agree that there was nothing in the judgments of the 26th August, 1903, and 25th November, 1903, which precluded the Court from coming to the conclusion, as it did in 1911, that Jobson had acquired some right title and interest in the Bortogina lands, that he had mortgaged that right or interest to Ogden and that Attah purchased it from him in due course. Their Lordships would however emphasise that the Court in 1911 did not decide the nature of the right or interest. On the contrary Gough, J. was careful to say that he had not sufficient data to give a decision on that point. Gough, J. must, however, have been satisfied that it entitled Attah to possession of the land for he gave judgment for the plaintiff whose claim was for possession.

Returning to the present suit, the learned Judge accepted the submissions

of Mr. Blay, counsel for the plaintiff, that it was immaterial whether or not the writ of possession had actually been issued pursuant to the order of 29th October, 1912, that Attah was *bona fide* purchaser of the rights of Jobson and that he thereby acquired an interest which was transmissible to his heirs, the present respondents. He rejected a claim based on the Statutes of Limitation for reasons into which their Lordships need not enter as Mr. Ramsay does not now rely on the Statutes of Limitation and brushed aside an argument based on the references to tribute in the pleadings, treating that point as disposed of by Mr. Blay's admission of the defendant Angu's right to the tribute.

From that decision the present appellants appealed to the West African Court of Appeal. Their grounds of appeal were five, two only of which in view of the attitude very properly adopted by Mr. Ramsay before their Lordships are now material. They are as follows:

“ 3. Because the setting up of an adverse title to Bortogina lands by the plaintiffs-respondents against the defendant-appellant Chief Kobina Angu and his subjects and agents was according to native custom a ground for ousting the plaintiffs-respondents and their predecessor Kojo Attah from possession or from entering upon Bortogina lands.

“ 5. Because on the judgment of the Privy Council in this case dated the 23rd June, 1916, in *Kobina Angu v. Cudjoe Attah* (1), the plaintiffs-respondents are estopped from claiming title to and possession of Bortogina lands.”

When the matter came before the West African Court of Appeal, the main point argued was the question of limitation of action. This had ceased to be material. The Court of Appeal affirmed the decision of the Land Court. The material portions in the judgment of Smith, J. who delivered the leading judgment are as follows:

“ I am in no doubt at all that the plaintiffs' tenure is governed by native law. It is quite clear that he has bought an interest in the property which carries with it the right of possession. Thirty years ago he brought an action for possession and in pursuance of it entered into part of the land. In his evidence in this case he said that the plaintiffs are in possession of parts while the defendants are in possession of other parts. The plaintiffs are entitled to possession of the whole.

“ As I indicated the final conclusion of the judgment of the learned Judge is correct. One final point, the co-defendant claims that he is now entitled to possession of the land because the plaintiffs denied his overlordship. It seems to me that the co-defendant cannot have it both ways. By claiming tribute in the suit of 1912 he has inferentially recognised that Kojo Attah had rights in the land from which the liability to pay tribute arises. The only occasion upon which the plaintiffs' predecessor in title denied co-defendant's right to tribute was when he contested the co-defendant's claim in the 1912 case. This alone cannot be a good ground for forfeiture, otherwise no person could ever risk contesting any claim of this nature and holders of land would be left entirely at the mercy of their overlords. I hold that there has been no forfeiture and that the plaintiffs' title is still unimpaired. I would dismiss this appeal with costs.”

From this decision the appellants appealed to this Board. Mr. Ramsay

who appeared for the appellants did not dispute that the respondents had rights of occupancy as successors to Kojo Attah, but he submitted that the respondents' claim must fail (a) because they had forfeited those rights either (1) by non-payment of tribute to the appellant, Chief Kobina Angu; or (2) by setting up in the present proceedings title to tribute adverse to that of the said appellant; (b) because the boundaries of the Bortogina lands are not defined; (c) because the respondents were seeking to convert a right of occupancy into ownership; (d) because upon the true construction of their claim they were claiming tribute; (e) because the judgments of Gough, J. and of the Full Court are no longer available in view of the decision of the Privy Council in 1916.

Their Lordships can dispose shortly of the last point. The decisions of Gough, J. and of the Full Court did not deal with the question of ownership or the right to tribute. The claim in those proceedings was for possession and rent or in the alternative damages for use and occupation. In giving judgment Gough, J. made it clear, as their Lordships have already observed, that he was not determining the exact nature of the rights by virtue of which Kojo Attah was entitled to an order for possession. In the Privy Council case Chief Kobina Angu was claiming tribute and the decision in his favour far from being inconsistent with the decisions of Gough, J. and the Full Court proceeded on the basis that Kojo Attah was entitled to be in occupation of the Bortogina lands. Sir Arthur Channell who delivered the judgment of the Board said:

“ There is nothing in the notes of the evidence of the plaintiff's witnesses as to the defendant being in possession of any of the lands of Bortogina, but this must have been admitted, as the defendant in support of his plea of *res judicata* relied on judgments to the effect that he was entitled to the possession.”

Their Lordships are also satisfied that the argument as to the boundaries being ill-defined has no substance. It is sufficient to point out that the decisions of Gough, J. and the Full Court as well as the decision of Hawtayne, J. which was affirmed by this Board in 1916 all proceeded on the basis of the boundaries being ascertainable. If there is any dispute between the parties of the present suit as to those boundaries when the time comes to enforce the judgment of Hooper, J. it will be for the appropriate Court in the Gold Coast to determine the dispute.

The remaining points really raise the same issue and may be thus stated. Did the respondents by their statements of claim set up a title to tribute adverse to the claim of the Chief Angu? If so, is that a ground on which their rights of occupancy are forfeited?

Mr. Ramsay contended that the respondents by paras. 2 and 5 of their statement of claim had set up a title adverse to that of Chief Angu. The use of the word owner in paragraph 2 and the reference to tribute in paragraph 5 undoubtedly lend colour to this argument. But it seems clear from authorities, to which their Lordships' attention was called in the course of the argument, that the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to rights of occupancy such as the respondents undoubtedly possessed. Again it appears that the terms rent and tribute are on occasions treated as interchangeable. This looseness of language is, their Lordships think, due very largely to the confused state of the land law in the Gold Coast as it now stands. As

appears from the report made in 1898 of Rayner, C.J. on Land Tenure in West Africa which was cited by Viscount Haldane delivering the judgment of this Board in *Amodu Tijani v. Secretary, Southern Nigeria* (2) there has been introduced into the native customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English Law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner. Having regard to the fact that by their writs in the present case the respondents claimed only possession and mesne profits, their Lordships feel some doubt whether by the use of the term owner and the reference to tribute in their statements of claim the respondents were intending to set up anything more than the rights of occupancy which had been recognised by the decision of this Board in 1916. But their Lordships will assume for the purpose of this judgment that it was the intention of the respondents to set up a claim adverse to the right to tribute of the Chief Kobina Angu. If that was their intention it was made abundantly clear by Mr. Blay on their behalf at the commencement of the hearing before the Trial Judge that this claim was abandoned, and it is their Lordships think, plain from the reports of the proceedings before the Trial Judge and before the Court of Appeal that the argument now relied upon by Mr. Ramsay was never raised in either court in West Africa. In those circumstances their Lordships have not the assistance of the Judges in West Africa on the point and they do not think it would be right to allow Mr. Ramsay to rely on it. Their Lordships therefore do not find it necessary to decide whether, if the pleadings ought to be construed in the sense in which Mr. Ramsay construes them, the allegations in the statement of claim would afford a ground on which the respondents' rights of occupancy were forfeited. It might be that the reasoning which induced the Court of Appeal to reject a similar argument based on the resistance offered by Kojo Attah to the claim of Chief Kobina Angu to tribute in 1912 would apply equally to the argument which Mr. Ramsay sought to advance before this Board.

In the result their Lordships are of opinion that the decision of Hooper, J. affirmed by the West African Court of Appeal was correct. As their Lordships read that decision, it decided only that the respondents were entitled to possession of the Bortogina lands and £50 damages; it left untouched the right of Chief Kobina Angu to tribute from the respondents.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

NANA OSEI ASSIBEY III, KOKOFUHENE SUBSTITUTED FOR
NANA KOFI ADU, KOKOFUHENE . . . APPELLANT

AND

NANA KWASI AGYEMAN, BOAGYAAHENE . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1952] 2 All E.R. 1084;

[1952] W.N. 534;

[1952] T.L.R. 890

Judgment—No reasons for judgment given—Rule 16 of the Judicial Committee Rules, 1925—Appeal—Dismissal.

Rule 16 of the Judicial Committee Rules 1925 reads as follows: "The reasons given by the judge, or by any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated to the Registrar and shall be included in the Record." The appellant contended that the judgment of the West Africa Court of Appeal should be set aside because that Court had expressed no reasons for dismissing the appeal in disregard of Rule 16.

Held: The contention showed a misconception of the Rule. The Rule did not say that the tribunal from whose decision the appeal to the Privy Council arose should give reasons. It merely enjoined that where reasons were given they should be communicated to the Registrar. No reasons were given and therefore there was nothing to communicate.

SIR LIONEL LEACH. This appeal arises out of a dispute over the ownership of lands situate within the Bekwai district of Ashanti. On the 19th August, 1946, the respondent, who is the Ohene of Boagyaa, Kumasi Division, instituted a suit in the Native Court of Asantehene (Grade A) against Nana Kofi Adu, the then holder of the Kokofu Stool, to establish his title to the lands. The summons issued was in these terms:

"Plaintiff sues the defendant herein for satisfactory and reasonable explanation as to why the latter's Akwamuhene and subjects do pay tribute to the Boagyasa Stool as far back as the reign of the then Boagyaaahene Nana Asamoah Kenin by virtue of the occupation on the Boagyaa Stool land known as 'Dwoamin', and now the defendant has ordered his subjects on the said land not to pay the tribute to the Boagyaa Stool."

The plaintiff claimed that the lands had been given to his Stool by the Asantehene Nana Opoku Wari (their Lordships understand that this Chief reigned sometime before the year 1700), that he had been in undisturbed possession ever since and that he had been collecting cocoa and game tribute from the defendant's subjects and other tenants who farmed within the area. The defendant denied the plaintiff's title. He maintained that the lands had been given to his own Stool and that they still belonged to it.

There were two hearings by the Asantehene's Court. At the first hearing there was a disagreement among the three Chiefs who composed the Court. The Chief who presided found for the defendant and the two other Chiefs for the plaintiff. The defendant appealed to the Chief Commissioner's Court, which referred the case back for rehearing by a new panel of Chiefs. Among the reasons given for this course was that the viewer's report made it clear that the definition of the lands in dispute was confused. The re-hearing commenced before three other Chiefs on the 1st December, 1947. In the meantime a proper plan of the area had been prepared as the result of a survey made under an order of the Court. On the 6th December, 1947, the newly-constituted Court delivered judgment. The three Chiefs were in agreement in holding that the lands belonged to the plaintiff's Stool.

The defendant appealed to the Chief Commissioner's Court which, by a judgment dated the 2nd April, 1948, upheld the finding of the Asantehene's Court. The defendant then appealed to the West African Court of Appeal, but again unsuccessfully. This appeal was dismissed on the 28th January, 1949. The West African Court of Appeal gave the defendant leave to appeal to His Majesty in Council, but he was subsequently destooled, whereupon the appellant was elected Chief in his place. In due course the West African

Court of Appeal substituted the name of the new Stool holder for that of the defendant and by an Order in Council dated the 30th January, 1952, the new Chief was brought on the record as the appellant in the appeal now before their Lordships.

The trial Court found that the plaintiff had in fact been in undisturbed possession of the lands for many years and that he had been collecting cocoa and game tribute from the defendant's subjects and other farming tenants. There was both oral and documentary evidence in support of this. In 1935 one Abroneh, a former Akwamuhene of Kokofu entered into an agreement in writing, whereby he undertook to pay to the plaintiff's Stool annually £35 as cocoa tribute in respect of the Dwoamin lands farmed by the defendant's subjects. This agreement was produced. The plaintiff also put in evidence a book of "Native Administration Receipts" which showed the grant of individual receipts to certain farmers of the Dwoamin village and an application made to the plaintiff's Stool by one Kwame Asare, a Kokofu subject living in the village, for the grant of a native physician's licence.

The Court refused to believe the defendant when he said that he was unaware that his subjects had been paying tribute to the plaintiff's Stool for many years. It also refused to believe him when he alleged that Abroneh (who was examined as a witness on behalf of the plaintiff) had executed the agreement for the payment of tribute to the plaintiff's Stool at a time when he was in rebellion against the defendant. It had been established that Abroneh's successor in the office had also paid the tribute to the plaintiff more than once. The defendant denied knowledge of Kwame Asare's application, but the Court considered that as it was presented at Kumasi and not at Kokofu the applicant must have known that the land belonged to the plaintiff. The trial Court concluded its judgment by saying that it considered that the plaintiff had proved his case beyond all reasonable doubt.

The judgment of the Chief Commissioner's Court was confined to the statement that it had read the record of the trial Court, together with the grounds of appeal and reply, and that it saw no ground for interference. The West African Court of Appeal dismissed the appeal made from the judgment of the Chief Commissioner's Court without making any observations, but the record shows that notes were made of the arguments and it must be presumed that the Court considered what was said.

The contentions advanced in support of the appeal to Her Majesty in Council are that the judgment of the Asantehene's Court was against the weight of evidence and that the West African Court of Appeal erred in not giving reasons for the dismissal of the appeal made to it by the defendant.

While their Lordships have not received much assistance from the Appellate Courts in West Africa, they have been taken through the whole of the record and are satisfied that there was ample evidence to justify the trial Court finding for the plaintiff. They are convinced that the case was carefully tried and that the judgment dealt fairly and adequately with the contentions raised by the parties. Moreover, the observations of Lord Atkin in delivering the judgment of the Board in *Abakah Nthah and Anguah Bennieh* ([1931] A.C. 72) have direct bearing. That case also raised the question of ownership of land in West Africa. The Provincial Commissioner had set aside the decision of a Native Tribunal, constituted under the Native Jurisdiction Ordinance, 1883, and the Supreme Court had concurred in his decision. The Board restored the finding of the Court of first instance. Lord Atkin said:

“ By colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong, and their Lordships fail to find such proof in the present case.”

There is no indication in the present case of any error. The indication is all the other way and the judgment of the Asantehene's Court has been accepted by the two appellate Courts in West Africa.

The appellant's contention that the judgment of the West African Court of Appeal should be set aside because it has expressed no reasons for dismissing the appeal to it must also be rejected. The suggestion is that the Court disregarded Rule 16 of the Judicial Committee Rules, 1925, which reads as follows:

“ The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall be included in the Record.”

The contention shows misconception of the rule. It does not say that the tribunal from whose decision the appeal to Her Majesty in Council arises shall give reasons. It merely enjoins that where reasons are given they shall be communicated to the Registrar. No reasons were given and therefore there was nothing to communicate.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

SOCKNA MORMORDU ALLIE AND OTHERS . . . APPELLANTS
AND
AHMED ALHADI (THE OFFICIAL ADMINISTRATOR) RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 13 W.A.C.A. 320

1952 Nov. 27

Lords Porter, Normand and Cohen

Claim for revocation of will—Proceedings wrongly stayed and sent to Attorney-General to consider criminal prosecution—No prosecution instituted—Influence on Judge's mind of conclusion reached by Attorney-General—Concurrent findings of fact.

The facts are fully set out in the judgment. The plaintiffs were the appellants and appealed against the concurrent findings of the trial Court and the West African Court of Appeal dismissing their claim to have a will revoked.

Appellants' counsel argued that the decision was against the weight of evidence and that the proceedings were wrongly stayed and the Judge's mind was influenced by the decision of the Attorney-General not to prosecute.

Held: The Board did not determine anything with regard to the principle under which, in England, it is essential that a prosecution should take place

before a civil action is taken. It assumed for the purpose of its decision that it was not necessary or not even proper that this case should have been sent to the Attorney-General. It was abundantly clear that the Judge with great care drove from his mind any suggestions that the Attorney-General's decision influenced him. There was ample evidence to support the Judge's finding although it was quite true there was ample evidence on which he could have found the other way. In such circumstances the Board does not interfere with concurrent findings of fact of the trial Court and of the Court of Appeal of the Colony itself.

Privy Council Appeal No. 22 of 1951.

Appeal from the West African Court of Appeal W.A.C.A. Civil Appeal No. 8 of 1950, 13 W.A.C.A. 317.

The following judgment was delivered:

LORD PORTER. This action was brought by the executors of a will executed in 1939 against the Official Administrator, and it arose in the following way. The testator, who was the owner of a considerable amount of property, amounting to some £60,000 had died in 1948. When he died there were known to be in existence two wills, one being a will made in 1939, and another being a will made in 1946.

There was, then unknown to the parties, so far as their Lordships are able to ascertain, a third will which had been made in 1942, but their Lordships are not concerned with that will. If they were minded to accede to the argument which Mr. Wilberforce has so forcibly placed before them, they might have to send the case back to the Court of Appeal to have ascertained what the rights of the parties were, having regard to the existence of both the will of 1939, and an admittedly genuine will of 1942.

The testator died on the 22nd January, 1948, and there being this question of the two known wills, a dispute arose as to the genuineness of the second. Apparently in Sierra Leone there is a regulation under which a will may be deposited with the registrar. In fact, in this case, the will of 1946 was so deposited. Their Lordships understand that the 1939 will was also deposited with the Registrar, but that has not been clearly established. What has been established is that the will of 1946 and a codicil of 1947 were deposited with the registrar. The codicil is admitted to be a genuine document and therefore their Lordships will say nothing further about it. The only question which arises is with regard to the 1946 will.

The circumstances which happened after the death of the testator were that a gentleman called Wurie, who was probably a friend of both parties and presumably disinterested, was given authority to recover the will and the codicil so deposited, and bring them back to the parties concerned, and he did recover them. Though there is a regulation, their Lordships are not sure whether this is essential or not, probably not, which makes it proper that the registrar should peruse the will before giving it back. In fact nothing of that kind was done in this case; it was given to Mr. Wurie and returned by him to the younger widow of the deceased man.

The deceased man had two wives and—it is not material to be exact about this—the elder wife had had a number of children, but their Lordships have no knowledge of what the family of the younger wife may have been.

Before handing over the will Mr. Wurie, in the presence of one Ibrahim, who was a son of the elder widow, read the document to the younger widow. That latter kept the document and went into mourning for 40 days. During that period she and the elder widow lived together in the same house and in the same room, so that there was ample opportunity of communication between them, but the younger widow did not

communicate the contents of the will or have the will read to the elder or to any of the family.

At a later stage it was discovered that the will, when produced, was very favourable to the younger widow; it cut out, as far as their Lordships are able to understand, the elder widow altogether, and finally left the residue to the younger widow.

In those circumstances, perhaps not unnaturally, the elder widow contested the will. The son, Ibrahim, who was called as a witness, also alleged that he had been or ought to have been left a larger portion of the property. Though the claim was not originally very artistically framed, eventually it was claimed that somebody had suppressed the 1946 will as originally drafted, and had substituted for it another will.

If their Lordships were minded to send the case back, they are not sure what the result of that would be, because it might be possible to say that the 1942 will was still in existence; at any rate it does not get rid of the difficulty to say that the 1946 will has been suppressed and that therefore the 1939 will comes into force, because there was the intermediary will in 1942, which, even if the 1946 will was suppressed, might quite well supersede the 1939 will. However that may be, it was alleged that somebody had substituted a will which was not the will of the testator for the will which he had executed.

The parties who were called to deal with this matter were, first of all, the two witnesses to the 1946 will, and, secondly, the two persons to whom the will was read over. Substantially there were the two groups, and there was one witness with regard to handwriting.

Their Lordships do not propose to go through the evidence at length, or indeed to say more about it than that there was ample evidence upon which the judge could find that the will of 1946 was the will which had been made by the testator. It is quite true that there was ample evidence upon which he could have found the other way. It may be, and their Lordships are prepared to assume, without deciding, that the evidence in favour of the rejection of the will was supported by a larger body of evidence than the evidence asserting that the will produced was the document originally signed.

However, that may be, it is not a matter upon which their Lordships could, or ever do, interfere, when the matter has been not only to the Court of First Instance but to the Court of Appeal in the Colony itself. It comes under the rule that concurrent findings of fact are not set aside and indeed the learned judges' decisions in the present case are much less open to attack than were those of the judges in the latest case decided by their Lordships with regard to the Indian Rajah, in which a great deal more could have been said than can be said in this case in derogation of the findings of the Court of Appeal.

It is admitted by Mr. Wilberforce on behalf of the appellants that the concurrent finding of the two Courts would finally establish his opponent's case were it not for an unfortunate incident which occurred in the course of the hearing. Their Lordships do not propose to determine anything with regard to the principle under which, in England, it is essential that a prosecution should take place before property can be recovered in a civil action. They will assume for the purposes of their decision that it is in no sense necessary or not even proper that this case should be first of all sent to the Attorney General to discover whether a prosecution should take place or not. Though that assumption be made the question still arises whether the conclusion arrived at by the Attorney General had any influence on the learned Judge's mind in the decision to which he came.

Their Lordships have read, and had read to them, the whole of the careful, learned and accurate judgment by the learned judge dealing with the law in the matter. It is quite true, if any question of onus arose, one might spell out of his judgment a tendency to regard the onus as being on the side of the respondent rather than of the appellant. In their Lordships' view, however, onus does not arise at all in a case of this kind, where the whole matter has been gone into and the Court is satisfied on the balance of evidence, even though it may not be that the balance of evidence is to a considerable degree more favourable to the one side rather than to the other.

These being the facts, one goes to the learned Judge's judgment to find out whether he formed his own view of the truthfulness of the witnesses or whether he felt himself guided, influenced or affected by the decision of the Attorney General not to prosecute.

Their Lordships think it is abundantly clear that the learned Judge with great care drove from his mind any suggestions that the Attorney General's determination had influenced him. He quotes correctly the cases bearing upon the point and therefore in their Lordships' view it cannot be said that he in any way departed from the principles upon which his decision ought to be made.

The Court of Appeal in the same way, seeing that the learned Judge had had an opportunity of hearing the witnesses, and that his must be the deciding voice in the matter, accepted the same view, though at the same time they expressed the view that he was wrong in sending the papers to the Public Prosecutor before the case was determined.

In those circumstances, having regard to the fact that there are concurrent findings of fact, that there was ample evidence to justify them, and that in their Lordships' view the learned judge was in no way influenced by the decision of the Attorney General, it only remains for them to say that they will humbly advise Her Majesty that the appeal should be dismissed.

In their Lordships' opinion, the respondent is entitled to his costs.

Appeal dismissed.

F. & M. KHOURY	. . . . .	APPELLANTS
	AND	
PHILIP SAID AZAR	. . . . .	RESPONDENT
SAME	. . . . .	APPELLANTS
	AND	
SAME	. . . . .	RESPONDENT
F. & M. KHOURY	. . . . .	APPELLANTS
	AND	
K. MASSOUD & SONS	. . . . .	RESPONDENTS

[CONSOLIDATED APPEALS FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 12 W.A.C.A. 268

Consolidated appeals—Interpleader—Written agreement to secure repayment of loan on chattels—Breach by debtor of covenant therein by assignment of chattels to secure further debt to third part without notice to first lender—Defence (Control of Transfer of Used Motor-Vehicles) Order, 1943 (as amended)—Applicability thereof to transfer by way of mortgage—Whether mortgagor in possession of mortgaged chattels holds them as trustee for mortgagee—Effect of non-registration under Kumasi Lands Ordinance, 1943, section 22—Position of person paying off registered equitable charge and obtaining similar charge (which he fails to register) in his own favour—Gold Coast Supreme Court Rules, Order 44, rule 25 (1).

The facts are fully set out in the judgment.

Held: (i) that a mortgage of motor-vehicles was not a sale or purchase thereof within the meaning of the Defence (Control of Transfer of Used Motor-Vehicles) Order, 1943 (as amended).

(ii) a mortgagor in possession of mortgaged chattels does not hold them "not on his own account or as his own property but on account of or on trust for" the mortgagee, within the meaning of Order 44, rule 25 (1) of the Gold Coast Supreme Court Rules, nor is the mortgagor, if he uses the chattels for profit, bound to account to the mortgagee;

(iii) an equitable chargee must register his own charge under the Kumasi Lands Ordinance, 1943, in order to secure the validity thereof. Although he pays off, at the request of the debtor, a charge which is in fact registered and simultaneously takes a charge on the same property, he does not stand in the shoes of the paid-off chargee so as to be able to claim the benefit of that chargee's registered charge.

LORD MORTON OF HENRYTON. These are consolidated appeals by leave of the West African Court of Appeal from judgments and orders of that Court in three proceedings, (1) an interpleader summons the parties to which were the appellants, F. & M. Khoury, one George Bechir Moukarzel (hereafter referred to as "the Debtor") and the respondent Azar (hereafter referred to as "Azar"); (2) an action (No. 35 of 1947) in which Azar was plaintiff and the appellants were defendants; (3) an interpleader summons the parties to which were the appellants, the Debtor and the respondents K. Massoud & Sons (hereafter referred to as "Massoud"). Massoud has taken no part in this appeal and the judgment of the Court of Appeal in the third proceeding mentioned above was as follows:

"In this case the facts are the same as in the case of *Azar v. G. B. Moukarzel and F. & M. Khoury* in which judgment has just been delivered in this Court. It having been agreed that the judgment in the present case should follow that which has been delivered in the other, there will be judgment in the same terms."

It is unnecessary to refer further to the third proceeding, as it would appear to have been conceded throughout that the case put forward by Massoud must stand or fall with the case put forward by Azar.

The events leading up to the first two proceedings are as follows. On the 16th November, 1946, the Debtor and Azar made an agreement under seal (hereafter called "the First document") for the purpose of securing repayment to Azar of the sum of £4,000 then lent by him to the Debtor together with interest thereon, by instalments of £400 each. The first of such instalments fell due on the 30th November, 1946, and subsequent instalments on the last day of every subsequent calendar month until the 30th September, 1947, when an instalment of £250 was to be paid. A final instalment of £250 fell due on the 31st October, 1947. It was provided that in default of any one payment being made when it became due the whole of the said principal sum or so much thereof as then might remain unpaid,

together with the interest thereon then due, should become immediately payable.

Repayment was secured by the grant to Azar of certain rights over fourteen used motor vehicles and trailers (hereafter called "the motor vehicles" and "the trailers" respectively) then belonging to the Debtor as set out in the Schedule to the First document.

The rights so granted were (*inter alia*) upon such default of the Debtor as aforesaid (a) to require him to transfer to Azar all or any of the motor vehicles and the trailers at a valuation provided such transfers were approved by the competent authorities and (b) to seize or take possession thereof or of any of them wherever they happened to be and either then to exercise the right to have such motor vehicles and trailers transferred to him or in the event of such transfer not being approved as aforesaid or if he did not wish to exercise such right to retain possession until such time as the principal sum and interest or so much thereof as might be due at the date of such default should be paid or until execution should be levied thereon consequent upon any judgment or order obtained by Azar against the Debtor in respect of the latter's default under the First document whichever should first happen.

The Debtor further therein covenanted with Azar not to transfer, part with the possession of charge or in any way encumber the motor vehicles and the trailers or any of them.

By a Deed dated the 22nd November, 1946, and made between the Debtor and the appellants (hereafter called "the Second document") the Debtor in breach of his covenant in the First document assigned to the appellants the motor vehicles and the trailers and a large number of other used motor vehicles and trailers by way of security for the payment of the sum of £16,140 and interest thereon and covenanted that he would pay to the appellants the said principal sum together with interest then due by monthly instalments of £1,500 on the last day of each calendar month the first of such instalments to be paid on the 31st December, 1946.

The Second document contained agreements by the Debtor in the following terms:

" (3) That in case the Borrower shall make default in payment of the principal sum by instalments as aforesaid or of the interest thereon at the times hereinbefore appointed for payment thereof respectively or in the performance of any agreement contained herein and necessary for maintaining this security or shall suffer the said chattels or any of them to be distrained for rent rates or taxes or if execution shall during the continuance of this security have been levied against the goods of the Borrower under any judgment at law then and in such case it shall be lawful for the Lenders their servants or Agents without previous notice to the Borrower to seize and take possession of any chattels included in this security in whatever place or places they may happen to be.

" (4) That if the Lenders shall become entitled to seize the chattels hereby assigned they and their agents may enter and remain upon any premises where the said chattels may be and if necessary may break open doors and windows in order to obtain admission and after the expiration of five clear days from the day of seizure may sell the said chattels by public auction or private contract on or off the said premises and retain out of the proceeds so much of the said principal sum as may then remain unpaid and the interest then due and all costs and expenses which they may incur as aforesaid and the expenses of

sale and also any rent rates and taxes which they may pay in respect of the premises where the said chattels may be and the surplus (if any) shall be paid to the Borrower."

No permit for the assignment of the motor vehicles effected by the Second document was ever obtained or applied for. The Defence (Control of Transfer of Used Motor Vehicles) Order 1943, made under Regulation 41 of the Defence Regulations 1939 (hereafter called "the 1943 Order") as amended by the Defence (Control of Transfer of Used Motor Vehicles) (Amendment) Order 1944 (hereafter called "the 1944 Order") provides *inter alia* as follows:

" 2. In this Order, unless the context otherwise requires—

' Purchase ' includes any acquisition of the property in a used motor-vehicle;

' Sell ' includes any transfer of the property in a used motor-vehicle;

' Used motor-vehicle ' means a motor-vehicle as defined in section 2 of the Motor Traffic Ordinance which has at any time been licensed under that Ordinance for use on a public highway.

3.—(1) No person shall sell or purchase a used motor-vehicle unless a permit has first been obtained under this Order.

(2) No person shall sell or purchase a used motor-vehicle for a sum in excess of the price specified in that behalf in the permit issued by the Competent Authority.

4.—(1) The person intending to sell and the person intending to purchase a used motor-vehicle shall jointly apply to the District Transport Control Officer of the District in which either ordinarily resides for issue of a permit.

(2) The application, which shall be in the form set forth in the Schedule, shall be made in triplicate.

* * * * *

(5) The Director of Supplies, if satisfied that the transfer of the used motor-vehicles is essential or desirable, shall grant his permit therefor; and such permit shall be in the form set forth in the Schedule."

Section 2 of the Motor Traffic Ordinance (Chapter 195 of the Laws of the Gold Coast 1936 Revision) provides as follows:

" Interpretation.

In this Ordinance, unless the context otherwise requires:

' Motor Vehicle ' includes every description of vehicle propelled by means of mechanism contained within itself, other than vehicles constructed for use on specially prepared ways such as railways or tramways."

Prior to the 28th November, 1948, there was owing upon overdraft on the Debtor's account with the Kumasi Branch of Barclays Bank (Dominion, Colonial and Overseas) the sum of £7,171 15s. 4d. which was secured by an equitable mortgage duly registered in accordance with section 22 of the Kumasi Lands Ordinance 1943 upon two parcels of land belonging to the Debtor and known as Plot No. 571 and Plot No. 586 Old Town, Section

“ B ” Kumasi. On the 28th November, 1948, the Debtor gave to the appellants an undertaking in the following terms:

“ Accra.
28th Nov. 1946.

F. & M. Khoury,
Nsawam.

Dear Sirs,

In consideration of you paying at my request to Barclays Bank (D.C. & O.), Kumasi Branch the sum of £7,171 15s. 4d. (which is the amount now due from me to the Bank) I hereby undertake:

(1) To request the Bank to hand to you as security such documents as they possess relating to Plot 571 and Plot 586, Old Town Section ‘ B ’ Kumasi.

(2) To deposit with you without delay the title deeds of property of which I am the lessee situate at Tamale, Bawku, Navorongo, Bolgatanga and the document relating to my interest in Plot 105, O.T.B. Kumasi.

(3) To execute when called on by you a proper legal mortgage of the properties mentioned in paras. (1) and (2) above securing the repayment to you of £7,171. The rate of interest in such mortgage to be 8% and the principal to be repaid by me by monthly instalments on the last day of each month of £1,500. The first such instalment to be paid on 31st December, 1946. I will be permitted to repay at any time all or any of the principal money due without previous notice.

(4) To execute a formal Bill of Sale covering all the transport and trailers which I at present own together with spare parts in stock. The Bill of Sale will be to cover the sum of £16,140 0s. 0d. and the rate of interest will be 8% and with the same provisions as to repayment of principal.

(5) To hand over to you any sums I may receive from the P.W.D. in connection with the hiring by them of my transport.

Yours faithfully,

(Sgd.) G. B. MOUKARZEL.”

Their Lordships were informed at the opening of the appeal that No. 571 was the only plot as to which any question now arises. The appellants duly paid off the bank overdraft, and the deeds relating to Plot 571 were handed over to the appellants by the bank at the request of the Debtor, but the Debtor never executed a legal mortgage in accordance with head (3) and never executed a Bill of Sale in accordance with head (4). The equitable mortgage of the properties situated at Kumasi constituted by the Undertaking and the deposit of the relevant title deeds with the appellants was never registered pursuant to section 22 of the Kumasi Lands Ordinance, 1943, sub-section (1) whereof is in the following terms:

“ (1) No lease, transfer, devolution, mortgage, whether legal or equitable, assignment, underlease or surrender of land vested in the Asantehene under the provisions of this Ordinance, shall be of effect until the same is registered by the Commissioner of Lands, and the fees payable in respect of any such registration shall be the fees set forth in the Eighth Schedule.”

On the 30th November, 1946, the Debtor gave Azar a cheque for £400 in payment of the instalment due under the First document on that day, but this cheque was dishonoured on presentation. Azar then attempted to obtain a permit under the 1943 Order for the transfer to him of some of the motor vehicles and the trailers, but the District Transport Control Officer refused to approve such transfers as he had received about the same time several applications for the transfer of the same and other vehicles to other persons.

Accordingly on the 10th December, 1946, Azar commenced an action (No. 87 of 1946) against the Debtor for repayment of the whole of the monies secured by the First document. On the 16th December, 1946, Azar recovered an interim judgment in this action for £3,350 upon which final execution was stayed until the 17th January, 1947, and on the 24th December, 1946, he recovered a final judgment for a further sum of £691 together with the removal of the said stay.

During the course of this action Azar obtained an interim Order for attachment of the fourteen motor vehicles on or about the 14th December, 1946, and shortly thereafter eight or nine of the motor vehicles were so attached. On or shortly after the 24th December, 1946, at the instance of Azar, the Sheriff (acting under a writ of *feri facias* pursuant to the provisions of Order 43 Rule 5) seized and attached all the following property belonging to the Debtor to satisfy the said judgment, viz.:

The motor vehicles and the trailers comprised in the First document and certain other motor vehicles and trailers and spare parts; and
The Debtor's right title and interest in Plot No. 571 and other lands.

The right title and interest of the Debtor in Plot 571 was a sub-term of 60 years from the 7th March, 1945.

On the 16th or 17th December, 1946, the appellants caused their name or initials to be painted on certain motor vehicles belonging to the Debtor which had not been attached under the interim attachment, and on the 17th December, 1946, the appellants locked up the stores containing the spare parts, took possession of the keys, and wrote on each door " Seized under a Bill of Sale ". It would appear however that they took no other step to assume possession. On the 4th January, 1947, the appellants issued an interpleader summons calling on Azar to show cause why all the properties seized should not be released from attachment. The said summons was issued under Order 44, Rule 25 (1), which is in the following terms:

" 25.—(1) In the event of any claim being preferred to, or objection offered against, the sale of lands, or any other immovable or movable property which may have been attached in execution of a decree, or under any order for attachment made before judgment, as not liable to be sold in execution of a decree against the judgment debtor, the Court shall, subject to the proviso contained in the next succeeding rule, proceed to investigate the same with the like powers as if the claimant had been originally made a party to the suit, and if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was not in the possession of the party against whom execution is sought, or of some person in trust for him, or in the occupancy of persons paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account, or as his own property, but

on account of, or in trust for some other person, the Court shall make an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was in possession of the party against whom execution is sought as his own property, and not on account of any other person, or was in the possession of some person in trust for him, or in the occupancy of persons paying rent to him at the time when the property was attached, the Court shall disallow the claim.

The Supreme Court of the Gold Coast (Mr. Justice Smith) by its judgment in the interpleader summons delivered on the 19th March, 1947, held:

- (a) that the Second document created a valid legal mortgage and was not affected by the 1943 Order since that Order was confined to outright sales only and did not prohibit a transfer by way of mortgage;
- (b) That as the Undertaking had not been registered under section 22 of the Kumasi Land Ordinance 1943 it was of no effect against the Debtor's judgment creditors.

Other matters were dealt with which are not now in dispute.

It was accordingly decided that Azar was entitled to seize in execution Plot 571 free from any right title or interest of the appellants, but was only entitled to seize in execution the motor vehicles and the trailers subject to the appellants' prior mortgage under the Second document.

From this decision both the appellants and Azar appealed to the West African Court of Appeal.

On the 28th March, 1947, Azar commenced the above-mentioned action No. 35 of 1947 in the Supreme Court of the Gold Coast, Ashanti, against the appellants and the Debtor, contending that even if the Second document was not avoided by the 1943 Order that order had the effect of preventing any transfer of a legal interest in the subject-matter thereof, and that the appellants had in any event had notice of the First document at the date of the Second document. Judgment in this action was given on the 17th June, 1947. The Court (Mr. Justice Smith), following its decision on the Interpleader Summons, held that under and by virtue of the Second document the appellants had a first legal mortgage upon the motor vehicles and the trailers, the learned Judge not being satisfied that they had taken with notice of the First document, and that accordingly the Second document took priority over the First document. He accordingly dismissed the action.

From this judgment Azar appealed to the West African Court of Appeal.

In addition to the arguments preferred in the Court below, the appellants contended that by reason of their payment off of the moneys secured by the equitable mortgage to Barclays Bank they had acquired a lien on the property therein comprised which ranked in priority to the claims of Azar.

The judgment of the West African Court of Appeal (Sir John Verity, C.J., McCarthy and Coussey, J.J.) in both matters was delivered on the 13th December, 1947. On the cross-appeals on the interpleader summons it was held:

- (a) That the appellants were not entitled to the benefit of the lien for which they contended, because either no such lien ever arose, or, if it did, it was waived by accepting the Undertaking:

(b) That the judgment appealed from was correct in dismissing the appellants' claim in respect of the Kumasi Lands;

(c) That the Second document was void as contravening the provisions of the 1943 Order.

Accordingly the appellants' appeal was dismissed, and the judgment of the Court below was upheld in so far as it related to Plot 571. The cross-appeal by Azar was allowed in so far as it related to the motor vehicles and the trailers and judgment was entered for Azar on that part of the claim.

Immediately following these judgments the same Court gave judgment upon the appeal in the said action, allowing the appeal and declaring that Azar was entitled to be treated as a first mortgagee and to all the rights and remedies of a first mortgagee including the right to sell the fourteen lorries and fourteen trailers described in the First document, and to apply the proceeds in payment of the debt thereby secured. On the question of notice they concurred with the decision of Mr. Justice Smith. From these judgments the appellants appeal.

The arguments put forward before the Board sufficiently appear from the views which their Lordships will now express thereon.

Their Lordships will first consider the question whether the mortgage effected by the Second document was a purchase or sale of used motor vehicles within the meaning of the 1943 Order as amended by the 1944 Order. It is convenient to quote again paragraph 2 of the 1943 Order:

"In this Order, unless the context otherwise requires . . . 'sell' includes any transfer of the property in a used motor vehicle."

It cannot be doubted that the Second document might appropriately be described as a transfer of the property in used motor vehicles, as it contains an assignment of the lorries mentioned in the Schedule thereto, but in the ordinary use of language it would be quite inappropriate to describe it as a sale. The definition just quoted enlarges the meaning of the word "sell," but in considering whether the definition brings within the scope of the Order any transfer which would not ordinarily be described as a sale, it is necessary to consider whether or not "the context otherwise requires." In their Lordships' view the context "otherwise requires" in the case now under consideration. Paragraph 1 of the 1944 Order provides that it "shall be read as one" with the 1943 Order. Considering the 1943 Order, as amended, as one document, their Lordships note that paragraph 3 (2) provides:

"No person shall sell or purchase a used motor vehicle for a sum in excess of the price specified in that behalf in the permit issued by the Competent Authority."

and paragraph 4 provides that the application which must be made jointly to the District Transport Control Officer of the District by the person intending to sell and the person intending to purchase a used motor vehicle "shall be in the form set forth in the Schedule." Turning to the Schedule in the altered form introduced by the 1944 Order their Lordships observe that the parties are described throughout as "intending vendor" and "intending purchaser" and they note in particular the following portions of the Schedule:

(a) "I, the said (intending purchaser) hereby declare that—

(1) The reasons (in full) for intended purchase, are:

(2) The District in which I propose to use the vehicle is”

(b) “ I recommend that this transfer be/be not approved and I agree/do not agree to accept the vehicle for petrol in my District.”

(To be signed by the District Transport
Control Officer of intending purchaser’s District.)

(c) “ Permission is hereby given for the transfer to take place, provided that the purchase price of the said vehicle shall not exceed the sum of £.....

.....
Director of Supplies
(Competent Authority).”

In their Lordships’ view clause 3 (2) is quite inappropriate to the case of a mortgage. It is difficult to see how in such a case the Competent Authority could specify the maximum price at which the motor vehicle was to be “ sold ”; yet it is clearly contemplated by paragraph 3 (2) that a maximum price is to be specified in the permit. When property is mortgaged no price is paid; the lender lends a sum and the borrower assigns the property by way of security for the repayment of that sum. Again, it would be inappropriate, in the case of a mortgage, for the mortgagee to specify “ the District in which I propose to use the vehicle ” because it is the usual intention of both parties to a mortgage of motor vehicles that the mortgagor shall remain in possession of the motor vehicles and use them, unless and until the mortgagee takes possession of them under some power contained in the mortgage. The same difficulty arises at the point where the District Transport Control Officer of the intending purchaser’s district has to agree or not to agree “ to accept the vehicle for petrol in my District.” Further, the concluding words of the Schedule link up with paragraph 3 (2) and seem to give the Director of Supplies no alternative to stating a maximum price in the case of every application.

Paragraph 66 of the Defence Regulations 1939 (Regulations No. 25 of 1939) imposes severe penalties in the case of any breach of the 1943 Order.

For the reasons already given, and bearing in mind the principle that any real doubt as to the construction of a penal statute should be resolved in favour of the subject, their Lordships hold that the Second document is in no way affected by the provisions of the 1943 Order.

The result is that when the Sheriff seized the lorries and trailers on the 24th December, 1946, the appellants had a valid legal mortgage thereon. Counsel for Azar rightly conceded that, if this were so, the charge created by the Second document would have priority over the charge created by the First document, as the appellants obtained the legal estate by the Second document. Counsel was unable to contend before the Board that the appellants had notice of the First document, in view of concurrent findings of fact to the contrary effect in the Courts of West Africa.

The appellants’ next contention was that on the 17th or 18th December, 1946, they effectively took possession of all the lorries and trailers not included in the interim attachment of the 14th December, and that they were entitled so to do by virtue of clause (3) of the Second document. The words in clause (3) on which counsel for the appellants relied were:

“ In case the Borrower shall make default in . . . the performance of any agreement contained herein and necessary for maintaining this security.”

Counsel contended that by giving Azar a dishonoured cheque for the instalment of £400 which fell due under the First document on the 30th November, 1946, the Debtor had broken an agreement which was to be implied by reason of the terms of the Second document, viz., that the Borrower would not do any act which would impair or render useless the power to seize contained in clause (3) of the Second document. Thereupon, said counsel, the appellants' power to seize arose.

In their Lordships' view there is no substance in this argument. They incline to think that the acts done by the appellants on the 17th or 18th December fell short of taking possession of the lorries and trailers, but even if possession was taken, no event had occurred to justify it. Counsel's argument gives no effect at all to the words " contained herein " in clause (3) of the Second document. There is a clear contrast between express terms which are " contained in " a document and implied terms, which are not contained in the document, but are to be implied by reason of something contained in the document. Counsel entirely failed to prove any breach by the Borrower prior to the 17th December, 1946, of any agreement " contained in " the document. There are other reasons why his argument on this point must fail, but their Lordships will refrain from elaborating upon a matter which seems to them plain.

It was next contended for the appellants that even if the Debtor was in possession of the lorries and trailers on the 24th December, 1946, he was in possession " not on his own account or as his own property but on account of or on trust for " the appellants, within the meaning of Order 44, Rule 25, already quoted. This argument also must be rejected. A mortgagor in possession of motor vehicles is not a trustee thereof for the mortgagees, nor, if he uses the vehicles for profit, is he bound to account to the mortgagees. Their Lordships were informed at the hearing that some or all of the vehicles in question have been sold, and they think the most convenient course would be to make the first four declarations set out hereafter, giving leave to any party to apply in the Supreme Court of the Gold Coast for the appropriate orders on the footing of these declarations.

There remains only the question whether the appellants had a valid equitable mortgage on Plot 571 at the relevant date, or whether the Undertaking was ineffective at the relevant date, by reason of section 22 (1) and (2) of the Kumasi Lands Ordinance 1943. Their Lordships have no doubt that the latter is the correct view. The Undertaking was an equitable mortgage of land, and it is not disputed that Plot 571 was " land vested in the Asantahene " under the provisions of the Kumasi Lands Ordinance 1943. This equitable mortgage was not registered, at any material time, in accordance with section 22 of that Ordinance. Accordingly it was of no effect at any material time, by reason of the provisions of the same section. Counsel for the appellants sought to escape from this difficulty by an argument on the following lines. They said truly that the bank's equitable mortgage was registered in accordance with the section and they contended that on paying off the bank the appellants " stood in the shoes of the bank " and were entitled to the benefit of the bank's registered equitable mortgage. To this there are two answers, each of which is fatal to the appellants. In the first place, their Lordships can feel no doubt that the Debtor and the appellants both intended the Undertaking, and the deposit of deeds pursuant thereto, to be the only security for the debt. The bank's security consisted simply in the deposit of deeds. Once the overdraft had been paid off and the deeds had been handed over the result was that the only security for payment of the debt owing to the appellants was the

Undertaking, and the deposit of deeds pursuant thereto, and this was plainly the result intended by the parties. In the second place, even if the bank's security could be said to have remained on foot for the benefit of the appellants until the 17th December, it clearly ceased to have any existence on that date. According to the evidence of the bank manager, which was not contradicted, the Commissioner of Lands was informed on the 17th December, 1946, that the bank's charge had been paid off. Thereupon the registration of the bank's mortgage would be vacated. Thus it had ceased to have any existence before the 24th December, 1946, which is the relevant date.

For these reasons their Lordships will humbly advise Her Majesty that an Order should be made in the following terms:

“ Declare

(1) that the Second document was not a purchase or sale of used motor vehicles within the meaning of the 1943 Order as amended by the 1944 Order;

(2) that the appellants' right to seize and take possession of the lorries and trailers mortgaged by the Second document had not arisen when they purported to exercise it on the 17th or 18th December, 1946;

(3) that on the 24th December, 1946, the lorries and trailers mortgaged to the appellants by the Second document were not in the possession of Moukarzel 'on account of or in trust for' the appellants, but the said lorries and trailers could only be sold subject to the rights of the appellants as mortgagees under the Second document;

(4) that as against the respondent Azar the appellants are entitled to be treated as first mortgagees of the said lorries and trailers;

(5) that the appellants had no effective mortgage or charge on plot 571 Old Town Section ' B ' Kumasi on the 24th December, 1946;

Each party to these consolidated appeals has liberty to apply to the Supreme Court of the Gold Coast for such Order or Orders as may be appropriate on the footing of the above declarations.”

Each of the parties must pay his own costs here and in the Courts of West Africa.

OPANIN ASONG KWASI AND OTHERS . . . APPELLANTS
AND
JOSEPH RICHARD OBUADABANG LARBI . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1952) 13 W.A.C.A. 76

1952 Dec. 24

Lords Normand, MacDermott and Cohen

Arbitration award according to native customary law—General principles governing such arbitrations—Effect of one party withdrawing before arbitration completed—Constitution of Native Appeal Courts—Construction of section 3 of the Native Courts (Colony) Ordinance, 1944.

The appellants argued that an arbitration award made during the trial before the original trial Court was not binding because they resiled before the arbitration award was made.

The respondent contended that the Native Appellate Court was not lawfully constituted under section 3 of the Native Courts (Colony) Ordinance, 1944, and that all proceedings subsequent to the trial before the Native Court " B " were null and that the decision of that Court must stand.

Held: Without laying down any general proposition as to native customary law, on the material before it the Board was of the opinion that the appellants had no right to resile and the arbitration award was binding.

Held: further, that the Native Appellate Court was properly constituted. In this respect the Board disagreed with the *Obiter dictum* of the West African Court of Appeal that there was substance in the submission of the respondent. Cases referred to:

- (1) *Ekua Ayafie and Kwamina Banyea*, 1884 Fanti L.R. 38.
- (2) *Kuturka Yardom and Kurankyi Minta III*, Gold Coast L.R. Full Court, 1926-29, p. 76.
- (3) *Abotche Kponuglo and Adja Kadadja*, 2 W.A.C.A. Judgments, 24, p. 27.

Privy Council Appeal No. 11 of 1951.

Appeal from West African Court of Appeal, W.A.C.A. Civil Appeal No. 66/49. 13 W.A.C.A. 81.

The following judgment was delivered:

LORD NORMAND. This is an appeal from a judgment of the West African Court of Appeal, allowing an appeal by the respondent from a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court, which had affirmed, with a minor variation, a judgment of the Native Appeal Court of Akyem Abuakwa, allowing an appeal from the Native Court " B " Adonten, Akyem Abuakwa. The effect of the judgment appealed against is to restore the judgment of the Native Court " B."

The subject matter of the suit is the title to a parcel of land at Mfrano near Anum Apapam in the Akim Abuakwa District. But the appeal is only indirectly concerned with the merits of the dispute. There are two issues presented for decision: first, the nature and effect of proceedings, described as an arbitration in the Record, which took place while the suit was pending in Native Court " B "; and second, the question whether the Native Appeal Court, Kibi, was a court regularly and properly constituted. This latter issue was raised by the respondent's counsel, who was allowed to address argument upon it to their Lordships as it goes to jurisdiction, though it is not properly raised in his Case. He maintained that the Native Appeal Court was not lawfully constituted and therefore that all the proceedings subsequent to the judgment of the Native Court " B " were null.

This is a preliminary issue which must be decided before entering upon the first issue, the nature and effect of the so-called arbitration proceedings. It can fortunately be disposed of without considering the circumstances of the particular suit in which it has arisen. It depends upon the construction of section 3 of the Native Courts (Colony) Ordinance, 1944, which reads as follows:

"The Governor in Council may by order provide for the constitution of Native Courts which shall exercise jurisdiction in accordance with this Ordinance within such area as may be defined in the order and may by the same or a subsequent order authorise a Native Court to sit as a Native Appeal Court: and any such order shall assign to any Native Court thereby constituted such name as the Governor may think fit."

The term " Native Court " is defined by section 2 and it includes a Native Appeal Court unless the context otherwise requires. The Native

Appeal Court in question was instituted by Order No. 17 of 1945 as a Native Appeal Court without jurisdiction as a court of first instance. The respondent's contention is that it was incompetent for the Governor-in-Council to proceed in this manner, and that the only competent mode of creating a Native Appeal Court was to create a Native Court of first instance, and then to confer appellate jurisdiction upon it either by the same or by a subsequent order. This point was taken for the first time in the West African Court of Appeal. The learned President in his judgment says that he was inclined to think that there was substance in the respondent's submission, but that it was unnecessary for him to decide it.

In their Lordships' view the respondent's reading of section 3 is too narrow. The section is not artistically drawn, but it contains nothing which requires that the words "Native Courts" should not include Native Appeal Courts. If so, it is competent by order to constitute a Native Court having only appellate jurisdiction, though it is also competent to constitute a Native Court of first instance and confer appellate jurisdiction upon it by the same or a subsequent order. By subsequent provisions of the Ordinance (section 13) Native Courts having jurisdiction as courts of first instance must be graded as A, B, C or D courts, but this has no application to a Native Court having only appellate jurisdiction. The respondent's submission on this head accordingly fails.

Their Lordships therefore turn to the first issue, the nature and effect of the so-called arbitration proceedings.

The suit was brought in the Native Court "B" of Adonten, Akyem Abuakwa by the respondent and by one Kwasi Prince. Kwasi Prince, however, is now said to have died before the action was begun and the present respondent was in fact the sole plaintiff. He claimed against the present appellants a declaration of title to certain land and an injunction. The case came before the Court for hearing on the 27th October, 1947. What then took place is narrated in the "Findings of Special Arbitration" which subsequently came before Native Court "B." The facts stated in the findings, it should be noted, were not challenged by the appellants. The document bears that at the hearing a representation of the Odikro of Apapam and his Elders appeared and offered "to withdraw the said action from the Native Court "B" of Kukurantumi for arbitration." It was then "mutually agreed upon by both parties to submit the dispute to arbitration by a panel of Elders of Apapam." The arbitration court comprised eleven persons of whom four were Stool Holders. The sum of five shillings was paid by Opanin Adu, one of the Stool Holders, as an adjournment fee and the sum of sixteen shillings was paid by each of the parties to signify their consent to refer the matter to the arbitrators. The court then adjourned the case.

The arbitration proceedings also are fully described in the "Findings of Special Arbitration" which is subscribed by "Opanyin Kwami Ayim, President, Arbitration Panel of Apapam Elders." It is a formal document setting out the proceedings with great clearness and considerable detail. It appears from it that the case was duly called for hearing on the 5th November, 1947, when both parties were present. Every effort was made by the arbitrators to give each side the fullest opportunity to state its case thoroughly and to call witnesses. There are findings which summarise the evidence with comments upon the value of some of the testimony offered. The document then states that after hearing all the relevant statements on both sides and their witnesses and thoroughly satisfying themselves through cross-examinations the arbitrators decided to send messengers to view the

land under dispute. Both parties were asked to pay an advance of £12, which they paid. The messengers were appointed and a date for viewing the land was fixed and both parties were asked to meet the messengers on the spot and agreed to do so. The viewing party met both parties on the land but the appellants refused to show their boundaries. The respondent on the other hand took the party to the land and pointed out the boundaries. After viewing the land the messengers instructed both parties to appear before the arbitrators at Apapam on the 18th November, 1947. At this sitting of the arbitrators the respondent was present but the appellants absented themselves and sent a letter intimating their decision to dissociate themselves from the arbitration and demanding a refund of the £12 advanced by them. It is not clear whether this sum was in fact refunded but their Lordships do not consider that this is a material point.

The arbitrators considered the questions before them. After a long discussion they decided "to break the last minute deadlock created by the defendants (the appellants) to brush aside their objections and to proceed with the case." They then gave their decision in favour of the respondent.

The case again came before the Native Court "B" on the 9th and 10th August, 1948. The respondent moved the court to enforce the arbitration award, but the appellants objected, partly on the technical ground that no record of the arbitration proceedings had been taken, and partly on the ground that they had withdrawn from the arbitration. The Court ruled that the award should be accepted as the judgment of the court. It prefaced its ruling by narrating that the Opanin Yaw Adu on behalf of the Odikro of Apapam and his Elders had at the first hearing "submitted to withdraw the case for settlement" that the parties had agreed and the case was adjourned with their consent, and that the Elders of Apapam had held an arbitration.

The appellants' submission to their Lordships is that the court had erred and the submission was supported on alternative grounds: (a) that the so-called arbitration was not an arbitration as understood in British jurisprudence but merely an attempt to arrive at a settlement agreed by the parties with the aid and active intervention of the Elders; (b) that even if the proceedings were of the nature of arbitration and not of negotiations yet either party was entitled to resile at least till the date when the award was made. These matters are, it is agreed, questions of native customary law. It is therefore embarrassing to find that while Native Court "B" decided in favour of the respondent this decision was reversed by the Native Appeal Court. Had the two courts agreed their Lordships would have been disposed to accept their ruling as an authoritative application of native customary law, which ought not to be overruled except for clear and convincing reasons. As it is, their Lordships must decide the disputed issues upon the material available in the case before them, without laying down general propositions as to native customary law, which might not consist with the results of a fuller inquiry than the scanty material in this case allows.

In the Native Appeal Court the president, having stated that the appellants objected to the award on the ground that they had not consented to it, observed somewhat ambiguously, as it appears to their Lordships, "so far as the defendants-appellants have consented to the award of the arbitration, they cannot extricate themselves from the arbitration award." He then brushed aside a purely technical objection based on an error of date, and proceeded, "We find that there were many irregularities in the lower court in the procedure"; but he specified only one irregularity, the adjournment of the case instead of striking it out for the arbitration. Finally he says that in the circumstances the appellants did not accept the award,

and in order to avoid misunderstanding and multiplicity of actions there should be a retrial by Native Court " B."

An appeal was taken by the respondent to the Land Court. The judgment of the learned judge in that court was that the Native Appeal Court was right in setting aside the judgment of the Native Court " B," but he thought that the case should be retried by the Native Appeal Court with a different panel from that which heard the appeal.

In the respondent's appeal to the West African Court of Appeal, the learned President said that the first question to decide was whether the proceedings before the Elders amounted to an arbitration and whether the parties were bound by the award and that a perusal of the proceedings had satisfied him that this was not a mere negotiation for a settlement but that it was a formal arbitration. He also noted the contention that the award was not under native customary law binding on the appellants since they withdrew from the proceedings at the time of the inspection of the land. He dismissed the contention, but unfortunately he based his decision mainly on precedents which dealt with the enforcement of awards in proceedings from which neither party had resiled before the award was made. Smith, Acting C.J., agreed with the President. He observed that he construed the judgment of the Native Appeal Court as meaning that since the case was not struck out but only adjourned it must be inferred that the proceedings in question had been merely a negotiation for a settlement. Lewey, J.A., also agreed with the President. He said that the Native Appeal Court seemed to him to have regarded the proceedings as of the nature of an arbitration, but had criticised the adjournment as an irregularity.

Their Lordships agree with the finding of the Court of Appeal that the proceedings before the Elders were of the nature of an arbitration and not merely of a negotiation for a settlement. The reasons can be briefly stated. The suggestion that the case should be brought before the Elders came, not from the parties themselves, but from the representatives of the Odikro, and the parties gave their consent. In native customary law the Elders have a recognised judicial function and are in fact a tribunal before which natives can bring their disputes for judicial decision. (Danquah, *Akan Laws and Customs*, pp. 83 ff.) It seems to their Lordships improbable that the intervention of the Odikro and the Elders was for the purpose of aiding a settlement by negotiation rather than for the purpose of discharging a judicial function in the form of an arbitration. Secondly, the proceedings before the elders, as narrated in their findings, have no resemblance to negotiations for a settlement but have all the marks of a well-conducted formal arbitration. Thirdly, the Native Court " B " when the case again came before it treated the award as an award in an arbitration and acted upon it by giving judgment in accordance with it. They knew how and with what intention the proceedings had originated and they could not honestly have acted as they did if the proceedings had been for the purpose of facilitating a settlement. The fact that the case was adjourned is not in their Lordships' opinion inconsistent with this view of the proceedings; it was indeed appropriate to adjourn rather than to strike out the action if only because the arbitration proceedings might for one reason or another have aborted. No authority was cited to support the appellants' contention that it is incompetent for the Native Court to adjourn with the consent of parties in order to allow the dispute to be determined by arbitration, and it would be unfortunate if so convenient a procedure were prohibited. Other criticisms of the procedure of the court were submitted by Counsel for appellants. It was said that if the proceedings were of the nature of an

arbitration the court ought not to have given judgment conform [*sic*] to the award, but ought at that stage at latest to have struck out the action leaving to the respondent the right to raise another action to enforce the award. Their Lordships are of opinion that there is no substance in this argument. The Native Court had authority under Regulation 40 of the Procedure Regulations of Native Courts made under section 70 of the Native Court (Colony) Ordinance, 1944, to make in its discretion any order within its powers and jurisdiction which it considered necessary for doing justice. The order made in the present case was an order within the court's powers and jurisdiction in an action for enforcement and under regulation 40 the court could competently pronounce the order in the pending case since that would at once do justice and avoid multiplicity of actions. It was further said that the court had refused to hear witnesses before giving judgment and that such a refusal might have resulted in shutting out objections to the award, as *ultra fines compromissi* or as being vitiated by the improper conduct of the arbitration, which could have been stated and heard in an independent action to enforce the award. The answer to this is that there never has been and there is not now any suggestion that the arbitrators either exceeded the powers committed to them or acted otherwise than with exemplary probity. If objections of that sort had been stated it would of course have been the duty of the court to entertain them and to receive evidence in support of them, and there is no reason to suppose that they would have refused to do so. They did in fact hear a technical objection to the award, that no record had been made of the arbitration proceedings. This objection failed because evidence was immediately given that the minutes had in fact been recorded. Had other and more fundamental objections been put forward they would no doubt have been heard. But it was not the duty of the court to hear evidence which had been or which ought to have been led before the arbitrators.

All this is, of course, on the assumption that there was no right to resile from the arbitration before the award was made. If there is such a right it is clear that the appellants intended to exercise it and intimated their withdrawal from the arbitration proceedings to their opponent and to the arbitrators. The question is whether the native customary law recognises such a right. It is established that there is no such right after the award is made (*Ekua Ayafie and Kwamina Banyea*, (1884) Fanti L.R. 38; *Kuturka Yardom and Kurankyi Minta III*, Gold Coast L.R. Full Court, 1926-29, p. 7); but there is no authority on the question of the right to resile before the award. There is in the judgment of this Board in *Abotche Kponuglo and Adja Kodadja*, 2 W.A.C.A. Judgments, 24, p. 27 a single sentence which, divorced from its context, appears to support the appellants' proposition. But in that case, as appears from the judgment of the Supreme Court, there had been no binding arbitration, and no more than an attempt to arrive at a settlement. Moreover there was evidence that the alleged arbitrators had so conducted themselves that the party who claimed to have resiled would have had a plain right to do so even in an arbitration. Further the proceedings, such as they were, had in the end proved abortive. Considered in the light of these circumstances the observation founded on by the appellants affords no support to their contention. No positive assistance is to be found in any of the judgments in the present case but it is difficult to believe that if the right to resile exists it should not have been mentioned by any of the judges in any of the courts. Since it is established that the parties gave their consent to the submission of the dispute to the Elders without any express reservation of a right to resile, and since there is certainly no right to resile

after the award is made, it is for the appellants to satisfy the Board that a right so contrary to the basic conception of arbitration is recognised by native customary law. In this they have failed.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. As the argument on section 3 of the Native Courts (Colony) Ordinance, 1944, took only an insignificant part of the time occupied by the hearing, the appellants must bear the costs of the appeal.

Appeal dismissed.

STOOL OF ABINABINA APPELLANTS
AND

CHIEF KOJO ENYIMADU (ON BEHALF OF THE
STOOL OF NKASAWURA) RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1953] 2 W.L.R. 261

1953 Jan. 12

Lords Normand, Reid
and Cohen

West Africa—Land—Claim to declaration of title—Proof by traditional evidence—Point of law not taken below—Exception to rule as to concurrent findings of fact.

On a claim by the appellants for a declaration of their title to certain lands, known as Nkasawura lands, to which the respondents, who had admittedly been in possession of them for many years, claimed to be entitled, the appellants alleged that tribute had been paid to them by the respondents for a number of years in respect of the lands, and that whether or not tribute was proved to have been paid the respondents were only in occupation of the lands by the appellants' leave and licence. The evidence called on both sides was partly traditional—as to rights alleged to have existed beyond living memory—and partly factual as to events within living memory. The trial judge, in summing up his conclusion, in favour of the respondents, said that in claims for a declaration of title the plaintiff "must evidence such positive and numerous acts within living memory sufficiently" frequent and positive to justify the inference that he is the exclusive "owner," and he held that the appellants had failed to satisfy that test. On appeal by the appellants to the West African Court of Appeal the decision of the trial judge was affirmed without qualification, and they made no observations as to the nature of the evidence required to establish title.

On appeal by the appellants on the ground, *inter alia*, that the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that such title could not be supported by traditional evidence alone:

Held, first, that although that point was not taken before the West African Court of Appeal, it involved a substantial substantive point of law and it was plain that no further evidence could have been adduced which would affect it, and the Board would therefore entertain it.

Held, secondly, that the opinion of the trial judge that frequent and positive numerous acts within living memory were essential to justify the inference of exclusive ownership, with which opinion the West African Court of Appeal must be taken to have agreed, was not well founded.

Nchirahene Kojo Ado v. Bouyemhene Kwadwo Wusu (1938) 4 W.A.C.A. 96; *Nchirahene Kojo Ado v. Bouyemhene Kojo Wusu* (1940) 6 W.A.C.A. 24, and *Kwamina Kuma v. Kofi Kuma* (1939) 5 W.A.C.A. 4 applied.

Further, the appellants had satisfied the conditions which brought into

operation the exception to the rule as to concurrent findings of fact which, as stated in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* (1946) A.C. 508, 521 (L.R. 73 I.A. 246, 259; 62 T.L.R. 549), is that "in order to obviate the practice there must be some . . . violation of some 'Principle of law or procedure' as therein defined."

Appeal allowed and case remitted for a new trial.

APPEAL (No. 5 of 1951), by special leave, from a judgment of the West African Court of Appeal (June 4, 1947) which affirmed a judgment of the Supreme Court, Divisional Court, Cape Coast, Gold Coast (October 16, 1946).

The following introductory statement is taken from the judgment of the Judicial Committee. The appellants claimed a declaration of their title to a piece of land edged in pink on the plan, exhibit 1 in the proceedings, and also damages for alleged trespass. The respondents alleged that they were entitled to the piece or parcel of land known as Nkasawura lands and edged in green on the same plan, which included part of the land claimed by the appellants. It was admitted that the respondents had been in possession of the Nkasawura lands for many years, but the appellants said that tribute had been paid to them for a number of years in respect of the lands, and that whether or not tribute was proved to have been paid, the appellants were entitled to the disputed lands and the respondents were only in occupation of them by their leave and licence. Before turning to the record of the proceedings their Lordships of the Board thought it advisable to observe that the expression "title" appeared to be used throughout in the sense of the usufructuary right defined by Lord Haldane in *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399, 402).

The proceedings were commenced by writ dated November, 21, 1941, the immediate cause of the dispute being that a Mr. R. T. Briscoe had felled trees on the disputed lands pursuant to a licence granted, as the appellants alleged unlawfully, by the respondents. The proceedings were commenced in the Native Tribunal, and on April, 27, 1942, were transferred to the Divisional Court, Cape Coast. There were various interlocutory proceedings and finally the case came before Jackson J. in 1946. He heard the evidence out in full in May, but on September, 5, 1946, decided that in view of a then recent decision of the West African Court of Appeal he should have heard the evidence with an assessor, and accordingly he determined to rehear the whole of the evidence in the presence of an assessor. The rehearing was commenced on that date and evidence was called on both sides. It was partly traditional—that was to say, evidence as to rights alleged to have existed beyond time of living memory, and proved by linguists, or other members of the various tribes concerned—and partly factual as to actual events occurring within living memory. In the course of the proceedings, after the appellants' evidence had been concluded and in the middle of the respondents' evidence, the judge of his own motion directed that a sketch plan in the handwriting of the judge who had presided at the trial of a land dispute between the appellants' stool and another tribe (hereinafter referred to as the 1902 action) should be put in evidence in order to explain the judgment of Bradford Griffith C.J. in that case. At the conclusion of the evidence and arguments of counsel, after taking the opinion of the assessor, the judge reserved judgment.

He delivered his judgment on October 16, 1946. He referred in the course of it not only to the record in the 1902 action, but also to the proceedings in a case in 1879, *Ahin Doman v. Acquassie Essaimin*. Basing himself on what had occurred in these two actions as well as in part on what had taken place

at the abortive hearing before him in May, 1946, in the present proceedings, he came to the conclusion that the plaintiffs (by which he must have meant Chief Kwesi Kuma II, then Chief of the appellants and his witnesses) had been lying in the evidence they gave before him both as to their evidence of tradition and as to their former settlement at Wiosu. He then considered the factual evidence as to tribute and said that it was of a most unsatisfactory nature, and as to credibility he preferred the denials of the defendants to the averments of plaintiffs in that connection. He did not dwell on the traditional evidence advanced on behalf of the respondents other than to say that he was inclined to a conclusion in favour of the respondents.

He summed up his conclusion in the following words:

“ In claims for declaration of title the *onus* lies upon the plaintiff to establish his cause upon the strength of his own case and not upon the weakness of his opponents. In such action he must evidence such positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he is the exclusive owner. This test the plaintiff has failed signally to satisfy and I do dismiss the claim of the plaintiff both in respect of the declaration sought for and in respect of that for damages for trespass.”

The appellants appealed to the West African Court of Appeal (Harragin (C. J. Gold Coast), Verity (C.J. Nigeria) and Lucie-Smith (C.J. Sierra Leone), who dismissed the appeal. Their judgment was short and, so far as material, was in these terms:

“It should by this time be more or less universally known that in a claim of this sort the burden of proof rests heavily on the claimant. The trial judge found that the appellant had failed signally to prove his claim and we are in agreement with him in so finding.”

They did not make any observations as to the nature of the evidence required to establish title, but as the Court of Appeal affirmed without qualification the decision of Jackson J., their Lordships of the Board considered that the Court of Appeal must be taken to have agreed with his views on that point.

From that decision the appellants appealed.

1952. December 3, 4. *Dingle Foot* for the appellants.

Khambatta Q.C. and *T. B. W. Ramsay* for the respondents.

1953. January 12. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above, and continued: Mr. Dingle Foot, on behalf of the appellants, attacked the judgments in the West African courts on two grounds : (1) that the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that such title could not be supported by traditional evidence alone and (2) that the trial judge was not justified in finding that the plaintiff was lying on the ground of discrepancies between his evidence at the trial in September, 1946, and evidence given (a) by him at the abortive trial in May 1946, and (b) by his predecessor in title in the 1902 action.

Neither of these points was taken in the West African courts. They could not, of course, have been taken before Jackson J., since they only emerged from his judgment. They could have been taken before the West African Court of Appeal, but their Lordships consider that as they involve substantial points of law, substantive or procedural, and it is plain that no

further evidence could have been adduced which would affect the decision of them, the appellants should be allowed to raise them before this Board.

The respondents submitted that they were entitled to judgment since there were concurrent findings of fact in the West African courts which applying the principles laid down in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* ([1946] A.C. 508; L.R. 73 I.A. 246; 62 T.L.R. 549) ought not to be disturbed. But the rule as to concurrent findings is subject to certain exceptions, one of which is clearly stated by Lord Thankerton, delivering the judgment of the Board, as follows ([1946] A.C. 508, 521; L.R. 73 I.A. 246, 259): "In order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure." After defining miscarriage of justice, Lord Thankerton continued ([1946] A.C. 508, 521; L.R. 73 I.A. 246, 259):

"The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect."

Their Lordships considered that if Mr. Foot could make good his attack on both points, he would have satisfied the conditions which bring this exception into operation. They therefore proceed to consider whether he has done so.

Their Lordships are satisfied by reference to authorities that the opinion of Jackson J. that frequent and positive numerous acts within living memory are essential to justify the inference of exclusive ownership is not well founded. It will be sufficient to refer to two cases. In *Nchirahene Kojo Ado v. Buoyembhene Kwadwo Wusu* ((1938) 4 W.A.C.A.) the actual decision in the Court of Appeal was on a point of equity, but it is clear from the judgment of the court, that apart from that point the court would have accepted the plaintiff's title solely on the basis of traditional evidence. The opinion thus expressed was not merely a dictum, since the court ultimately on the facts decided the point of equity in favour of the plaintiff and gave judgment in his favour (*Nchirahene Kojo Ado v. Buoyembhene Kojo Wusu* (1940) 6 W.A.C.A. 24).

That traditional evidence may be very relevant is also apparent from the decision of this Board in *Kwamina Kuma v. Kofi Kuma* ((1939) 5 W.A.C.A. 4). This case is also of importance because Sir Lancelot Sanderson, delivering the judgment of the Board, pointed out (*Ibid.* p. 7) that

"even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question, for some considerable time without paying tribute to the plaintiff or his predecessors, such possession . . . is not conclusive evidence of the defendant's title."

Their Lordships are also of opinion that Mr. Foot was right in his criticism of the use made by the trial judge of the evidence given by the plaintiff's predecessor in title in the 1902 action without giving the plaintiff an opportunity of explaining the supposed discrepancy between his evidence and that of his predecessor. The use for a similar purpose of the plaintiff's own evidence in the abortive trial in May is perhaps more excusable, since plaintiff's counsel may have had a note of that evidence and could thus have dealt with the discrepancy. Even so, their Lordships think that it would have been better had this discrepancy also been put to the witness before it

was used against him. Their Lordships are, however, of opinion that the use of the evidence in the 1902 proceedings in the way indicated above is sufficient in itself to vitiate the finding of the trial judge that the plaintiffs were lying in the evidence they gave before him as to tradition. Their Lordships would add that even if the discrepancy remained unexplained it would hardly justify a finding of deliberate untruth.

Their Lordships are therefore of opinion that Mr. Foot has made good his two propositions and that the order of the courts in West Africa must be discharged. It is, however, plainly a case where their Lordships cannot themselves reach a conclusion on the evidence and there must be a new trial.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the orders of the West African Court of Appeal and of the Divisional Court at Cape Coast be set aside, and that the case be remitted to the said Divisional Court for a new trial. Each party must pay their own costs of the appeals to the West African Court of Appeal and to this Board. The costs of the original trial before the Divisional Court are to abide the result of the new trial.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

JOHN OJOBO AGBEYEGBE APPELLANT
AND
FESTUS MAKENE IKOMI AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1953) 12 W.A.C.A. 383

1953 Jan. 12

Lords Porter, Oaksey
and Asquith of Bishopstone

Immovable property—Sale by auction—Action to set aside sale—Case struck out—Application to re-list—Discretion—Relevant factors—Inadequate explanation of undue delay—Position of bona fide purchaser for value—“Balance of justice.”

At a public auction sale on 27th May, 1938, held pursuant to leave of the Court to issue execution against land belonging to the appellant judgment-debtor, the land was purchased, subject to the approval of the Governor, by the respondent. A claim by the appellant, brought within the statutory period of twenty-one days, to set aside the sale, was struck out by the Court on 7th July, 1938, on the application of the respondent, who contended that inasmuch as the Governor had not at that date approved the purchase, there had been no sale. No further proceedings were taken by the appellant until, on 15th September, 1947, he moved the Supreme Court of Nigeria to re-list the suit which had been struck out on 7th July, 1938. As reasons for the delay the appellant gave the death of his legal advisers, his own illness and the difficulties of ascertaining his true position in the matter. The respondent, during his occupation following the approval of the purchase by the Governor, was alleged to have removed some of the buildings on the land and rebuilt others.

The Judge of the Supreme Court granted leave to re-list the suit, and on the hearing of the action found that the sale was irregular and null by reason of inadequate compliance with the Court's directions relating to advertising the auction sale, and that the appellant had sustained substantial injury by reason of the irregularity. An appeal by the respondent to the West African Court of Appeal was allowed on the ground that in the exercise of his discretion the trial Judge did not appear to have taken into consideration all the relevant circumstances, including such questions as to the extent of the delay in making

the application to re-list the case, the reasons for the delay, the nature of the claim and the effect of granting leave on the rights of the respondent. On appeal by the appellant:

Held: That the length of the delay, the inadequacy of the explanation of the delay, and the consequences of setting aside the sale of land as against a *bona fide* purchaser for value who had been in occupation of the land during the whole period of the nine years and had apparently altered the buildings thereon caused a "balance of justice" in favour of the respondent within the meaning of the *dictum* of Lord Blackburn in *Erlanger v. New Sombrero Phosphate Company* (1) at p. 1279, and the case ought not to have been re-listed, and having been re-listed ought to have been dismissed.

Cases referred to:

- (1) *Erlanger v. New Sombrero Phosphate Co.* (1878) L.R. 3 A.C. 1218; 39 L.T. 269; 48 L.J.Ch. 73.
- (2) *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221.
- (3) *Weld v. Petre* (1929) 1 Ch. 33; 97 L.J.Ch. 399; 139 L.T. 596; 44 T.L.R. 739 72 Sol.J., 569.
- (4) *Clifford v. Clifford* [1948], 1 A.E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 64 T.L.R. 209; 92 Sol.Jo. 166.

Appeal from the West African Court of Appeal.

Cope Morgan, Q.C. and *Collier* for Appellant.

Millner and *Kellock* for first Respondent.

The following judgment was delivered:

LORD OAKSEY. This is an appeal from a judgment of the West African Court of Appeal at Lagos, Nigeria, dated the 26th November, 1948, setting aside a judgment of the Supreme Court of Nigeria dated the 2nd April, 1948, whereby the Supreme Court (Rhodes, J.) declared that a sale of the appellant's property in the Warri Township made by the Deputy Sheriff on the 27th May, 1938, was a nullity.

The principal issue in this appeal is whether the trial Judge was right in allowing the appellant's action to set aside the aforesaid sale, which had been struck out in 1938, to be re-listed nine years later and in deciding that the sale should be set aside or whether, as was held by the West African Court of Appeal, the learned Judge failed to exercise his discretion judicially when he allowed the said action to be re-listed, and decided that the sale should be set aside.

Section 46 of the Sheriffs and Enforcement of Judgments and Orders Ordinance (Cap. 205 of the Laws of Nigeria, 1948) is as follows:

"At any time within twenty-one days from the date of the sale of any immovable property, application may be made to the court to set aside the sale on the ground of any material irregularity in the conduct of the sale, but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity."

The facts are as follows. In November, 1937, the second respondent (Amarah) brought an action against the appellant in the Warri High Court of the Protectorate of Nigeria (Warri Judicial Division) at Warri, claiming £330 for building materials and damages. Judgment was entered in his favour for £212.

On the 30th December, 1937, the Assistant Judge at Warri (Jackson, J.) made an order giving leave for the issue and execution of a writ of *fi. fa.* to issue against the appellant in respect of the land in question.

The learned Judge ordered that the sale of the judgment-debtor's interest in the land should be conducted by public auction under the personal direction of the Deputy Sheriff and that prior to the auction the sale and a description of the land so put up for auction should be published in three consecutive publications in the *Nigeria Gazette*.

On the 1st April, 1938, a letter was sent on behalf of the Sheriff to the Chief Secretary to the Government, Lagos, asking that the notice of this sale should be published in three consecutive publications of the *Nigeria Gazette*. Two only of such publications were made.

The sale of the land was held by public auction at the Police Office on the 27th May, when it was purchased by the first respondent (Festus Makene Ikomi) for £680.

On the 31st May, 1938, the appellant's solicitor applied in the said High Court (Warri Judicial Division) for a civil summons to set aside the aforesaid sale. The summons was issued on the 8th June, 1938, impleading the first respondent as second defendant and the second respondent as first defendant.

On the 7th July, 1938, the said claim to set aside the sale came before the High Court. The Judge's note is as follows:

“ Claim to set aside a sale.

No appearance by or for plaintiff.

Second defendant in person—says he has briefed Wright.

First defendant not served—non appearance.

Letter from Alakija and Alakija asking for pleadings—presumably for plaintiff.

Telegram from Vincent for plaintiff asking for pleadings and adjournment.

Wright informs Court that there has not yet been any sale.

Second defendant bought subject to the approval of the Governor and that approval has not yet been given, so there has been no sale.

Applies for case to be struck out. Order 18 rule 1

ORDER: the Case is struck out with costs to second defendant assessed at 5 guineas.

(Sgd.) DONALD KINGDON
Chief Judge ”

On the 16th August, 1938, the Acting Resident Warri Province approved the first respondent as purchaser pursuant to section 11 of the Crown Lands Ordinance.

On the 22nd August, 1938, the Assistant Judge in the High Court of the Warri Judicial Division (Pearson, J.) issued a certificate that the first respondent had been declared the purchaser of the right, title and interest of the appellant in the said land.

No further proceedings were taken by the appellant until on the 15th September, 1947, the appellant moved the Supreme Court of Nigeria in the Warri Judicial Division at Warri to re-list the suit which had been struck out as aforesaid on the 7th July, 1938. The motion was supported by an affidavit dated the 19th July, 1947, which included the following paragraphs:

“ 6. That late Lawyer Alakija and Alakija and Lawyer Olatunde Vincent whom I engaged for pleading and adjournment of the case. I come from Lagos in March, 1942, and I investigated from the records

to know what happened before the case was struck out. I got the copies of the judgment of the case.”

“ 9. That my delay to bring up the case was due to all the documents about the case with Lawyer Alakija. I got only few of the documents.”

On the hearing of the motion both the appellant and the respondents appeared in person and no note of any argument appears to have been made. The learned judge of the Supreme Court (Rhodes, J.) granted leave to re-list the suit.

At the hearing of the suit on the 18th December, 1947, the appellant deposed (*inter alia*) that there were only two publications made in the *Nigeria Gazette* and not three, and that he had had offers of £2,000 made to him for the purchase of the land but “ they were waiting for the completion of the *Gazette Notices*.” He also stated that the respondent during his occupation had removed some of the buildings on the land and rebuilt others.

Mr. Justice Rhodes in giving judgment did not comment upon the nine years delay which had elapsed between the sale and the application to have the case re-listed or upon the reasons given by the appellant to excuse the delay, but found that owing to the fact that only two notices of the sale had been given the sale was irregular and null and stated that he was satisfied from the evidence that the appellant had sustained substantial injury by reason of the irregularity.

On appeal by the respondent to the West African Court of Appeal the appeal was allowed, the Court (Sir John Verity, C.J., Sir Henry Blackall, P., and Lewey, J.A.), being of opinion that in the exercise of his discretion the trial Judge did not appear to have taken into consideration all the relevant circumstances including such questions as to the extent of the delay in making the application to re-list the case, the reasons for the delay, the nature of the claim and the effect of granting leave upon the rights of the respondent.

Their Lordships are in agreement with the West African Court of Appeal in thinking that the learned trial Judge did not exercise his discretion judicially on these matters.

A number of technical points have been argued on both sides before their Lordships. It has been argued for the appellant that the respondent ought to have appealed against the order to re-list and that the *laches* was not taken as a formal point at the earliest possible moment. The parties, however, were not legally represented at the hearing to re-list, no note was taken of their arguments at that stage, the question of delay was put in the forefront of the cross-examination of the respondent at the hearing and counsel for the appellant before their Lordships recognised that the delay which had occurred was the real difficulty which he had to face.

In cases of *laches* the law was stated by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Company* (1) at p. 1279:

“ In *Lindsay Petroleum Company v. Hurd* (1874) L.R. 5 P.C. 221 it is said: ‘ The doctrine of *laches* in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in

either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

The length of the delay and the nature of the acts done during the interval in the present case in their Lordships' opinion cause a balance of justice in favour of the respondent who had been in possession of the land for nine years at the time of the trial.

Reliance was placed on behalf of the appellant upon the cases of *Weld v. Petre* (1929) 1 Ch. 33; 97 L.J.Ch. 399; 139 L.T. 596; 44 T.L.R. 739; 72 Sol.Jo. 569 and *Clifford v. Clifford* [1948] 1 A.E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 64 T.L.R. 209; 92 Sol.Jo. 166, but in their Lordships' view these cases are not in point in the present case.

Weld v. Petre [1929] 1 Ch. 33; 97 L.J.Ch. 399; 139 L.T. 596; 44 T.L.R. 739; 72 Sol.Jo. 569 was a case of a mortgage and it was expressly stated by Lord Russell of Killowen that delay in exercising the rights of a mortgagee stood upon an entirely different footing from delays in cases such as the present where the Court is asked to re-open a matter which has been already decided. *Clifford v. Clifford* [1948] 1 A.E.R. 394; [1948] P. 187; (1948) L.J.R. 969; 64 T.L.R. 209; 92 Sol.Jo. 166 was a case of nullity of marriage and in such a case it is obvious that there may be circumstances which induce the delay which have no resemblance to the facts of the present case. In no other case to which their Lordships' attention has been drawn has there been anything like a delay of nine years and having regard to the length of the delay, the inadequacy of the explanation of the delay and the consequences of setting aside the sale of land as against a *bona fide* purchaser for value who had been in occupation of the land during the whole period and had apparently altered the buildings thereon, their Lordships are of opinion that the case ought not to have been re-listed and having been re-listed ought to have been dismissed.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

JOSEPH ORAKWUE IZUORA

APPELLANT

AND

THE QUEEN

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1953) 13 W.A.C.A. 313

1953 Mar. 16

Lords Porter, Tucker
and Asquith of Bishopstone

Criminal contempt of Court—What amounts to contempt—Act of discourtesy by counsel or conduct involving breach of duty by counsel to his client not necessarily contempt—Right of appeal to West African Court of Appeal.

The appellant, counsel for the respondent in a divorce case, applied to the trial Judge to be excused attendance at a reserved judgment. His application was granted but rescinded on petitioner's counsel also asking to be excused attendance. The appellant, without tendering any explanation, failed to attend on the delivery of the reserved judgment. He was summoned to attend the Court to show cause why he should not be committed for contempt of Court and fined £10 or in default two months' imprisonment.

Upon appeal to the West African Court of Appeal that Court held following the case of *Poku & Jantuah*, 13 W.A.C.A. 277 that the Court had no jurisdiction to entertain the appeal which was struck out.

Held: It is not every act of discourtesy to the Court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. The appellant's conduct was clearly discourteous but did not amount to a contempt.

Held further, that the case of *Poku & Jantuah* was wrongly decided, that the trial Judge's order amounted to a conviction from which an appeal lies to the West African Court of Appeal.

Cases referred to:

(1) *In re Poku & Jantuah*, 13 W.A.C.A. 277.

(2) *Reg. v. Grey* [1900] 2 Q.B. 36.

(3) *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014.

(4) *Parashuram Detaram Shamdasani v. The King-Emperor* [1945] A.C. 264 at 270.

(5) *O'Shea v. O'Shea & Parnell*, 15 P.D. 59 at 64.

Privy Council Appeal No. 29 of 1952.

Appeal from the West African Court of Appeal. W.A.C.A. 3645.

The following judgment was delivered:

LORD TUCKER. The appellant is a barrister practising in Nigeria. On 18th September, 1951, Manyo-Plange, J., sitting in the Supreme Court of Nigeria in the Benin Judicial Division fined the appellant £10 and ordered that in default he be imprisoned for two months for contempt of court.

The appellant appealed to the West African Court of Appeal who on 23rd November, 1951, struck out the appeal on the ground of lack of jurisdiction, considering themselves bound by a previous decision of that Court in the case of *Poku and Another*, 13 W.A.C.A. 277 given seven days earlier on 16th November, 1951. The appellant obtained special leave to appeal to Her Majesty in Council by order dated 24th June, 1952. No case was delivered on behalf of the respondent and counsel for the Crown was heard only on the question of costs.

The circumstances in which the order appealed from came to be made were as follows. On 4th September, 1951, at the conclusion of the hearing

of a divorce case in which the appellant represented the respondent in those proceedings, judgment was reserved by the trial Judge, Manyo-Plange, J. until the following day. The appellant thereupon applied to the Judge that he might be excused from attendance next day. His application was granted. Counsel for the petitioner then asked that he also might be excused. Thereupon the learned Judge stated that the Court could not carry on in the absence of counsel for both parties and in the circumstances the appellant's permission was withdrawn and counsel for both parties were to attend next day. At the sitting of the Court next day counsel for the petitioner was present but the appellant was absent and no communication from him had been received by the Court.

The Judge ordered that the appellant be summoned to attend the Court to show cause why he should not be committed for contempt.

Accordingly on 10th September a summons was issued, and was later duly served on the appellant, calling on him to appear before the Court to show cause why he should not be committed for contempt of court; the contempt being

“ Your failure, without leave of the Court, to attend the Court sitting at Okene on Wednesday, 5th September, 1951, in suit No. B/34/50—*Cole v. Cole*—in which you were engaged as counsel for the respondent, in defiance of the Court and in disobedience of an order of Court made on Tuesday, 4th September, 1951, for counsel for the parties to appear at the resumed hearing on 5th September 1951.”

On 18th September the appellant duly attended the Court and was represented by counsel who submitted on his behalf that no contempt was intended and that there had been a misunderstanding. The learned Judge in giving judgment observed that but for the appellant's inexperience he would not have hesitated to commit him to prison. He fined him £10 and ordered that in default he be imprisoned for two months.

In support of his appeal to the West African Court of Appeal the appellant swore an affidavit in which he set out at length the circumstances in which he came to absent himself. It is not necessary for the purposes of the present appeal to refer thereto. By his notice of appeal he submitted, *inter alia*, that his action in the circumstances did not and could not amount to contempt of Court. As previously stated the Court of Appeal struck out the appeal for want of jurisdiction.

Before proceeding to consider (1) whether the West African Court of Appeal had jurisdiction to entertain the appeal and (2) whether the conduct complained of was capable in law of amounting to contempt of court, it may be convenient to refer to certain statutory provisions which give disciplinary powers to the Courts in Nigeria over barristers and solicitors.

The Legal Practitioners Ordinance (c. 110 of the Laws of Nigeria) established a Legal Practitioners Committee which can, at the instance of the Attorney-General inquire into allegations of misconduct against a legal practitioner. This committee reports to the Supreme Court who may admonish, suspend or strike the name of the offender from the roll of the Court. The Court can also exercise their powers independently without previous reference to the committee.

Section 56 (1) of the Supreme Court Ordinance (c. 211 of the Laws of Nigeria) also gives power to make rules of court for, *inter alia*, regulating “ the discipline employment in causes and fees of legal practitioners.” In pursuance thereof Order XVI of the Supreme Court Rules gives power to

the Court in certain circumstances to suspend any barrister or solicitor or to strike his name off the roll.

Rule 11 of Order XVI is as follows:

“ Every barrister or solicitor who shall be engaged in any cause shall be bound to conduct the same on behalf of the plaintiff or defendant, as the case may be, for whom he shall have been engaged, until final judgment, unless allowed by the Court for any special reason to cease from acting therein; but he shall not be bound, except under express agreement, or unless re-engaged, to take any proceedings in relation to any appeal from such judgment.”

Rule 19 reads:

“ Any barrister or solicitor who commits any breach of any of the said provisions of this order or fails to comply with any of the said provisions, for which breach or non-compliance no specific penalty is provided, shall be liable for a first offence to a fine not exceeding twenty pounds, and for any subsequent offence to a fine not exceeding fifty pounds, without prejudice to the powers of the Court to suspend any barrister or solicitor or strike his name off the roll for professional misconduct.”

Their Lordships have thought it proper to refer to these provisions to show that the Courts in Nigeria possess wide—and no doubt very necessary—disciplinary powers over barristers and solicitors, which it is to be observed, however, do not include the power to imprison.

Turning now to the question of the jurisdiction of the West African Court of Appeal, section 10 c. 229 of the Laws of Nigeria which deals with appeals in criminal cases is as follows:

“ A person convicted by or in the Supreme Court or a Native Court may appeal to the Court of Appeal

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Appeal, or upon the certificate of the Judge who tried him or, in the case of a person convicted by a Native Court, who heard his appeal to the Supreme Court, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal.”

Section 9 of the West African Court of Appeal (Gold Coast) Ordinance (c. 5 of the Laws of the Gold Coast) which was the relevant ordinance in *Poku's* case reads: “ A person convicted by or in a Divisional Court or by any Judge may appeal to the Court of Appeal.”

The material word in each case is for present purposes the word “ convicted.” It is clear that the appellant's conduct was treated by the Judge as being contempt of a criminal kind, viz., “ any act done . . . calculated to bring a Court or a Judge of the Court into contempt or to lower his authority” or something “ calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts”: See *Reg. v. Gray* [1900] 2 Q.B. 36.

Was the order made by him, including the order for imprisonment in default of payment of the fine, a “ conviction ” within the meaning of

section 10 of the Ordinance? The West African Court of Appeal, following the decision of the full Court in *Poku's* case, held that it was not. This decision was based upon the view that the Ordinance was modelled upon the English Criminal Appeal Act, 1907 and was to be interpreted accordingly. The English Act gives a right of appeal only in the case of a person "convicted on indictment."

In the Nigerian Ordinance the words "on indictment" are omitted: It was thought that this omission was due to the fact that indictments do not form part of the criminal process in Nigeria and that the Ordinance must therefore be interpreted as limiting the word "convicted" to convictions resulting from process analogous to the English procedure by way of indictment. Reliance was placed upon a passage in the speech of Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014 where in dealing with ambiguous words he said, "Where, in construing general words, the meaning of which is not entirely plain there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles then we may be justified in adopting a narrower construction."

Their Lordships do not consider there is any ambiguity in the word "convicted." Nor do they accept the view that to interpret it as giving a right of appeal in the case of criminal contempt involves the disregard of any fundamental principle merely because the English Act is so worded as clearly to exclude such a case. They consider that the governing principle to be applied in the present case is that stated by Viscount Simon at page 1022 of the report in *Nokes' case* where he says, "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning."

Dealing with the question whether an appeal lies to the Court of Appeal in England, where appeals in "a criminal cause or matter" are expressly excluded by the Judicature Act, Lindley, L.J. in *O'Shea v. O'Shea & Parnell*, 15 P.D. 59 at 64. said, "We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies."

In the present case an order for payment of a fine and for imprisonment in default has been made by a Judge in the Supreme Court for conduct adjudged by him to amount to contempt of Court of a criminal nature and their Lordships feel no doubt that such order was a "conviction" within the meaning of section 10 of the Nigerian Ordinance and that both *Poku's* case and the present case were wrongly decided in the West African Court of Appeal.

In these circumstances if their Lordships had been of opinion that the appellant's conduct could amount to contempt it might have been necessary to consider whether the proper course would not have been for the case to be remitted to the West African Court of Appeal to hear and determine the appeal. As, however, their Lordships take the contrary view such a course is not necessary.

It is not possible to particularise the acts which can or cannot constitute contempt in the face of the Court, but in this connection it is desirable to bear in mind what was said in the judgment of the Board delivered by Lord Goddard in the case of *Parashuram Detavam Shamdasani v. The King-Emperor* [1945] A.C. 264 at 270 where these words are to be found:

"Their Lordships would once again emphasise, what has often been said before, that this summary power of punishing for contempt

should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended."

It is not every act of discourtesy to the Court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case the appellant's conduct was clearly discourteous, it may have been in breach of rule 11 or Order XVI, and it may perhaps have been in dereliction of his duty to his client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed, the order of Manyo-Plange, J., set aside and the fine of £10 repaid to the appellant. The appellant must be paid his costs of the proceedings before the West African Court of Appeal and of his petition for special leave to appeal and one-half of his costs of the appeal.

Appeal allowed.

ADEGBITE, THE OWA-ALE OF IKARE APPELLANT

AND

ALASAN BABATUNDE, THE OLUKARE ODO RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1953) 13 W.A.C.A. 68

1953 July 14

Lords Porter, Tucker, Asquith of Bishopstone,
The Chief Justice of Canada (Mr. T. Rinfret) and Mr. L. M. D. De Silva

Claim to chieftainship—Validity of appointment and status of another chief challenged—Assertion of subsidiary claims also—Precedence and privilege having no monetary value—Jurisdiction of Court to entertain action considered.

The appellant appealed against the judgment of the West African Court of Appeal which had allowed the respondent's appeal and held that the Court had no jurisdiction to entertain appellant's claim on the grounds that it was a suit challenging the validity of the appointment of a Chief and that the subsidiary claims were also solely related to procedure dignity or primacy which did not involve definite material rights.

Held: The question of jurisdiction could not be properly decided without ascertaining the facts. It was essential to ascertain what by native law and custom was the status of the respondent the Olukare.

The first question to be decided was whether the respondent was a subordinate chief of a quarter of Ikare or was he the head chief of the whole of Ikare.

Privy Council Appeal No. 9 of 1951.

LORD TUCKER. This is an appeal from a judgment of the West African Court of Appeal dated 12th May, 1950, allowing the appeal of one Adu Jibrilu, the Okare of Ode, against the judgment of Acting-Judge Pollard in the Supreme Court of Nigeria dated 14th October, 1949, in favour of the appellant. The nature of the action and judgment will be more specifically referred to hereafter. Adu Jibrilu has died since judgment and by Order in

Council of 11th February, 1953, the present respondent was substituted in his place. For convenience Adu Jibrilu is referred to hereafter as the respondent.

By his Particulars of Claim, which were embodied in the Civil Summons, the Appellant claimed a declaration that as the Owa-Ale of Ikare he is by Native Customary Law the Natural Oba and Ruler of the whole Ikare and as such the only person entitled to wear a crown and not the respondent who is a subordinate Chief under the appellant. He alleged that the respondent had wrongfully arrogated to himself the right of wearing a crown and had been wrongly ruling the Ikare people and enjoying the privileges thereto attached. He claimed an injunction restraining the respondent from wearing a crown and performing the functions of Oba and Ruler and enjoying the privileges thereto attached, for by Native Law and Custom no Olukare of Odo can ever wear a crown or rule as Oba in Ikare.

The nature of the claim was elaborated in the appellant's Statement of Claim dated 27th August, 1948, in which he alleged that his ancestors beginning with Agba-Ode had from time immemorial reigned over the whole Ikare. That he became Owa-Ale of Ikare on the death of his father Ajiboye in 1920. That when Ikare became thickly populated the Owa-Ale created one Rotowa the first Oluika Odo, Odo being a small quarter in Ikare. That Ajagunna the eighth Oluka-Odo was the respondent's grandfather and Momo was his father and that none of the respondent's ancestors ever wore a crown. That in 1886 Owa-Ale Ajiboye, the appellant's father, being too advanced in age to attend public functions, deputed Jagunna, the respondent's grandfather, to treat with the Europeans. He alleged that as a result the respondent's grandfather started to arrogate to himself the title of Olukare instead of Oluka-Odo which had been the title of his ancestors. That from time immemorial Oluka-Odo now known as Olukare had been a subordinate Chief under the Owa-Ale of Ikare. That on Momo's death in 1927 the respondent became Oluka-Odo and was and still is a subordinate Chief under the appellant the Owa-Ale. Paragraphs 13 and 17 of the Statement of Claim are as follows:

“ 13. Upon the 25th day of September, 1947, defendant for the first time arrogated to himself the right of wearing a crown and has been wrongfully ruling the Ikare people (and this with the assistance of the District Officer who even went so far as to seize the plaintiff's crown and bugle on the pretext of inspecting it on 17th March, 1947) and enjoying the privileges and emoluments thereto attached.

“ 17. Plaintiff, by the assumption by the defendant of office of the ruler of Ikare and the arrogation of right of wearing crown and the seizure of his crown and bugle, has suffered great damages and has been wrongfully deprived of and ousted from his office as the Owa-Ale and ruler of the whole Ikare and consequently the privileges and emoluments thereto attached.”

The respondent, who has been represented throughout by Crown Counsel, delivered a defence dated 27th August, 1949, wherein he denied the allegations of the appellant and alleged that his predecessors were the natural rulers of Ikare and wore crowns from time immemorial. He further alleged that he was appointed Olukare at a public election by the majority votes of the kingmakers and people of Ikare in accordance with native law and custom and that the appellant voted for him at the election. He denied

that the appellant's ancestors ever received emoluments as they were only quarter Chiefs. Paragraphs 11 and 12 of the Defence are as follows:

" 11. The defendant avers that he is a Chief within the meaning of the Appointment and Deposition of Chiefs Ordinance (No. 14 of 1930); also that his appointment as the Olukare of Ikare was approved in 1928 by the Lieutenant-Governor, Southern Provinces, and that he is a member of the Olukare and Ikare Group Council which is a native authority subordinate to the Akoko Federal Native Authority.

12. The defendant will contend at the trial that this Honourable Court has no jurisdiction to try this action."

By his Rejoinder of 12th September, 1949, the appellant averred that he as the respondent's Head-Chief had merely approved of the respondent's election as Oluka Odo after the people had submitted him to the appellant and that the respondent was one of several Oluikas of different quarters of Ikare but was the only one who had altered his title of Oluika Odo to Olukare to make it appear that Olukare means Oba of Ikare.

On these pleadings the trial began and the question of Jurisdiction was raised as a preliminary issue the onus of which lay on the respondent. On this issue he called only one witness, viz., the Assistant District Officer of Owo Division to prove the Lieutenant-Governor's approval of the respondent's appointment as Olukare as published in the Nigerian Gazette No. 38 dated 15th July, 1948. The respondent relied on section 2 of the Appointment and Deposition of Chiefs Ordinance 1930, which is as follows:

" 2.—(1) Upon the death, resignation or deposition of any Chief or of any head Chief the Governor may approve as the successor of such chief or head Chief, as the case may be, any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom and, if no appointment is made before the expiration of such interval as is usual under native law and custom, the Governor may himself appoint such person as he may deem fit and proper to carry out such duties incidental to the Chieftancy as it may be necessary to perform.

(2) In the case of any dispute the Governor, after due enquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a Chief has been made in accordance with native law and custom."

In the course of legal argument Counsel for the appellant admitted that the respondent holds the title of Olukare and that the Lieutenant-Governor approved his appointment as also did the appellant himself, but he stated that his case was that the position of Olukare is that of a subordinate Chief of one of the quarters of Ikare.

It may be observed at this stage that no question was raised on the pleadings or in argument to the effect that the Court had no jurisdiction to entertain the suit on the ground that it was a mere claim to an empty dignity not cognisable by the Courts. The sole issue was whether the action involved a dispute as to the appointment of a Chief in accordance with native law and custom as to which the Governor is the sole judge. In the course of legal argument Counsel for the respondent stated that the writ raised the question as to which of the parties is by Native Customary Law the natural Oba and

Ruler of the whole of Ikare and as such entitled to wear a crown, which he contended was an issue as to Chieftaincy. He contended that the title of Olukare had been known from time immemorial and had always meant the Head Chief or Ruler of Ikare.

Their Lordships are of opinion that the respondent's Counsel correctly stated the issues involved but that this was a case where the question of jurisdiction could not be properly decided without ascertaining the facts and that it was unfortunate that the course was adopted of attempting to decide this issue on pleadings alone except for formal evidence of the respondent's appointment. It was essential to ascertain what by native law and custom is the status of Olukare. Is he a subordinate Chief of a quarter of Ikare or is he the head Chief of the whole of Ikare? If he is a subordinate Chief, his appointment not being in dispute it would appear that, subject to the question whether the claim is only one to a title or empty dignity, section 2 of the Ordinance of 1930, as amended in 1945, would not preclude the Court from entertaining the appellant's claim. On the other hand if the position of Olukare by native law and custom constitutes the holder the ruler of the whole of Ikare it might be necessary for the Court to give consideration to the question whether in the light of the pleadings and the evidence adduced at the trial the appellant's claim was or was not in substance a challenge to the appointment of the respondent. Their Lordships do not feel able on the material before them to express any final opinion on these matters and consider that the trial Judge was equally at a disadvantage in the absence of evidence. It is true that this resulted from the parties electing to call no evidence with the exception already stated, on this preliminary issue, and that the respondent having accepted the onus was primarily responsible, none the less since no omission or no acquiescence on the part of Counsel can confer jurisdiction which is expressly taken away by Statute their Lordships do not consider it would be satisfactory—this issue having been clearly raised on the pleadings—to pronounce a final judgment thereon on the material before the trial Judge when he gave his judgment on the preliminary issue of jurisdiction.

The learned Acting-Judge decided in favour of the appellant that he had jurisdiction and adjourned the further trial of the action. At this stage Counsel for the respondent withdrew from the case and took no further part in the trial. This was a second unfortunate feature of the case since his participation in the hearing could not have prejudiced his position with regard to jurisdiction. The result was that the trial Judge proceeded to hear and read evidence adduced on behalf of the appellant only and without any assistance from Crown Counsel on behalf of the respondent. Some of the evidence dealt with matters which would have been relevant to the issue involved in the preliminary hearing. No question was raised by the Judge as to the claim relating only to an empty dignity. Accordingly the precise nature of the claim to be "a ruler" as distinct from the mere claim to wear a crown was not investigated nor was any detailed evidence given as to the privileges and emoluments alleged to be attached to the position of Owa-Ale.

The respondent appealed to the West African Court of Appeal who held (1) that section 2 of the Ordinance of 1930 applied to the claim and ousted the jurisdiction of the Court and (2) that in any event even if this were not the case the claim was one relating to a mere empty dignity which, in accordance with the decision of the Full Court in *Adanji v. Hunvoo*, 1 N.L.R. 74, following the English law as stated in *Cowley v. Cowley* [1901] A.C. 450, was not cognisable by the Courts.

Their Lordships are of opinion that the important issues involved in this case both as to jurisdiction and as to the true nature of the appellant's claim, viz., whether it amounted to no more than a claim to an empty dignity, cannot be properly decided on the present material having regard to the course of the proceedings below and that there ought to be a new trial at which all the evidence on all issues, including jurisdiction, is heard before any judgment is given.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the judgment of the West African Court of Appeal be set aside and that the judgment of the Supreme Court be also set aside and the action remitted to the Supreme Court for a new trial and that the parties be at liberty to apply to amend their pleadings if so advised. The present respondent must pay two-thirds of the appellant's costs of this appeal. The costs of the proceedings in the Supreme Court and the West African Court of Appeal will abide the result of the new trial.

*Appeal allowed.
Judgments of the West African
Court of Appeal and the
Supreme Court set aside.
Action remitted to the Supreme
Court for a new trial.*

WUDANU KWASI, ACTING CHIEF OF
ATIPRADAA AND ANOTHER APPELLANTS

AND

NANA OSEI TWUM, OHENE OF BUKURUWA
(SUBSTITUTED FOR YAW NKANSAH II,
DSASEHENE OF BUKURUWA-KWAHU),
AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1953) 12 W.A.C.A. 309

1953 Nov. 17

Lord Oaksey, Sir Lionel Leach,
Mr. L. M. D. de Silva

Claim to land—Concurrent findings of fact by the Supreme Court of the Gold Coast and the West African Court of Appeal—Power of Supreme Court to amend pleadings in cause transferred to it from Native Court—Courts Ordinance, section 17—Native Administration (Colony) Ordinance, s. 75.

Once a valid transfer is made by the appropriate authority of a suit from a Native Court to the Supreme Court, the latter Court's power to amend pleadings remains uncurtailed by the transfer.

Cases referred to:

(1) *Ababio v. Ackumpong*, 6 W.A.C.A. 173.

(2) *Srimati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508; (1947) L.J.R. 209; 176 L.T. 209; 62 T.L.R. 549.

Appeal from the West African Court of Appeal.

The following judgment was delivered:

MR. L. M. D. DE SILVA. This is an appeal from a judgment of the West African Court of Appeal dated the 1st March, 1948, which affirmed a

judgment of the Supreme Court of the Gold Coast dated the 2nd May, 1947, in favour of the respondents.

The action was instituted by the respondents for a declaration of title to land and for an injunction on the 13th March, 1940, in the Kwahu State Tribunal. It arose out of a dispute concerning title to a tract of land between certain Kwahu Chiefs and certain Wusuta Chiefs. The case was transferred to the Lands Division of the Supreme Court of the Gold Coast by an order of the Commissioner of the Eastern Province dated the 21st March, 1942. In the Supreme Court various parties were added or substituted for existing parties in order *inter alia* that the real contestants of the questions that had arisen for investigation might be brought into Court and bound by its order.

The attempt so to bring them in did not completely succeed because an order made on the 29th September, 1946, that certain parties be added was rescinded by consent on the 24th February, 1947, owing to difficulties encountered in serving notice. This, however, does not affect the views expressed by their Lordships in the following paragraphs.

The description of the land claimed as it appeared in the papers filed in the Kwahu State Tribunal and in the original pleadings in the Supreme Court was amended in the latter Court on the 17th April, 1947, as the result of an application which had been made earlier but the date of which does not appear. The amendment was made at the instance of the appellants without objection by the respondents. It fixed the Western boundary of the land claimed with a definiteness greater than had been achieved in the Kwahu State Tribunal and for the Northern Boundary substituted the river Obosom for the river Faa. The Eastern and Southern boundaries were not altered. A plan (Exhibit "A") was prepared by a surveyor for the purposes of the case on an order of Court. It was stated by the appellants that they (the appellants) claimed only a part of the land claimed by the respondents. The land claimed by the appellants has not been delineated on the plan (Exhibit "A") or on any other plan. But this fact has not led to any difficulty in understanding the judgments of the Courts in Africa. Further, no difficulty can arise in giving effect to those judgments because those Courts have arrived at the conclusion, which their Lordships accept for reasons hereinafter stated, that the appellants are not entitled to any portion of the land claimed by the respondents.

Although the amendment referred to in the previous paragraph was not objected to before the trial Judge or before the Court of Appeal, it has been contended before their Lordships that it was made without jurisdiction and that it has vitiated the proceedings. It is admitted that the amendment is one which could properly have been made in the Kwahu State Tribunal but it is argued that, once the transfer was made, the Supreme Court had not the power to do even that which the Native Tribunal might have done. This view in their Lordships' opinion is erroneous.

By reason of the provisions of section 17 of the Courts Ordinance (c. 4 Laws of the Gold Coast) the Supreme Court could not have exercised jurisdiction over the matter which was pending before the Kwahu State Tribunal. But under section 75 of the Native Administration (Colony) Ordinance (c. 76 of the Laws of the Gold Coast) the Provincial Commissioner under stated conditions could "by order stop the hearing of any civil or criminal cause, matter or question commenced or brought" before the Kwahu State Tribunal and "direct that such cause, matter or question shall be inquired or, tried, and determined in the Divisional Court" which by virtue of recent legislation has become the Lands Division of the Supreme Court. By an order of the 21st March, 1942, the Provincial

Commissioner transferred the case to the Lands Division of the Supreme Court. It is admitted that the order of the Provincial Commissioner was properly made and that the case was validly transferred. It is argued, however, that the scope of a "cause, matter or question" transferred becomes so rigidly fixed in the process of transfer that the Supreme Court had no jurisdiction to make the amendments which it has made.

The power to amend pleadings possessed by the Supreme Court is necessary to enable it to deal effectively with the matters that come before it. Any limitation of such powers would be so unusual that, if it was ever found necessary to impose one in a special case, the legislature would normally use express words of limitation. In the relevant statute law applicable to a transfer their Lordships are unable to find words that can be said to impose a limitation even by implication.

In their Lordships' opinion once a valid transfer is made by the Provincial Commissioner to the Supreme Court its power to amend pleadings remains uncurtailed by the transfer. Its jurisdiction is full and unfettered. In *Ababio v. Ackumpong* (1), Graham Paul, C.J., said: "The Divisional Court can and must deal with any transferred case in every respect as if it were a case originally brought before it by its own writ of summons." Their Lordships respectfully agree.

It is convenient at this point to refer to an award made by a Travelling Commissioner in the year 1903 in arbitration proceedings in a dispute between Kwahu Chiefs and Wusuta Chiefs concerning much of the land which is the subject matter of this action. What the trial Judge regarded as an extract from the award (Exhibit "F") was admitted in evidence by him. It is signed by the Travelling Commissioner and *inter alia* expresses the view that the Kwahus were entitled to succeed for reasons therein stated. It was not in fact an extract from the award but an extract from a report relating to the award made by the Travelling Commissioner to the Secretary for Native Affairs at Accra. The Court of Appeal after considering arguments relating to Exhibit "F" advanced by the appellants took the view that "there was no evidence before the Court as to the terms of the actual award made." Their Lordships do not find it necessary to decide whether this view is correct and therefore refrain from commenting upon it, because the Courts in Africa arrived at concurrent findings of fact in favour of the respondents on a consideration of the evidence apart from the award and the arbitration proceedings. The trial Judge said: "I should, if of opinion on the evidence before me that the Commissioner came to a wrong decision, give effect to that opinion. But having weighed the evidence outside the award my view is that the balance is slightly in favour of the Kwahu Stools." He did say "in my final conclusion I have been influenced by the award." In the circumstances this must be taken to mean that he was satisfied on the other evidence that the Kwahus had the better claim, and that this conviction was strengthened by the award which he thought admissible. The Court of Appeal said:

"During the four days that this appeal has been argued before us it has been increasingly clear to us that the evidence is far from slightly in favour of the plaintiffs' (Kwahu) Stools as the learned Judge has found. We are satisfied upon a review of all the evidence that the plaintiffs are entitled to the declaration."

The question which has now to be considered is whether there is sufficient reason to disturb these concurrent findings of fact arrived at on the evidence

apart from the evidence furnished by the arbitration proceedings and the award. The principles which guide the Board in dealing with cases in which there are concurrent findings of fact are clearly and exhaustively set out in a judgment of the Board delivered by Lord Thankerton in the case of *Srimati Devi v. Kumar Ramendra Narayan Roy* (2) and there is no need to restate them here. There is nothing in this case which would entitle the appellants to ask their Lordships to review the evidence in detail with the object of testing the correctness of the concurrent findings arrived at by the Courts below.

In support of his submission that their Lordships should review the evidence counsel for the appellant argued that the judgment of the learned trial Judge was historically inaccurate. In particular he argued that the view of the learned trial Judge that after certain incidents which he referred to "it seems probable that any Wusutas then settled on the West Bank of the Volta on the land in dispute would have fled before the enemy" was historically incorrect. There is nothing that has been pointed out to their Lordships from the historical material which was placed in evidence before the trial Judge which demonstrates that he could not have arrived at the finding mentioned. The finding is concurred in by the Court of Appeal. It has been suggested that there is material in historical works not placed before the Courts in Africa which indicates that this concurrent finding is historically inaccurate. The appellants had a full opportunity of placing all the relevant evidence before the Courts in Africa and their Lordships are not prepared to review that evidence in the light of further historical material which may be placed for the first time before them.

Counsel for the appellants argued further that his case had been prejudiced by the consideration at the trial of the title to a tract of land larger than the land claimed by them. Prejudice can sometimes be caused in that way. But counsel was constrained to admit that in this case, decided largely on facts derived from tradition, the evidence relating to the land not claimed by the appellants was relevant to the consideration of title to the land claimed by them. Their Lordships are therefore unable to find any substance in the argument.

It was also argued that the Courts below had misapprehended the case as presented by the parties. In support of this contention their Lordships were referred to a statement made by the trial Judge that "The Wusuta case is that the Wusutas regained dominion over the land." This statement is quoted with approval by the Court of Appeal. It has been said that the Wusuta case was that the Wusutas had always had dominion over the land, had never lost it and consequently never "regained" it. Their Lordships are of the view that when the words referred to are read in the context of the judgment as a whole the contentions for the appellants, even if accepted, do not lead to the inference that the Courts in Africa have misapprehended any point of material importance.

The argument of misapprehension was sought to be supported by a reference to a statement in the judgment of the Court of Appeal that the area of the subject matter of the case was twenty square miles when in fact it was very much larger. This same mistake occurs in the evidence of a surveyor. The plan (Exhibit "A") shows the scale upon which it was prepared. It is difficult for their Lordships to imagine that this plan which played a prominent part in the presentation of this case to them was given so little consideration by the Court of Appeal that it did not realise that it was dealing with a tract of land vastly exceeding twenty square miles in area. Their Lordships are of the view that the mis-statement in the place where it occurs was purely inadvertent, and that there has not been a lack of

appreciation of the true extent of the land or, as the result thereof, of the true character of the points upon which a decision has been given.

Lastly, it was said that the Court of Appeal has failed to attach due importance to the evidence of occupation. The trial Judge discusses the question of occupation in a paragraph which begins, "I would however state that it does appear that at present there are more Ewes on the land than Kwahus," a statement *prima facie* in favour of the appellants. This discussion is not commented on by the Court of Appeal but "evidence of occupation" is referred to by the Court of Appeal and their Lordships are convinced that it was fully conscious of the views expressed by the learned trial Judge and gave due weight to those views and to the question of occupation.

The appellants have failed to satisfy their Lordships that there is any ground for reviewing in detail the evidence upon which the Courts in Africa have arrived at concurrent findings.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the respondents' costs in this appeal.

Appeal dismissed.

HENRY CHARLES CHRISTIAN (OTHERWISE
KNOWN AS KOFI AMPAH)

APPELLANT

AND

SAMUEL TAWIAH INTSIFUL

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 1 W.L.R. 253

1953 Dec. 14

Lords Porter, Oaksey and
Mr. L. M.D. de Silva

West African—Will—Blind testator—Whether "by what appears on the face of the will . . . he had . . . knowledge of its contents"—Court entitled to take cognisance of elaborate provisions of will—Courts Ordinances, Laws of the Gold Coast, 1936 Rev., c. 4, Sch. 3, Ord. 49, r. 29.
Will—"Blind."

By Ord. 49, r. 29, in Schedule 3 to the Courts Ordinance, c. 4 of the 1936 Revision, Laws of the Gold Coast: "Where the testator was blind or illiterate, the court shall not grant probate of the will, or administration with the will annexed, unless the court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution, or that he had at that time knowledge of its contents."

An elderly testator, whose eyesight was defective, handed a document to a man who had been a solicitor's clerk who, at the testator's request, typed it out for him. It was then signed by the testator and witnessed as his will without it having been read over to him. The will was an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it was never suggested to the solicitor's clerk that he had any such knowledge of the testator's relationships and friendships. The evidence did not establish that the testator was incapable of reading the document:

Held, that, if it could be shown plainly that the testator was incapable of reading, that would be sufficient proof that he was "blind" in this context; but that, even assuming that he was blind, the court in determining under Ord. 49, r. 29, whether it was satisfied "by what appears on the face of the will . . .

that he had at that time"—when the will was made—"knowledge of its contents," was entitled to take cognisance of the elaborate nature of the contents of the will, which was not a document which one who was not intimately acquainted with the testator's life could possibly have devised. Taking that matter into consideration, as well as the question of the testator's eyesight, it appeared that the testator in fact understood what he was doing and intended to do it, and the will was accordingly valid.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 7 of 1953) from a judgment of the West African Court of Appeal (December 21, 1951) which reversed a judgment of the Supreme Court of the Gold Coast (March 12, 1951).

In the proceedings out of which this appeal arose the respondent, as plaintiff, claimed as one of the executors of the last will, dated November, 20, 1944, of John Intsiful, who died on June 18, 1950, to have the will established, alleging its due execution on November 20, 1944. The present appellant (defendant) denied the respondent's claim, averring that on that date the testator was totally blind and could not have executed the will as alleged.

At the trial no serious question of due execution of the will or of the testator's testamentary capacity arose, but the dispute centred around the question whether the testator, whose eyesight was admittedly impaired, knew and approved of the contents of the will.

The trial judge (Dennison J.) found against respondent's claim, and held that the testator had died intestate. On appeal by the respondent the West African Court of Appeal (Foster-Sutton P., Coussey and Korsah JJ.) unanimously allowed the appeal, holding that when he executed the will the testator was fully aware of its contents, knew what he was doing and wished to make his last will.

The defendant appealed.

1953, December 14. *T. B. W. Ramsay and Sirimevan Amerasinghe* for the appellant.

James Petrie and *Gilbert Dold* for the respondent, were not called upon.

The following cases were cited in argument: *Battan Singh v. Amirchand* ([1948] A.C. 161; [1948] 1 All E.R. 152); *Tyrrell v. Painton* [1894] P. 151); *Fincham v. Edwards* ([1842] 3 Curt. 63; *In the Estate of Wallace, Decd.* ([1952] 2 T.L.R. 925, 928).

Dec. 14. The judgment of their Lordships was delivered by LORD PORTER. This case is one which in certain aspects has raised matters of difficulty for their Lordships' consideration. In making this statement their Lordships do not mean that, having regard to the evidence adduced in the courts in Africa, it presents difficulty as to the decision which they must reach. The difficulty rather occurs because certain matters which might have been elucidated in those courts were not dealt with, and consequently their Lordships are obliged to come to a conclusion upon the case as presented and to give their advice accordingly.

The case has been fully, accurately and impartially presented to their Lordships by Mr. Ramsay, who has said everything that could be said on behalf of the appellant, but their Lordships are not persuaded that it is a case in which they ought to advise Her Majesty to allow the appeal.

The facts are brief, and may be stated in a few sentences. The testator was at the time of his death in 1950, an old man of 93. The question at issue is whether a will which purports to have been, and indeed was, executed in 1944, represented the true and last will and testament of the testator, and in particular whether he understood the contents of the will as then executed.

appreciation of the true extent of the land or, as the result thereof, of the true character of the points upon which a decision has been given.

Lastly, it was said that the Court of Appeal has failed to attach due importance to the evidence of occupation. The trial Judge discusses the question of occupation in a paragraph which begins, "I would however state that it does appear that at present there are more Ewes on the land than Kwahus," a statement *prima facie* in favour of the appellants. This discussion is not commented on by the Court of Appeal but "evidence of occupation" is referred to by the Court of Appeal and their Lordships are convinced that it was fully conscious of the views expressed by the learned trial Judge and gave due weight to those views and to the question of occupation.

The appellants have failed to satisfy their Lordships that there is any ground for reviewing in detail the evidence upon which the Courts in Africa have arrived at concurrent findings.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the respondents' costs in this appeal.

Appeal dismissed.

HENRY CHARLES CHRISTIAN (OTHERWISE
KNOWN AS KOFI AMPAH)

APPELLANT

AND

SAMUEL TAWIAH INTSIFUL

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 1W.L.R. 253

1953 Dec. 14

Lords Porter, Oaksey and
 Mr. L. M.D. de Silva

West African—Will—Blind testator—Whether "by what appears on the face of the will . . . he had . . . knowledge of its contents"—Court entitled to take cognisance of elaborate provisions of will—Courts Ordinances, Laws of the Gold Coast, 1936 Rev., c. 4, Sch. 3, Ord. 49, r. 29.
Will—"Blind."

By Ord. 49, r. 29, in Schedule 3 to the Courts Ordinance, c. 4 of the 1936 Revision, Laws of the Gold Coast: "Where the testator was blind or illiterate, the court shall not grant probate of the will, or administration with the will annexed, unless the court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution, or that he had at that time knowledge of its contents."

An elderly testator, whose eyesight was defective, handed a document to a man who had been a solicitor's clerk who, at the testator's request, typed it out for him. It was then signed by the testator and witnessed as his will without it having been read over to him. The will was an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it was never suggested to the solicitor's clerk that he had any such knowledge of the testator's relationships and friendships. The evidence did not establish that the testator was incapable of reading the document:

Held, that, if it could be shown plainly that the testator was incapable of reading, that would be sufficient proof that he was "blind" in this context; but that, even assuming that he was blind, the court in determining under Ord. 49, r. 29, whether it was satisfied "by what appears on the face of the will . . .

that he had at that time"—when the will was made—"knowledge of its contents," was entitled to take cognisance of the elaborate nature of the contents of the will, which was not a document which one who was not intimately acquainted with the testator's life could possibly have devised. Taking that matter into consideration, as well as the question of the testator's eyesight, it appeared that the testator in fact understood what he was doing and intended to do it, and the will was accordingly valid.

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In the proceedings out of which this appeal arose the respondent, as plaintiff, claimed as one of the executors of the last will, dated November, 20, 1944, of John Intsiful, who died on June 18, 1950, to have the will established, alleging its due execution on November 20, 1944. The present appellant (defendant) denied the respondent's claim, averring that on that date the testator was totally blind and could not have executed the will as alleged.

At the trial no serious question of due execution of the will or of the testator's testamentary capacity arose, but the dispute centred around the question whether the testator, whose eyesight was admittedly impaired, knew and approved of the contents of the will.

The trial judge (Dennison J.) found against respondent's claim, and held that the testator had died intestate. On appeal by the respondent the West African Court of Appeal (Foster-Sutton P., Coussey and Korsah JJ.) unanimously allowed the appeal, holding that when he executed the will the testator was fully aware of its contents, knew what he was doing and wished to make his last will.

The defendant appealed.

1953, December 14. *T. B. W. Ramsay and Sirimevan Amerasinghe* for the appellant.

James Petrie and Gilbert Dold for the respondent, were not called upon.

The following cases were cited in argument: *Battan Singh v. Amirchand* ([1948] A.C. 161; [1948] 1 All E.R. 152); *Tyrrell v. Painton* [1894] P. 151); *Fincham v. Edwards* ([1842] 3 Curt. 63; *In the Estate of Wallace, Decd.* ([1952] 2 T.L.R. 925, 928).

Dec. 14. The judgment of their Lordships was delivered by LORD PORTER. This case is one which in certain aspects has raised matters of difficulty for their Lordships' consideration. In making this statement their Lordships do not mean that, having regard to the evidence adduced in the courts in Africa, it presents difficulty as to the decision which they must reach. The difficulty rather occurs because certain matters which might have been elucidated in those courts were not dealt with, and consequently their Lordships are obliged to come to a conclusion upon the case as presented and to give their advice accordingly.

The case has been fully, accurately and impartially presented to their Lordships by Mr. Ramsay, who has said everything that could be said on behalf of the appellant, but their Lordships are not persuaded that it is a case in which they ought to advise Her Majesty to allow the appeal.

The facts are brief, and may be stated in a few sentences. The testator was at the time of his death in 1950, an old man of 93. The question at issue is whether a will which purports to have been, and indeed was, executed in 1944, represented the true and last will and testament of the testator, and in particular whether he understood the contents of the will as then executed.

It might be convenient at this moment to state that in consonance with the ordinary practice in this country, a provision is made in Ord. 49, r. 29, of the Courts Ordinance of the Gold Coast, c. 4, which runs in this way: "Where the testator was blind or illiterate, the court shall not grant probate of the will, or administration with the will annexed, unless the court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution, or that he had at that time knowledge of its contents."

The actual question which their Lordships have to determine does not lie in the first part of the rule. The will in fact was, according to the evidence of a Mr. Arthur, who had been a solicitor's clerk but was not then acting on behalf of a solicitor, typed out by him. Some dispute took place as to what actually occurred when the will was made. The final evidence of Mr. Arthur is that it was made sometime after he had left a previous employer, which could not be earlier than 1943 and might be 1944, and that what occurred was this. He was called to the side of the testator, handed a document and asked to type it. He did so, and then gave it back to the testator, and the document was afterwards signed by the testator and witnessed by two witnesses, and then on the instructions of the testator placed in an envelope and put into the custody of the court in order to ensure that it was as regular as possible.

A good deal of discussion took place as to whether that was an accurate account of what had occurred. Apparently, by some mistake, the solicitor acting for the executor in the case who was propounding the will, had obtained what was not an accurate description of what had occurred at the interview. The inaccurate account was that the testator had dictated his wishes to the solicitor's clerk who took them down, and made a copy. The solicitor's clerk was called a second time in the course of the case, said that the proof taken by the solicitor was inaccurate, and, as their Lordships understand his evidence, adhered to the story which was first put forward. It is on that evidence that their Lordships have to decide the case.

It is admitted on all sides that the will was not read over to the testator by the solicitor's clerk, nor is there any evidence that it was read over to him by anyone else, and therefore their Lordships are thrown back upon the question whether by proof or by what appears on the will the testator had at the date of its signing knowledge of its contents. It is upon that matter that the dispute between the parties now turns. The first court thought that he was blind within the meaning of the relevant Order, and that as the document had not been read over to him there was not sufficient evidence to show that he knew of its contents. The Court of Appeal, on the other hand, took the view that there was sufficient evidence to show that he knew its contents, and unless the appellant can dispose of that finding their Lordships would not be entitled to alter the decision of the West African Court of Appeal.

The first problem is this: was there evidence that the testator in fact was blind? That is by no means clear; on the contrary, the onus being on the appellant to show that the testator was blind, in their Lordships' view that onus has not been discharged. The solicitor's clerk, Mr. Arthur, did not suspect him of blindness, nor is such a view necessarily inherent in the evidence given by the two persons who witnessed the will. They certainly thought that the testator understood what he was doing, and, if the evidence which they gave is looked at, the first witness, Mr. Hammond, said on p. 6: "The deceased was not totally blind, but his eyesight had been bad for some time before he died—how long I cannot say." That deals with the

question of the eyesight of the testator at the time he died, but does not deal directly with his eyesight in 1944 when the will was executed. The second witness, another Mr. Arthur, said: "I cannot say if the deceased was totally blind; he was groping with thing on his table." From that and from other evidence, it is plain that the testator's eyesight was impaired, but that he was unable to read or unable to see what was on the document is not proved.

Their Lordships, on the whole, are inclined to agree with Mr. Ramsay that if it could be shown plainly that the deceased was incapable of reading, that would be sufficient proof of blindness because the word "blind" occurs in collocation with the word "illiterate." Apparently both matters are meant to be put on the same basis, namely, was the man incapable of reading the document which he had signed. In their Lordships' view that has not been sufficiently established.

Even supposing he were blind, there still remains the question whether he understood the document which was put before him. So far as the witnesses were concerned they obviously thought that he was capable of understanding what he had done. But the matter does not rest there. Their Lordships have had presented to them the will, which is marked "P.1," and have read it through in order to see what result was to be deduced from that reading. In reaching a conclusion as to the decision at which they should arrive, their Lordships find that in Ord. 49 one matter for their consideration is whether by what appears on the face of the will the testator "had at that time," that is, at the time of making it, "knowledge of its contents." The will is an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it is not a document which one who was not intimately acquainted with the testator's life could possibly have devised.

Their Lordships are entitled, in their view, to take cognisance of this fact. It was never suggested to Mr. Arthur, the solicitor's clerk, that he had that or any such knowledge of the testator's relationships and friendships, and their Lordships are entitled to take that matter into consideration, as well as the question of his eyesight, in making up their minds as to what advice they should humbly tender to Her Majesty.

It is true that there has been some difficulty owing to the production of two documents, both of which are signed and purport, as Mr. Ramsay quite rightly says, to be witnessed by the same persons. If their Lordships had to speculate upon the matter they would be inclined to say that one was meant to be a copy of the other, one to be the will and the other to be a copy for the testator to keep, but there is no reason why they should have to speculate in this matter. Except for the omission of a certain gift, which might well occur in a case where there is a long list of persons to whom gifts were given, for all practical purposes the two documents are similar. That the one which has been numbered P.1. is the true will, appears from the fact that it was by the express wish of the testator deposited with the court, and therefore was meant to be the formal document which should bind the estate.

None of the cases cited throws light upon the decision to which their Lordships have come. Their Lordships think that the judge of first instance in Africa probably took too much cognisance of the fact that the man was somewhat blind, and did not pay enough consideration to all the other circumstances which appear to their Lordships to show that in fact the deceased man understood what he was doing and intended to do it.

In those circumstances, their Lordships will humbly advise Her Majesty

that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Burchells; A. L. Bryden & Williams.*

AMOA ABABIO, OHENE OF ASAMANGKESE,
 REPRESENTING THE STOOL OF
 ASAMANGKESE AND ANOTHER APPELLANTS
 AND
 JOHN EDMUND TURKSON RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 1 W.L.R. 509

1954 Mar. 12

Lords Porter, Reid and Keith of Aronholm

West Africa—Gold Coast—Jurisdiction—Claims in respect of debt or liability against specified Stools—Certificate of Governor in Council—“The amount which ought to be paid”—Reference re whole question of liability and not merely quantum—Asamangkes Division Regulation Ordinance, 1935 (Laws of Gold Coast, 1936 Rev., c. 78) (as amended by Asamangkes Division Regulation (Amendment) Ordinance, No. 5 of 1945 (Gold Coast), s. 2 (b), s. 6 (2)).

Statute—Construction—Ambiguity—Relevance of inconvenient results of one construction.

The Asamangkes Division Regulation Ordinance, 1935, of the Gold Coast, the effect of which was to withdraw entirely from the jurisdiction of the courts any claim against the Asamangkes and Akwatia Stools for a debt or liability incurred before the date of the Ordinance, provided by section 6 (2), as amended by the Asamangkes Division Regulation (Amendment) Ordinance 1945, that *inter alia*, the Governor in Council “if he thinks fit, may refer the matter to the Executive Council for consideration as to whether or not it is desirable, in the interest of justice, that the claim or any part thereof, or the amount which ought to be paid, should be adjudicated upon in an action against the Stool” and may upon such reference, if he considers it desirable, in his absolute discretion certify that the circumstances in respect of any such claim were such that the matter might properly be the subject of legal proceedings. Pursuant to those provisions, a certificate was issued by the Governor in Council to the respondent which, after reciting that a claim by the respondent against the Asamangkes and Akwatia Stools for moneys alleged to be due to him under an agreement made in 1921, whereby the Stools agreed to pay him five per cent., of all moneys received by them in respect of certain mineral concessions granted to companies introduced by the respondent, had been referred to the Executive Council, stated that the Governor in Council “hereby certifies that in his opinion the circumstances are such that . . . the amount which ought to be paid in respect of the said claim, may properly be the subject of legal proceedings” by the respondent against the Stools:

Held, that the words, “the amount which ought to be paid” in the Ordinance and certificate covered the question of liability on the claim as a whole, and were not referring to a mere question of quantum.

Judgment of the West African Court of Appeal set aside and case remitted.

APPEAL (No. 48 of 1950) from a judgment of the West African Court of Appeal (Gold Coast Session—Accra) (February 9, 1949) which set aside a judgment of the Supreme Court of the Gold Coast (Eastern Judicial Division) (October 1, 1947) which had dismissed an action by the respondent claiming an account of commission alleged to be due to him,

and an order for payment of the amount found due, against the then representatives of the Stools of Asamankese and Akwatia.

On October 22, 1945, the Governor in Council of the Gold Coast, under section 6 of the Asamankese Division Regulation Ordinance, 1935, as amended, issued a certificate which, after reciting that a claim be the respondent against the Asamankese and Akwatia Stools for moneys alleged to be due to him under an agreement made in the year 1921 had been referred for consideration to the Executive Council and that the Governor in Council considered it desirable that the amount which ought to be paid in respect of the said claim should be adjudicated upon in an action against the Stools, certified that in the opinion of the Governor in Council the circumstances were such that the amount which ought to be paid in respect of the claim might properly be the subject of legal proceedings by the respondent against the Stool.

The provisions of the Ordinance and the terms of the certificate of the Governor in Council are set out in the judgment of the Judicial Committee.

The respondent thereupon, on August 29, 1946, issued a writ of summons constituting a statement of claim in which he alleged that in or about August, 1921, it was agreed between the respondent and the defendants, the then representatives of the Stools, that if the respondent introduced to the defendants a company or companies who would enter into mining leases with the defendants in respect of minerals on the Stool land and financed the prospecting for minerals the defendants would pay to the respondent a commission of five per cent., of all rents or royalties paid by the company or companies introduced during the continuance of a mining lease or leases. The respondent further alleged that the Stool lands were prospected at his expense and that on the discovery of diamonds he introduced to the defendants two named companies who entered into mining leases. He further alleged that he received commission at the rate of five per cent. from 1921 to 1935, but not since 1935, although he had orally and by letters requested payment. He claimed an account of all moneys by way of rents and royalties received by the defendants from the companies and the commission due in respect thereof to him, and payment of the amount found due.

The defendants delivered a defence whereby they denied, *inter alia*, the making of the agreement alleged; said that the alleged agreement was unknown to, invalid by and unenforceable under native customary law, and, if purporting to be made in accordance with English law, did not comply with the Statute of Frauds.

Coussey J. in the Supreme Court reached the conclusion that the agreement which the respondent alleged and the consideration for it had never been entered into. He found no money to be due to the respondent in respect of his claim, and accordingly gave judgment for the defendants. As regards the contention that the certificate of the Governor in Council precluded the court from finding that there was no binding contract between the parties, Coussey J. held that the court's duty was not limited to adjudication only as to the amount. He construed the Ordinance and certificate as empowering the court to adjudicate upon the claim as brought and to determine whether any money was due to the respondent and, if so, the amount.

On appeal by the respondent to the West African Court of Appeal (Blackall P., Smith Ag. C.J. (Gold Coast), and Lewey J.A.) on the ground, *inter alia*, that the trial judge was wrong in reopening and trying the whole case in the face of the certificate issued under section 6 of the Ordinance,

the Court of Appeal set aside the judgment of Coussey J. and remitted the case to the court below to determine the amount which ought to be paid in respect of the respondent's claim.

The Stools, through their representatives, appealed.

1954. Feb. 2, 3. *Frank Gahan Q.C.* and *W. T. Wells* for the appellants.

S. N. Bernstein for the respondent.

March 2. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM. This appeal raises a short but troublesome question as to the extent of the jurisdiction conferred upon the courts of the Gold Coast Colony, by a certificate of the Governor in Council, to entertain legal proceedings against the Asamankese and Akwatia Stools. The certificate was issued to the respondent in this appeal and following upon its issue he brought proceedings against representatives of the Stools, in the Divisional Court of Accra. In the writ of summons it was stated that in or about August, 1921, it was agreed between the plaintiff and the defendants that (1) if the plaintiff introduced to the defendants a company or companies who would enter into mining leases with the defendants, and (2) financed the prospecting of the Stool lands, for minerals, the defendants would pay to the plaintiff a commission of 5 per cent., on all moneys paid by the company or companies to the defendants by way of rents or royalties during the continuance of a mining lease or leases. The writ states that in consequence of the agreement the defendants' Stool lands were prospected at the expense of the plaintiff, and on the discovery of diamonds the plaintiff introduced to the defendants a company and a syndicate who entered into mining leases with the defendants. The writ further states that in pursuance of the agreement the defendants paid the plaintiff the commission of 5 per cent. as from 1921 to 1935; that the plaintiff is not aware of what sums of money the defendants have received from the company and syndicate since 1935; and that the defendant have not since that date paid the plaintiff any money or commission or rendered him any account of moneys received from the companies although requested orally and by letters to do so. He therefore claims (1) for an account of all moneys by way of rent and royalties received by the defendants from the companies and of the amount of the commission due to the plaintiff, and (2) for the payment of the amount found due on the accounting. The defendants entered a defence denying the plaintiff's allegations and stating various other defences, including invalidity of the agreement by native customary law, the Statute of Frauds, and the Statute of Limitation.

The parties joined issue on the allegations and defences and, after hearing evidence, the trial judge found that the agreement and the consideration for it was never entered into. He also rejected a contention for the plaintiff that by the terms of the certificate of the Governor in Council he was precluded from finding that no binding contract existed between the plaintiff and the defendant because the Governor in Council must be deemed to be satisfied as to the existence of such a contract and that the court was called upon to adjudicate only as to the amount which ought to be paid to the plaintiff. He accordingly found no money due to the plaintiff and gave judgment for the defendants. On appeal, the West African Court of Appeal, for reasons which the Board will consider in a moment, took the view that the trial judge, by considering the validity of the claim instead of confining himself to the question of the amount to be paid to the plaintiff, had gone beyond the matter to be adjudicated upon by the terms of the certificate of the Governor in Council. He had thus acted in excess of the jurisdiction conferred upon him. By their judgment the appeal was allowed, the order of

the trial judge was set aside, and it was ordered that the case be remitted to the court below to determine the sole issue which had been left to the court by the certificate of the Governor in Council, namely, the amount which ought to be paid in respect of the appellants' claim.

The certificate issued by the Governor in Council, is as follows:

“ WHEREAS a claim by John Edmund Turkson against the Asamangkese and Akwatia Stools for moneys alleged to be due to him from the said Stools under an agreement made in or about the year 1921, whereby the said Stools agreed to pay to the said John Edmund Turkson 1s. in the £1 of all moneys received by the said Stools in respect of certain concession granted to the Consolidated African Selection Trust Ltd. and the West African Diamond Syndicate, has been referred for consideration to the Executive Council pursuant to the terms of the proviso to section 6 (2) of the Asamangkese Division Regulation Ordinance (c. 78): AND WHEREAS the Governor in Council considers it desirable that the amount which ought to be paid in respect to the said claim should be adjudicated upon in an action against the said Stools: NOW THEREFORE pursuant to the terms of paragraph (ii) of the proviso to section 6 (2) aforesaid, the Governor in Council hereby certifies that in his opinion the circumstances are such that the matter, to wit, the amount which ought to be paid in respect of the said claim, may properly be the subject of legal proceedings by the said John Edmund Turkson against the said Stools.”

To appreciate the purpose and effect of this certificate it is necessary to have regard to certain legislation affecting the control and regulation of the property, revenues and expenditure of the Stools in the Asamangkese Division. The matter starts with an Ordinance of March 30, 1935, enacted by the Governor of the Gold Coast Colony, with the advice and consent of the Legislative Council, which had for its purpose to prevent the incurring of any debt or liability on behalf of a Stool without the consent of the Treasurer of the Stool Treasuries appointed under regulations made by the Governor in Council. The Ordinance also enacted that as from its commencement no action should lie against a Stool, and no execution should issue or be enforceable against the revenues of the Stool or any Stool property in respect of any debt or liability incurred whether before or after the commencement of the Ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after its commencement was incurred with the consent of the prescribed officer, *i.e.*, the Treasurer of the Stool Treasury. The effect of this Ordinance was to withdraw entirely from the jurisdiction of the courts any claim against the Stool for a debt or liability incurred before the date of the Ordinance. But under a power given by section 8 of the Ordinance to the Governor in Council to permit and regulate the discharge of debts due and liabilities incurred by a Stool prior to the commencement of the Ordinance, regulations were made, to which it is unnecessary to refer in detail, prescribing certain procedure upon which the Governor could approve of the payment of such debts, and expressly providing that no claim for debts existing prior to the commencement of the Ordinance should be paid by the Treasurer of the Stool Treasury unless such debt had been first approved by the Governor. So matters stood until 1945 when an Amendment of sub-section (2) of section 6 of the Ordinance of March 30, 1935, was made by an Ordinance of April 7, 1945. It is upon the interpretation of section 6 (2) of the Ordinance of 1935, as so amended,

that the question in issue in this appeal depends. As amended the subsection reads as follows:

“(2) From and after the date of the commencement of this Ordinance no action save as is hereinafter provided shall lie against a Stool or against any officer appointed under section 8 (e) for the collecting, safe custody, and management of the revenue of a Stool and no execution shall issue or be enforceable against the revenues of the Stool or any Stool Property in respect of any debt or liability incurred whether before or after the commencement of this ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after the commencement of this Ordinance was incurred with the consent of the prescribed officer; Provided that in any case where a claim in respect to a debt or liability alleged to have been incurred by or on behalf of the Stool before the commencement of this ordinance has been the subject of an inquiry in accordance with any regulations made under this Ordinance, and the Governor, upon consideration of the record of the inquiry and of any recommendation transmitted to him in connection therewith is in doubt as to whether or not any payment ought to be made in respect to the claim or any part thereof, or as to the amount which ought to be paid, the following provisions shall have effect: (i) The Governor, if he thinks fit, may refer the matter to the Executive Council for consideration as to whether or not it is desirable, in the interests of justice, that the claim or any part thereof, or the amount which ought to be paid, should be adjudicated upon in an action against the Stool (ii) where, upon any such reference, the Governor in Council considers it desirable that there should be any such adjudication, he may in his absolute discretion and without assigning any reason, certify that in his opinion the circumstances are such that, notwithstanding anything in this Ordinance, the matter may properly be the subject of legal proceedings: (iii) in any case where the Governor in Council has so certified, nothing in this subsection shall be deemed to preclude any court of competent jurisdiction from adjudicating upon the matter to which the certificate relates or to prohibit the issue or enforcement, after judgment, of execution against the Stool property or revenues.”

Their Lordships have come to the view that, on a sound construction of this provision, the words “ the amount which ought to be paid ” cannot be read in the restricted sense put upon them by the Court of Appeal. These words, in the context in which they are used, are not in the opinion of their Lordships unambiguous, as the judges in the court below seem to have thought. The word “ ought ” in itself introduces an element of ambiguity. Does it mean ought as a mere matter of assessment or accounting or ought as a matter of law? The support for the first meaning lies in the contrast between the words “ as to whether or not any payment ought to be made in respect to the claim or any part thereof ” in the one branch of the alternative and the words “ as to the amount which ought to be paid ” in the other branch. But in their Lordships’ opinion the difference can be explained by the contrast between “ debt ” and “ liability ” in the first part of the sub-section and in the opening words of the proviso. This contrast, their Lordships think, is between a claim to an ascertained or liquid sum and a claim to an unascertained or illiquid amount. On this reading the question whether any payment ought to be made refers to a claim in respect to a debt, and the question as to the amount that ought to

be paid refers to a claim in respect of a liability. Their Lordships find support for the meaning in the fact that in each of subheads (i), (ii) and (iii) of the proviso " the matter " there mentioned refers naturally to the claim as a whole. If, accordingly, under subhead (ii) the Governor in Council may certify that " the matter " may properly be the subject of legal proceedings there seems to be no point, and maybe even a doubt as to the competence, of excluding any part of the claim from legal proceedings. In their Lordships' opinion accordingly, it accords best with the natural and reasonable meaning of the language used to construe the words " the amount which ought to be paid " as covering the question of liability upon the claim as a whole and not as referring to a mere question of quantum.

It is not out of place to point to the difficulties and inconveniences which would result from the more restricted meaning being put upon these words. It was conceded that it would be relevant to consider whether the " amount " had been satisfied by payment, in whole or in part. But if so, why should a defence based on the Statute of Limitation, or the Statute of Frauds, or on the invalidity of the agreement, or the absence of agreement be excluded? These may all bear on the question whether any sum " ought " to be paid. There are also, in their Lordships' view, practical difficulties and inconveniences in part of a claim being determined by the Governor and part by the courts, and as to the manner of its enforcement. Where there is ambiguity, as in their Lordships' view there is here, these are relevant considerations.

The view was apparently taken by at least one of the Justices of Appeal in the court below that the trial judge should have proceeded on the basis that the claim had already been admitted by the Governor in Council. If the conclusion reached by the Court of Appeal were a sound one that may have been a proper assumption to make, but for the reasons stated it falls to be rejected. There is, in fact, no such statement in the certificate of the Governor.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal should be set aside and the case remitted to the Court of Appeal to adjudicate upon the other grounds of appeal contained in the appeal from the judgment of the trial judge. The costs of the appeal and of the hearing in the West African Court of Appeal which led up to the judgment dated February 9, 1949, must be paid by the respondent. The costs otherwise will be dealt with by the West African Court of Appeal after the case has been determined on the merits.

Solicitors: *Sole, Sawbridge & Co.; A. L. Bryden & Williams.*

JOHN ADEBAYO APPELLANT
 AND
 OFFICIAL RECEIVER OF NIGERIA RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 1W.L.R. 681

John Adebayo v. Official Receiver

West Africa (Nigeria)—Company—Winding up—Voluntary—Proposed reconstruction—One-man company—Nominee liquidator—Order for compulsory winding up—Evidence of creditors shut out—Discretion not properly exercised—Companies Ordinance (Laws of Nigeria, 1948, c. 38), ss 132 (2), 140.
Company—Winding up.

A limited company incorporated under the laws of Nigeria resolve that should be wound up voluntarily (with a view to reconstruction), and appointed as liquidator the appellant, who thereafter filed a motion for an order that he might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme for reconstruction. Before that motion was disposed of the Official Receiver, the respondent, presented a petition praying that the company should be wound up by the court under section 132 (2) of the Companies Ordinance, c. 38 of the Laws of Nigeria, 1948. The appellant had in the meantime applied for subpoenas on a number of persons whom he wished to call as witnesses and filed a number of affidavits of creditors who were prepared to give evidence. On the hearing of the petition it was stated by the judge that the company was virtually a one-man company and that the appellant was the nominee of the shareholder who had complete control of the company; that no fraud was alleged by the Official Receiver, but that it would be contrary to public interest and against the interest of creditors generally to allow a company to continue a voluntary winding up in those circumstances and that he saw no reason to call evidence. He accordingly ordered the company to be compulsorily wound up. On appeal by the liquidator:

Held, that it did not necessarily follow that, because a company was controlled by one shareholder of whom a liquidator in a voluntary liquidation might be regarded as the nominee, a voluntary winding up could not be continued with due regard to the interests of the creditors. In the light of sections 132 (2) and 140 of the Companies Ordinance and in the circumstances of the present case the wishes of the creditors were relevant matter for consideration, and the liquidator should have been allowed to lead the evidence which he desired to call and, he having been refused that opportunity, it could not be said that the trial judge was in a position properly to exercise a discretion to order a compulsory winding up, and there would be a re-trial of the petition. *In re Medical Battery Company* [1894] 1 Ch. 444 distinguished on the ground that the liquidator in that case was clearly not in a position to act impartially in the interests of unsecured creditors.

Judgment of the West African Court of Appeal set aside.

APPEAL (No. 35) from a judgment of the West African Court of Appeal, sitting at Lagos (May 18, 1953), affirming in part a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) (February 6, 1953).

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of the liquidation of a company under the Companies Ordinance, chapter 38 of the Laws of Nigeria, 1948. The Nigerian Farmers and Commercial Bank Ltd. was a limited liability company incorporated under the laws of Nigeria and having its registered office in Lagos. By extraordinary resolutions passed at an extraordinary general meeting held on December 12, 1952, it was resolved:

“(1) That the Nigerian Farmers and Commercial Bank Ltd. cannot, by reason of its liabilities and other difficulties, continue its business and that it is advisable to wind up the same and that the company be wound up voluntarily accordingly. (2) That Mr. John Adebayo, English accountant of No. 4, Coates Street, Ebute-Metta, Nigeria, and Mr. Charles D. Gairdner, chartered accountant, of No. 23, Lawrence Lane, London, W.C.2, be and they are hereby appointed liquidators of the company to conduct the winding up.”

Mr. Adebayo was appointed to act in respect of the assets of the company in Nigeria, and Mr. Gairdner, in respect of the assets in the United Kingdom.

At the statutory meeting of creditors held on December 29, a Mr. Akintola Williams, chartered accountant, was appointed as joint liquidator in place of Mr. Gairdner. Mr. Williams subsequently declined to act. At the same meeting a further resolution was passed that

“ Whereas it is the opinion of the majority of the creditors that the said bank should be reconstructed and that it should resume normal business and that a compromise be arrived at for the benefit of creditors. Be it resolved therefore, that the aforesaid Nigerian Farmers and Commercial Bank Ltd., in liquidation be reconstructed and that Mr. John Adebayo of 4, Coates Street, Ebutte Metta and Akintola Williams, chartered accountant, liquidators are hereby instructed to convene special meeting according to law for the purpose of discussing and approving the scheme of reconstruction and compromise.”

A protest was recorded by a Mr. A. M. Ferguson, who represented a number of creditors who had forwarded bills for collection by the bank, on the ground that the minute did not accord with the provisions of section 181 (2) of the Ordinance and was *ultra vires*, and that the vote was not properly conducted in that creditors by number and value were not identified.

On December 31, 1952, the appellant (hereafter referred to as the liquidator) filed a motion for an order that he might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme or schemes of arrangement (reconstruction) and compromise to be drawn up, and that directions be given as to the method of convening the meeting and for any further order or orders.

Before that motion was disposed of the Official Receiver (the respondent in this appeal) presented a petition to the court praying that for reasons set out therein the bank should be wound up by the court under section 132 (2) of the Companies Ordinance, that the petitioner be appointed liquidator and that Mr. Adebayo be ordered to hand over all books, papers and other documents in his possession relating to the affairs of the company, together with an account of his dealings with the affairs of the company since the date of his appointment. That petition was accompanied by an affidavit of the Official Receiver and various annexures, including a letter dated January 9, 1953, received by the Official Receiver from Mr. Ferguson.

After sundry procedure the motion of the liquidator of December 31, 1952, and the petition of the Official Receiver came up for further hearing on February 4, 1953. In the meantime the liquidator had filed a counter-affidavit and had applied for subpoenas on 36 persons whom he wished to call as witnesses, and filed a number of affidavits of creditors who were prepared to give evidence.

At the hearing on February 4, before Gregg J. counsel for the liquidator asked for an adjournment to hear witnesses, and stated that the whole purpose of the voluntary liquidation was reconstruction. He also stated that he wished Mr. Ferguson to be called. Counsel for the Official Receiver supported his petition and opposed an adjournment. Gregg J. adjourned the petition to February 6, stating that he would give his decision on whether evidence would be taken in this matter or whether the Official Receiver's petition would be granted forthwith on that date.

A motion for the liquidator for leave to appeal against that order was made and refused on February 6. On the same date the judge gave his decision on the adjourned petition. He stated in his judgment that there was no denial of three important averments made by the Official Receiver in his petition. Those were (1) That the directors of the company were Mr.

Adebayo Shobayo Olumuyiwa Coker and Mr. Tijani Afolabi Adeosun; (2) that the issued capital of the company was £25,194 made up of 500 preference shares and 24,694 ordinary shares; (3) that Mr. Coker held the whole of the 500 issued preference shares and 24,455 of the 24,694 ordinary shares.

The last averment meant, he said, that the company was virtually a one-man company and that the liquidator was the nominee of Mr. Coker who had complete control of the company.

“ On these facts,” he added, “ which are in themselves sufficient, in my opinion, to justify a winding up by the court, I see no reason to call evidence; and that being so I do not think it necessary to allow evidence to be called in relation to other matters . . . No fraud is alleged by the Official Receiver; but in my opinion it would be contrary to public interest and against the interest of creditors generally to allow a company to continue a voluntary winding up under the circumstances mentioned.”

He accordingly ordered the company to be wound up by the court.

Against that judgment an appeal was taken by the liquidator to the West African Court of Appeal (Foster Sutton P., Verity C.J. (Nigeria) and Coussey J.A.). The judgment of the court was given on May 18, 1953, dismissing the appeal on the only point with which the present appeal was concerned, viz. the order for a compulsory winding up. Foster Sutton P., who delivered the judgment of the court, said that it was a well-settled principle that the court would not interfere with an exercise of discretion, as this was, by a lower court unless it had proceeded upon a manifestly wrong ground. In his view the grounds stated by the trial judge were sufficient to entitle him to exercise his discretion in favour of making a compulsory order. He referred to *In re Medical Battery Co.* ([1894] 1 Ch. 444) as illustrating an order made by Vaughan Williams J. on similar grounds. From that judgment the present appeal was taken.

1954. March 23, 24. *Granville Sharp Q.C., T. B. Ramsay and E. Gardiner Smith* for the appellant.

R. O. Wilberforce for the respondent.

The following cases were cited in argument: *In re Charterland Goldfield Ld.* ([1909] 26 T.L.R. 132); *In re 1897 Jubilee Sites Syndicate* ([1899] 2 Ch. 204; 15 T.L.R. 391); *In re Haycraft Gold Reduction and Mining Co.* ([1900] 2 Ch. 230; 16 T.L.R.); *In re Gutta Percha Corporation* ([1900] 2 Ch. 665); *In re E. Bishop & Sons Ld.* ([1900] 2 Ch. 254); *In re Home Remedies Ld.* ([1943] Ch. 1; 59 T.L.R. 31; [1942] 2 All E.R. 552).

April 6. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above, and continued: The proper procedure was for an application to be made to the court for the appointment of Mr. Williams as joint liquidator, but as he subsequently declined to act, and as this matter does not enter into the appeal, their Lordships make no further reference to it.

Their Lordships have arrived at the conclusion, looking to the procedure followed before the trial judge, that the judgments of the Court of Appeal and of the trial judge cannot stand. In their Lordships' opinion the liquidator should have been allowed to lead the evidence which he desired to call and, he having been refused that opportunity, it cannot be said that the trial judge was in a position properly to exercise a discretion to order a compulsory winding up.

Section 132 (2) of the Companies Ordinance is as follows:

“ Where a company is being wound up voluntarily or subject to supervision, a petition may be presented by the Official Receiver attached to the court, as well as by any other person authorized in that behalf under the other provisions of this section, but the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up or winding up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories.”

Reference should also be made to section 140 which reads: “ The court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.”

In the light of these sections and in the circumstances of the present case it appears to their Lordships that the wishes of the creditors were relevant matter for consideration. It was said that the evidence was intended only to prove a desire by the creditors for reconstruction of the company. Even if this be so, it seems to their Lordships to be immaterial, as the creditors may still prefer reconstruction to be carried out under a voluntary winding up. There may also be other matters arising out of the affidavit and counter-affidavit on which the Official Receiver or the liquidator may wish to lead evidence, including the position of Mr. Ferguson. Their Lordships would leave this entirely open to the parties.

With regard to the ground of judgment on which both the trial judge and the Court of Appeal proceeded, their Lordships would point out that it does not necessarily follow that, because a company is controlled by one shareholder and a liquidator in a voluntary liquidation may be regarded as a nominee of that shareholder, a voluntary winding up cannot be continued with due regard to the interests of the creditors. In *In re Medical Battery Co.* ([1894] 1 Ch. 444) there were circumstances clearly sufficient to disqualify the liquidator from acting as an independent party. The control of the company and of the debenture holders was in the hands of the managing director and his family, and the liquidator was also receiver for the debenture holders. In these circumstances he was not in a position to act impartially in the interests of the unsecured creditors. Their Lordships do not find it necessary to enter more fully into this aspect of the present case or to examine the other authorities cited on this point, as any question of prejudice to creditors will have to be considered anew in the light of all the evidence which may be made available at a new trial.

A question was raised whether the wishes of creditors should not be ascertained by meeting directed under section 209 of the Ordinance. That is not, in their Lordships' opinion, a matter on which they should give any direction. The question will, if raised, have to be considered by the judge who takes the retrial.

In these circumstances their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the orders of the Court of Appeal and of Gregg J., and to order a retrial of the petition. The respondent must pay the costs of this appeal and of the hearing in the West African Court of Appeal. The costs of the hearing before Gregg J. shall abide the decision on the retrial.

Solicitors: *Burchells; Charles Russell & Co.*

ANTONIO ASSAF APPELLANT
 AND
 DANIEL OLATUNJI FUWA AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 3 W.L.R. 552

1954 May 31; June 1, 2, 3; Lords Porter, Asquith of Bishopstone,
 Oct. 4 Keith of Avonholm

West Africa—Vendor and purchaser—Priorities—Contracts to sell mortgaged land—Fee simple in mortgagees—Priority between purchasers—Equitable doctrine of conversion—Right to “call for” title deeds—Qui prior est tempore potior est jure—Vendor and Purchaser—Mortgage—Law before 1926.

On a conflict as to title between two owners of equitable interests in the same property situated in Lagos, Nigeria, one who had acquired his interest by a contract to purchase from a mortgagor and who had approved the title and executed the whole of his obligations under the contract, and one who had obtained a subsequent interest by a conveyance from the same mortgagor who had meanwhile become entitled to call for a reconveyance of the legal estate from the mortgagees:

Held, that a mortgagee under Nigerian law being the owner of the legal estate in the realty mortgaged, in default of a reconveyance of the legal estate to the owner of the subsequent equitable interest or of a positive act by the mortgagees in his favour which would have taken the place of such a reconveyance, as for instance, an express declaration of trust in his favour, or a delivery of the title deeds to him, the operative principle in deciding which of the two had priority remained *qui prior est tempore potior est jure*.

APPEAL (No. 3 of 1953) from a judgment of the West African Court of Appeal (Sir John Verity C.J., Arthur Lewey K.C., Justice of Appeal, and Joseph Henri Maxime de Comarmond, Senior Puisne Judge) at Lagos, Nigeria, dated May 26, 1950, allowing the defendant's appeal from a judgment of the Supreme Court of Nigeria (Ademola J.) of October 28, 1950, for recovery of possession of certain premises and mesne profits.

On October 9, 1948, Assaf, the plaintiff in the present action, contracted with one, Ajose, to purchase premises at 130 Denton Street, Ebute Metta, Lagos, Nigeria, of which Ajose was the owner. The property had been mortgaged on July 5, 1948, and, according to the law of Nigeria, the mortgagees were thus the owners of the legal estate in the premises.

By October 16, 1948, Assaf had accepted proof of Ajose's title and had paid the whole purchase price of £1,600, out of which Ajose was intended by the parties to discharge the mortgage to one Cameron, of the firm of Irving & Bonnar, who were acting as solicitors for both Assaf and Ajose. By a letter dated October 25, 1948, written by one Coker, a solicitor acting for Ajose, to Irving & Bonnar, Ajose purported to countermand the sale to Assaf and, on the same date, he purported to sell the same property to one Okunubi. Out of the purchase price of £2,700 paid by Okunubi, Ajose discharged the mortgage debt but the mortgagees did not reconvey the legal estate in the premises and it remained vested in them at the date of the appeal to the Judicial Committee. On October, 29, 1948, Ajose purported to convey the fee simple in the premises to Okunubi.

Assaf commenced an action against Ajose for a decree of specific performance and mesne profits in the Supreme Court of Nigeria and in a

judgment of June 28, 1949, Gregg J. made the decree prayed for. In compliance with the judgment Ajose then executed a conveyance of the premises to Assaf. By a writ of March 11, 1950, Assaf started the present action against Okunubi for recovery of the premises and mesne profits. After this date Okunubi died and the action continued against his personal representatives.

The facts are set out in full in the judgment of their Lordships' Board delivered by Lord Porter.

1954. May 31. *John Pennycuik Q.C.*, *T. B. W. Ramsay* and *John Woodhouse* for the appellant.

Lionel Edwards Q.C. and *R. A. Williams* for the respondents.

The following cases were referred to in argument in addition to those set out in the judgment: *In re Wells* ([1933] Ch. 29; 48 T.L.R. 617); *Phillips v. Gutteridge* ([1859] 4 De G. & J. 531); *Howard v. Miller* ([1915] A.C. 318); *Rooper v. Harrison* ([1855] 2 K. & J. 86).

October 4. The Judgment of their Lordships was delivered by LORD PORTER.

In 1948 one Ajose owned certain premises called 130 Denton Street, Ebute Metta, Lagos, Nigeria. On July 5, 1948, Ajose mortgaged these premises by an instrument of that date for £1,000 to a limited company of registered moneylenders, Messrs. Oshodi and Apena. A gentleman called Latunde Johnson, since deceased, was at this and all material times a director of that company, and also employed as its solicitor. He attended to this particular matter.

On October 9, 1948, Ajose contracted to sell this mortgaged property to the plaintiff and appellant in the present action, at a price of £1,600. This contract was made on the date mentioned and acknowledged on the same day at the offices of Messrs. Irving & Bonnar, solicitors, before one Cameron, a representative of that firm, who from then on acted, in relation to this transaction, as solicitor for both parties. On this occasion both parties instructed Cameron to obtain from the mortgagees the title deeds. Cameron did so, was satisfied as to title, and drafted (a) a reconveyance from the mortgagees; (b) a conveyance to Assaf, neither of which, however, were in the event executed.

The intention was that the plaintiff should acquire this property free from incumbrances, and in order to achieve this result that £1,300 out of the total price of £1,600 should be applied to the discharge of the mortgage debt and mortgage interest. Accordingly the plaintiff paid Cameron as agent for Ajose two cheques, the first for £300, the second for £1,300 (dated October 9, 1948, and October 15, 1948, respectively). It is common ground now though it was contested at some stages (1) that this contract of October 9, 1948, was a valid contract; (2) that it was evidenced by a note or memorandum sufficient to satisfy the requirements of the Statute of Frauds. It is here, perhaps, convenient to add that the law of Nigeria, so far as relevant to this case, consists of the rules of common law and equity, and statutes of general application ruling in England in 1900. Hence in Nigeria today a mortgagee is still, as under the law of England before 1926, the owner of the legal estate in the realty mortgaged, and the mortgagor has a mere equity of redemption. The mortgagor is not, as in England since the 1925 legislation, the owner, subject to a charge.

By October 16, 1948, the plaintiff—the intending buyer—had accepted proof of Ajose the seller's title, and had paid the whole of the purchase price, which Cameron had credited in his books to Ajose. It follows, in their Lordships' opinion, that at this stage, by the equitable doctrine of

conversion, the plaintiff had become owner of the premises in equity, that as between Ajose and himself, Ajose was a trustee and that the plaintiff's equitable title related back to the date of the contract—October 9, 1948.

Meanwhile, although the whole of the purchase price due from the plaintiff had been paid to Cameron as Ajose's agent by October 16, 1948, neither Cameron nor Ajose had applied the appropriate or any portion of it to the redemption of the mortgage so as to secure, by repayment of the mortgage debt and interest, the execution of a reconveyance of the legal estate in favour of whoever might be entitled to such reconveyance. This might have been the plaintiff, who was the owner in equity of Ajose's interest, or Ajose as trustee for the plaintiff. At October 16, 1948, no one else was in the picture, and the position in law was then clear. The only beneficial title was in the plaintiff, who would have been wise, at the earliest moment, to get in the legal estate from the mortgagees. The position, however, became obscure owing to the group of events which next followed, and to which their Lordships proceed to refer.

Ajose does not seem to have been, in commercial matters, a man of supersensitive scruple. He now proceeded to sell over again to one Okunubi the property which he had already sold and been paid for by the plaintiff and this gentleman, who was the original defendant in the present proceedings, has since died after action brought, and has been succeeded by his legal personal representatives.

The correspondence relating to the two transactions, though slender, is important, and should be set out in full.

It seems to have opened with a letter from Irving and Bonnar on behalf of the plaintiff (or of the plaintiff and Ajose) of October 11, 1948, relating to the sale to the plaintiff. This letter has not survived, but the reply, dated October 12, 1948, was in the following terms:

“ Messrs. Irving & Bonnar, Solicitors, Lagos.

Dear Sir, Re Sarminu Ajose's Mortgage Accounts. Yours of October 11, 1948, came to hand and duly noted. Mr. Sarminu Ajose has two mortgages with Messrs. The Oshodi & Apena Ltd., one at No. 130 Denton Street, Ebute Metta, and the other at Igbobi Village, Yaba, both mortgages are at the Lands Registry, Lagos, for registration which has not yet completed. The certified true copies of conveyances in respect of these properties are herewith enclosed. The mortgage debt on the two properties are as follows:

Rr 130 Denton Street, Ebute Metta	£1,000	0	0
Interest at 2½d. on £1 p.m. from 29.9.48– 29.10.48		10	8 4
Re Igbobi Village, Yaba	300	0	0
Interest at 3d. on £1 p.m. from 29.9.48– 29.10.48		3	15 0
	<hr/>	<hr/>	<hr/>
	£1,314	3	4

I shall be glad to receive your cheque for the above sums at your earliest convenience.

Yours faithfully,
(Sgd.) A. L. JOHNSON,
Solicitor for Oshodi & Apena Ltd.”

There next followed two letters between one G. B. A. Coker and Irving and Bonnar bearing on the sale to Okunubi, both dated October 25, 1948.

“ Messrs. Irving & Bonnar, Solicitor, etc., Lagos.

Dear Sir, Re Sarminu Ajose: Property at No. 130 Denton Street, E.B. I have been instructed by Mr. Sarminu Ajose to countermand the instructions already given with regard to the sale of the above-named property. Mr. Ajose informs me that the contract of sale in respect of the property has not been completed by you with anyone at all and as he has now got another more reasonable offer than that proposed by you, I think you would agree that he should stick to the higher offer the more so as the property is at present under a mortgage. In the circumstances, I shall be much obliged if you would be good enough to stay any further steps with regard to the sale of the property until further instructions: The mortgagee—Mr. Latunde Johnson has also been informed of this. With many thanks,

Yours faithfully,
(Sgd.) G. B. A. COKER.”

“ G. B. A. Coker Esq., Solicitor, 13, Idumagbo Avenue, Lagos.

Dear Sir, Mr. Sarminu Ajose. 130 Denton Street, Ebute Metta. We are in receipt of your letter of today's date with regard to the above. We were also acting for the purchaser Mr. A. E. Assaf and we presume his agreement to the cancellation of the sale to him has been obtained. We hold the purchase price paid by Mr. Assaf to Mr. Ajose's credit in our client's account.

Yours faithfully,
IRVING AND BONNAR.”

No reply was ever received to the inquiry in the second paragraph of this letter.

Lastly, there came a letter dated October 26, 1948, from A. L. Johnson to Irving and Bonnar.

“ Messrs. Irving & Bonnar Broad Street, Lagos.

Re Sarminu Ajose. Mortgage of 130 Denton Street, E.B. I have to inform you that Sarminu Ajose has paid off the whole mortgage debt with interests thereon since October 25, 1948. Will you kindly return the certified true copies of the conveyances I sent you on the 12th of this month as to enable me to return same to him.

Yours faithfully,
(Sgd.) A. L. JOHNSON ”

The events to which these letters furnish land marks were these:

(a) Ajose, after contracting to sell the property to the plaintiff, later, through a solicitor called Coker (who only crosses the stage on this one occasion) tells the plaintiff that he, Ajose, has received a “ more reasonable ” offer for the property (viz.: Okunubi's offer) and means to embrace it. Coker says that Latunde Johnson, the representative of the mortgagees, has been informed of “ this.” How much or how little “ this ” includes has been in controversy, but their Lordships will assume it to cover all the information contained in Coker's letter. In later proceedings Ajose has contended that his contract with the plaintiff was “ subject ” to his obtaining a better offer, but this contention—not on the face of it plausible—has been rejected by every tribunal before whom it has been preferred, and is not now pursued.

(b) Ajose purported to sell the same property to Okunubi on October 25, 1948, and on that date Okunubi paid £2,700 for the property, the purchase price of the freehold. Out of this sum Ajose applied the appropriate amount (£1,500) to the repayment of the mortgage debt and this payment (though out of funds furnished by Okunubi and perhaps paid direct by him) was in law a payment by Ajose.

(c) Neither then nor at any subsequent time did the mortgagees reconvey the legal estate to anyone—Ajose, the plaintiff, or Okunubi. To this day it remains vested in the mortgagees; whether savaect to any and if so what, trust, is one of the issues in the appeal.

(d) On October 29, 1948, Ajose purported by a "conveyance" of that date to transfer to Okunubi the fee simple of the property. The "fee simple" in the circumstances of this case could not exceed the right—the utmost right Ajose retained—to require the mortgagees to convey the legal estate in the premises to himself. More he did not possess.

Their Lordships may at this point anticipate, in outline, the main issue which this case raises. The plaintiff contends that the legal result of the facts just recited, which in substance are not in dispute, was that (1) the ownership in equity of the premises was vested in the plaintiff, by virtue of the contract of October 9, 1948, and the doctrine of "conversion," and (2) that the legal estate never vested in Okunubi. It is not questioned that Okunubi gave value for whatever he got, and got it without notice of the plaintiff's interest, but neither is it questioned that he never obtained the legal estate. (3) Consequently the utmost interest that could vest in Okunubi was an equitable interest and (4) equitable interests in land take effect in the temporal order in which they are created. Hence the plaintiff, being indubitably, *prior tempore*, claims to be *potior jure*.

For the defendant, Okunubi, on the other hand, and later for his personal representatives it was contended, that on the discharge of the mortgage debt by Ajose, (a) the mortgagees were not bound by any duty other than a duty owed to their mortgagor, Ajose—therefore in particular they were not concerned with and owed no obligations to persons standing behind Ajose or claiming under him by virtue of a contract to buy the mortgaged premises from him; (b) that their only duty was to reconvey the legal estate to him; (c) that by the conveyance of October 29, 1948, Ajose transferred or conveyed (the term does not matter) this right to Okunubi, who thereupon became entitled to call for a reconveyance; (d) that, upon the relevant authorities, the right to call for a reconveyance from a mortgagee of a legal estate vested in him by the mortgagor is as effective (granted (i) value and (ii) the absence of notice) as the reconveyance itself of that estate as an accomplished fact. Hence, it was argued, Okunubi, who certainly gave value and had no notice of the plaintiff's interest, was the equivalent of a purchaser for value without notice of the legal estate, and his title prevailed.

It is not suggested that this summary of the contentions on the two sides is exhaustive. Without expanding it at this stage their Lordships will conclude the narrative.

Okunubi, after the mortgage debt had been discharged, largely by money he had supplied, having no notice at that time of the plaintiff's interest, entered into possession of the premises and remained so possessed till he died, after the present action had been initiated and his personal representatives succeeded him as defendants.

The plaintiff brought an action against Ajose in 1949, for a decree of specific performance and mesne profits. The action was tried by Gregg J.,

who on June 28, 1949, made the decree prayed for. Ajose, in compliance therewith, executed a conveyance of the premises to the plaintiff. Okunubi gave evidence in these proceedings, but was not a party to them. Hence it is not surprising that every tribunal which was confronted with the contention that he was bound by the result of such proceedings, should have rejected it.

By a writ of March 11, 1950, the plaintiff started the present action against Okunubi, which since his decease has been continued against his personal representatives. The action was for recovery of the premises in question, and mesne profits. The statement of claim has been criticised but in their Lordships' view alleges sufficiently the contract of sale by Ajose to the plaintiff: and recites the facts of the previous litigation before Gregg J. By his defence Okunubi averred that he had bought the property in dispute in October, 1948, *bona fide*, without notice of any interest in the property claimed by the plaintiff, and that Ajose conveyed to him, Okunubi, by the conveyance dated October 29, 1948 ("1950" is, it would seem, a misprint) all the rights and interests which Ajose had left in such property. The action came on for hearing before Ademola J. in the Supreme Court of Nigeria and judgment was given by that learned judge on October 28, 1950, in favour of the plaintiff for recovery of possession of the premises and £400 mesne profits. Ademola J. seems to have based his view, in part, on the reasoning that after Ajose had paid off the mortgage (an event which he dates October 25, 1948) Ajose had nothing left which he could convey to Okunubi. The plaintiff was already owner in equity and from that moment the legal estate also vested in him. But earlier in his judgment he uses language which suggests that Okunubi did obtain the legal estate, though as he had had notice of the plaintiff's rights through Latunde Johnson as his solicitor, those rights remained intact.

The case on appeal came before the West African Court of Appeal which gave judgment on May 26, 1951, Verity C.J.'s judgment being concurred in without individual reasons by the three other members of the court. The learned Chief Justice, after dealing with a number of issues which are no longer contested, held in effect (1) that the plaintiff had, at no stage, any estate in the land. He had merely a contract, and unless and until Ajose paid off the mortgage and obtained a reconveyance, and so made that contract capable of performance, the plaintiff could have no proprietary interests. If, as in fact happened, Ajose failed to obtain a reconveyance, all he, the plaintiff, could do was to sue Ajose for damages for breach of contract, which he had not done. (2) The Chief Justice does, however, also advert to the principle stated in these words in Snell's *Principles of Equity* (23rd ed., p. 31): "A purchaser for valuable consideration who obtains a legal estate without notice of a prior equitable right is entitled to priority in equity as well as in law."

On this point he held (a) that Okunubi had no notice of the prior equitable interest, notice to Latunde Johnson being in his view not notice to Okunubi but merely notice to the mortgagees, for whom he was acting; (b) that Okunubi had at the material time acquired the legal estate or its equivalent as a consequence of the discharge of the mortgage debt. The reasoning of the learned Chief Justice would seem to be that, after that discharge, the mortgagees held the legal estate as trustee for the mortgagor, Ajose; and that after the conveyance executed by Ajose in the defendant's favour on October 29, 1948, the legal interest remained vested in the mortgagees but was so vested "on behalf of the defendant." On these grounds the appeal was allowed. The plaintiff appeals from this decision of the Court of Appeal for Western Africa, to this Board.

Before this Board, counsel for the plaintiff raised five questions (a sixth, relating to registration of titles to land, no longer arises), (1) Was there in the first fortnight of October, 1948, between Ajose and Assaf, the plaintiff, a valid contract for the sale of those premises for £1,600? (2) If yes, was the contract one of which specific performance would have been granted? (3) If so, did such contract create an equitable interest or ownership in equity in the property in favour of Assaf? (4) If it did, did the equitable interest of Assaf, being earlier in time than any interest acquired by Okunubi, prevail over his interest, or (5) Did Okunubi obtain priority over Assaf as a purchaser for value, without notice of Assaf's interest, of the legal estate? Counsel for the plaintiff claimed that the first four questions should be answered in the affirmative, citing *Holroyd v. Marshall*, (1862) 10 H.L.Cas. 191, *Shaw v. Foster* ([1872] L.R. 5 H.L. 321), and *Potter v. Sanders* ([1846] 6 Hare 1), amongst other authorities, and claimed that the fifth question should be answered in the negative. The fifth question raises the real contest between the parties.

It is undisputed that neither the plaintiff nor the defendants ever acquired the legal estate: but it is argued for the defendants that priority as between them and the plaintiff depended not on which of them had the legal estate, but on which of them had the better right to "call for" it. Counsel for the defendants relied on the contention that, once the mortgage debt had been repaid by Ajose, and Ajose had executed the "conveyance" of October 29, 1948, in favour of Okunubi, Okunubi acquired the right, or at any rate a better right than the plaintiff possessed, to require a reconveyance of the legal estate from the mortgagees, and should be treated for the purpose of the rule as though that right had been successfully exerted. On this view the existence and effect of the instrument of October 29, 1948, are decisive. This instrument, so the argument runs, conveyed to Okunubi the rights of a mortgagor who has redeemed the mortgage, rights not possessed by one who has a mere contract to purchase from the mortgagor uncompleted by any conveyance. These rights, it is said, consisted of or included the right to call upon the mortgagee to convey to him the legal estate, or to hold it in trust for him. Such is the main argument for the respondents.

In support of his contention as to the infirmity of the rights of a person who has merely contracted to buy from the mortgagor, counsel relied on *Tasker v. Small* ([1837] 3 My. & Cr. 63), and *Pearce v. Morris* ([1869] L.R. 5 Ch. 227). Their Lordships would, however, remark (i) that the reasoning in this and other cases relied on, so far as it depreciates the rights of the intending purchaser on the mere ground that a mortgagee cannot safely convey to him because he may resile from his contract, is hardly applicable to a case where the intending purchaser has approved the title, paid the whole contract price to the solicitor for both parties who on his part has credited it to the seller's account in his books, and has executed the whole of his side of the contract; (ii) that in such circumstances the contract could not "go off" through his action; and (iii) that the second of these cases might well have been decided differently if, as in the present case, the contractor to buy from the mortgagor has approved the title before filing his bill.

In support of the contention that a "better right" to call for a transfer of the legal estate is equated with actual possession of that estate, the defendants relied, *inter alia*, on *Wilkes v. Bodington*, ([1707] 2 Vern. 598), *Stanhope v. Verney (Earl)* ([1761] 2 Eden 81), *Maundrell v. Maundrell* ([1804] 10 Ves. 246) and *Taylor v. London and County Banking Co.* ([1901] 2 Ch. 231; 17 T.L.R. 413). When these cases are closely examined it will be found that in every one of them there was, in addition to the mortgagor's

act in redeeming or its equivalent, some positive act by the mortgagee operating in favour of the claimant; and counsel for the plaintiff contended that such an act there had to be, in order to defeat the strict temporal order in which, *prima facie*, equitable interests in land take priority. Okunubi, he argued, to be treated as though he had acquired the legal title, must be able to point to some such act, mere inertia or passivity on the part of the mortgagees will not avail him. He must show that the mortgagees either (1) had declared an express trust in his favour, or (2) had joined in the designment or conveyance to him of October 29, 1948, or (3) had lodged the title deeds with him. *Taylor v. London and County Banking Co.*, ([1901] 2 Ch. 231) in their Lordships' view supports this argument more particularly in the following passage from the judgment of Stirling L.J. (*ibid.* 262, 263)

“ Now, a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes v. Bodington* (2 Vern. 598). It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority.”

In the present case there was no transfer of the legal estate to Okunubi; no positive act by the mortgagees which could take its place; no declaration of trust in his favour; no joinder in the conveyance of October 29, 1948, nor delivery to Okunubi of the title deeds. There was therefore, it appears to their Lordships, nothing to displace the operation of the principle *qui prior est tempore potior est jure*. In this case there is no doubt who is *prior tempore*. The plaintiff had made his contract, paid the price in full, and accepted the title before Okunubi made his first appearance. In these circumstances their Lordships consider that the plaintiff's title must prevail and for the reasons given above will humbly advise Her Majesty that the appeal should be allowed. The defendants must pay the plaintiff's costs of the appeal to this Board and of the appeal to the West African Court of Appeal.

Appeal allowed.

Solicitors: *Lewis & Lewis and Gisborne & Co.; Hatchett Jones & Co.*

MATHEW OLAJIDE BAMGBOSE APPELLANT
AND
JOHN BANKOLE DANIEL AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 3 W.L.R. 561

1954 July 14, 15
Oct. 12

Lords Morton of Henryton, Cohen and Keith
 of Avonholm

*West Africa (Nigeria)—Succession—Intestacy—Child of marriage under Marriage Ordinance, 1884—Polygamous marriages—In accordance with native law and custom—Right of issue to succeed on intestacy—Applicability of law of England—Marriage Ordinance No. 14 of 1884 (Lagos), s. 41—Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10).
Conflict of Laws—Succession—Legitimacy—Domicile of parents at birth of child—Polygamous marriage.*

The deceased, the child of a marriage contracted under the Marriage Ordinance, 1884, of the Colony of Lagos, which provided in section 41 that the disposable estate of such a person dying intestate should be distributed in accordance with the provision of the law of England relating to the distribution of the personal estate of intestates, any native law or custom to the contrary notwithstanding, died domiciled in Nigeria and intestate. He was said to have entered into nine polygamous marriages in Nigeria in accordance with native law and custom, and no question of his capacity to do so by his local law arose. As between the appellant, who claimed as lawful nephew of the deceased to succeed to the whole estate, and the respondents, who claimed as legitimate children of the deceased born in Nigeria of the polygamous marriages to exclude him:

Held, that, subject to the respondents establishing their status of legitimacy under the law of their domicile, they came within the class of persons entitled to succeed under the English Statute of Distributions, which was the relevant law of England in 1884. As a matter of construction and on the authorities that statute could not be limited in its local application to children who were the issue of monogamous unions, and the effect of its application to the cases to which it applied was to fix the order of succession according to a table different from that prevailing under native law and custom.

The principle of *In re Goodman's Trusts* (1881) 17 Ch.D. 266—that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the English law of succession to personality recognises that status—is applicable to children of polygamous unions.

In re the Estate of Herbert Samuel Heelas Macaulay, decd. (1951, Cyclostyled Reports, Nov. 23, 1951, which was followed by the West African Court of Appeal in the present case, and which overruled *In re the Estate of Frederick Akindele Somefun* (1941) 7 W.A.C.A. 156, approved.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 19 of 1953) from a judgment of the West African Court of Appeal (June 2, 1952), in a matter relating to the distribution of the estate of John St. Matthew Daniel (hereafter referred to as the deceased), who died at Lagos on April 25, 1948, intestate. The Administrator-General of Nigeria was appointed administrator of the estate by order of the Supreme Court of Nigeria made on February 1, 1949.

The following facts are taken from the judgment of the Judicial Committee: The history of the matter was as follows: The deceased was the son, born posthumously, of Matthew Joaquim Daniel and Theresa Maria, who were married in a Wesleyan Methodist church in Lagos on September 28, 1890. That was a marriage under the Marriage Ordinance, 1884, of the Colony of Lagos, which applied to any person subject to native law and custom who contracted a marriage in accordance with the provisions of the Ordinance. The deceased was the only child born of the marriage. The deceased's parents had another son, Pedro, who was born, out of wedlock, in 1884. Pedro appeared to have entered into a Christian form of marriage at Lagos in 1909. It was claimed by the appellant that Pedro became legitimated in 1929 by virtue of the Legitimacy Ordinance of Nigeria of 1929, which introduced the principle of legitimation *per subsequens matrimonium* and applied it to marriages contracted both before and after the date of the Ordinance. Pedro died in 1936. The appellant claimed to be the only child of Pedro's marriage. The deceased was said to have entered into nine polygamous marriages in accordance with native law and custom,

and the respondents (other than the Administrator-General) claimed, as issue of those polygamous marriages, to be legitimate children of the deceased under Nigerian law. It would appear, and was assumed at the hearing, that all the persons mentioned were at all material times domiciled in Nigeria. The contest in this appeal lay between the appellant who claimed as lawful nephew of the deceased to succeed to the whole of the estate, and respondents who claimed, as children of the deceased procreated by polygamous marriages, to exclude him.

In the Supreme Court of Nigeria at Lagos, Robinson J., on May 17, 1951, made orders for distribution of the estate among the deceased's children. On appeal by the present appellant the West African Court of Appeal (Sutton P., de Commarmond Ag.C.J. (Nigeria) and Coussey J.A.) on June 2, 1952, allowed the appeal on the ground that there was insufficient evidence before the trial judge to justify his assumption that the 12 children concerned were issue of marriages with the deceased and remitted the respondents' motions for distribution of the estate to the court below for hearing *de novo*. The Court of Appeal further directed that the court below should require the respondents to adduce evidence sufficient to satisfy it on the following matters: (1) Whether the mothers of the 12 respondents were married to the intestate John S. Matthew Daniel, in accordance with the native law and custom applicable in each case. (2) Whether the respondents, or any of them, were the issue of such marriages; and if so, of which such marriages; and (3) whether by the native law and custom applicable in each case the respondents, or any of them, had the status of legitimate children.

The appellant was allowed to be joined as opposer to the respondents' motions.

In so doing it was clear from the judgment of the Court of Appeal that they rejected a claim by the appellant to oust the respondents from any share in the estate even if they were legitimate issue of polygamous marriages by the deceased. The appellant accordingly applied for leave to appeal against the judgment of the Court of Appeal to Her Majesty in Council, which leave was granted by the Court of Appeal on October 6, 1952.

Henry Salt Q.C. and *A. J. Belsham* for the appellant.

Lionel Edwards Q.C., *Bruce Campbell* and *R. A. Williams* for the respondents.

LORD MORTON OF HENRYTON announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

October 12. Their Lordships' reasons for dismissing the appeal were delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: The question at issue arises under the Marriage Ordinance of the Colony of Lagos of 1884. In the West African Court of Appeal it was assumed that the succession was governed by the Marriage Ordinance of Nigeria of 1914. It is now agreed between the parties that it is the Ordinance of 1884 that falls to be considered, and it appears to their Lordships that this must be so as the marriage of the deceased's parents was contracted under that Ordinance. There is no material difference in the language of the two Ordinances on any point affecting this appeal. It was at one time indicated by an amendment made by the respondents to their pleadings, and allowed by their Lordships, that the respondents intended to argue, as an alternative to their main submission, that the relevant section of the Marriage Ordinance did not apply to the deceased. In the end counsel for

the respondents did not see his way to submit any arguments in support of this amendment. Their Lordships accordingly proceed on the view which has been accepted throughout this case, that the succession to the deceased's estate turns upon an interpretation of the relevant provisions of the Marriage Ordinance, 1884.

Section 41 of the Marriage Ordinance of 1884 is as follows:

“ Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of 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. Provided always, that where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown such portion shall be distributed in accordance with the provisions of native law and custom and shall not become a portion of the said casual hereditary revenues. Provided also that real property, the succession to which cannot by native law or custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein to the contrary notwithstanding. Before the Registrar of Marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage.”

From what has been said at the outset of this judgment it follows that the deceased falls within the second category of intestate, being a person who was the child of a marriage contracted under the Ordinance. The short question is, what is the effect of the direction that his disposable estate 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?

The relevant law of England in 1884 is to be found in the Statute of Distributions, 1670 (22 & 23 Car. 2, c. 20) and the Act of 1685, 1 Jac. 2, c. 17. For purposes of this appeal their Lordships are concerned only with the direction in the Statute of Distributions dealing with the succession of children of an intestate. The appellant's contention is that this law precludes the succession on intestacy of children or others who cannot claim kinship with the deceased through monogamous marriage; that the respondent claimants being the offspring of polygamous marriage fall to be regarded as illegitimate under the English Statute of Distributions, and that he, the appellant, being the only person who can claim kinship with the deceased through monogamous marriage, is entitled to the whole estate. This ignores one factor, that the appellant's father, the brother of the deceased, was the issue of an illicit union and was only legitimated in 1929 by a statute of the Nigerian Colony, so that the appellant would have to rely on the law of his

father's domicile for the purpose of bringing himself within the class of legitimate heirs. This point was not, however, adumbrated in the courts below, and owing to the course which the hearing took before their Lordships was not developed in argument before their Lordships' Board on the view on which this judgment proceeds their Lordships have found it unnecessary to deal with this point, to which special considerations may apply. Accordingly, they do not refer further to this matter.

The contention for the respondent children is that by the law of their domicile of origin they are legitimate children of the deceased and accordingly come within the class of persons entitled to succeed under the English Statute of Distributions. This view has been upheld by the West African Court of Appeal, subject to the respondents establishing their status of legitimacy.

This question has been the matter of some conflict of decision in the Nigerian courts. It was very fully and clearly considered in *In re the Estate of Herbert Samuel Heelas Macaulay, decd.* ([1951] Cyclostyled Reps., Nov. 23, 1951) November 23, 1951, by Sir John Verity C.J., and concurred in by the two other members of the court, which decided in favour of children of polygamous unions. In the present case Sir Stafford Foster Sutton, President of the Court of Appeal, who delivered the judgment of the court, followed this decision, adding that he found himself "in entire agreement with that portion of the Chief Justice's judgment which touches the issue with which we are concerned on this appeal." These judgments overruled a previous decision in a contrary sense in *In re the Estate of Frederick Akindele Somefun* ([1941] 7 W.A.C.A. 156).

Reference was also made by counsel for the appellant to a number of decisions in the Nigerian courts, commencing with *Cole v. Cole* ([1898] 1 N.L.R. 15), where, in the case of marriages contracted under the rites of a Christian church, to which for one reason or another the provisions of a marriage Ordinance did not apply, the courts held that the parties must be taken to have intended their succession on intestacy to be regulated by English law, not by native law and custom. Their Lordships have carefully considered these cases, but cannot extract from them any principle that would affect the present case. They find it unnecessary to decide whether the courts were right in applying the English law of succession or whether if English law was applicable it was rightly applied in the circumstances of the particular cases.

Their Lordships, would observe that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom. Even a person who has himself contracted a monogamous marriage under the Ordinance is by section 37 of the Ordinance prohibited from contracting a valid marriage under any native law or custom only during the continuance of the monogamous marriage. If, then, the respondent children are found to have been from birth legitimate children of the deceased the only question with which their Lordships are concerned is whether they are entitled to share in the succession of the deceased under the Statute of Distributions.

Their Lordships entertain little doubt that under what are now well-accepted principles recognised by the English courts no ground exists, in circumstances like the present, for excluding the respondents from taking their rights of succession if they are legitimate children of the deceased under the law of their domicile. In *In re Don's Estate* ([1857] 4 Drea, 194,

197), *Kindersley V.-C.*, dealing with the status of a child born in Scotland of a father domiciled there and legitimated by the subsequent marriage of his parents, said:

“ It appears to me that on the authorities applicable to this question, the principle is this: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilised countries, at least all Christian countries, recognize him as legitimate everywhere. Questions may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy, is the law of the country where the individual was born, or the law of the country where the parents intermarried, or the law of the country of the domicile of the parents? And if the domicile of the parents was different, whether the law of the father’s or mother’s domicile governs? If it were necessary for me to determine these questions I should hold that the law of the father’s domicile governed.”

None of the special questions referred to in this passage arise here for, as their Lordships apprehend, all the circumstances concur to fix Nigeria as the domicile of the parents, the place of their marriages, and the place of birth of the children. This, and similar expressions of opinion in earlier cases, were no doubt given in cases dealing with the institution of monogamous marriage. But more recent authority shows that the principle cannot be confirmed within so narrow a field. (See the opinion of Lord Maugham in the *Sinha Peerage Claim* case (Journals of the House of Lords, 1939, Vol. 171, p. 350) and the opinion of Lord Greene M.R. in *Baindail v. Baindail* ([1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342)). Their Lordships’ Board have also on various occasions had regard to and acted on the application of the Statute of Distributions to Chinese successions in the Straits Settlements, arising from polygamous union. (See *Cheang Thye Phin v. Tan Ah Loy* ([1920] A.C. 369); *Khoo Hooi Leong v. Khoo Hean Kwee* ([1926] A.C. 529); *Khoo Hooi Leong v. Khoo Chong Yeok* ([1930] A.C. 346).

In their Lordships’ opinion the West African Court of Appeal has reached a right conclusion on the law applicable in this case, *In re Goodmans Trusts* ([1881] 17 Ch.D. 266) on which that court in the case of *Macaulay’s Estate* (Cyclostyled Repts. Nov. 23, 1951) largely proceeded, was a case under the Statute of Distributions in which it was held by a majority of the Court of Appeal that a child born in Holland, where her parents were at the time domiciled, who had been legitimated under Dutch law by the subsequent marriage of the parents there, was entitled to share as a “ brother’s child ” under the Statute of Distributions. As already indicated, their Lordships cannot hold that the principle of this decision is restricted to the case of monogamous marriage. Cotton L.J. said in that case (17 Ch.D. 266, 292) “. . . I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile.” And James L.J. said (*ibid.* 300):

“ It must be borne in mind that the Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishmen dying domiciled abroad . . . And, as the law applies

universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law adopted by the comity of States. The child of a man would be his child so ascertained and so determined.”

The decision and reasoning of the majority in that case has not, so far as their Lordships are aware, been questioned in any subsequent case. It proceeds in their opinion on sound principle and gives a meaning and effect to the Statute of Distributions wider than it would have under the purely domestic law of England.

In the present case the Statute of Distributions is a statute applying to a limited class of persons domiciled in Nigeria. As a matter of construction and on the authorities referred to it cannot in their Lordships' opinion be limited in its local application to children who are the issue of monogamous unions. The effect of the application of the statute in the cases to which it applies is to fix the order of succession according to a table different from that prevailing under native law and custom, leaving it to the courts to determine in accordance with the principles indicated who are the particular individuals who fall within any particular class in the succession table.

It was contended for the appellant that the Statute of Distributions could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives. The West African Court of Appeal observed that no claim had been put forward in this case by any person as a widow of the deceased, and their Lordships propose to say nothing as to what rights, if any, widows would have in the event of a claim being made. They cannot, however, agree with the appellant's submission. Whatever difficulties may arise in the case of the mothers of the children, the claims of the children as lawful children of the deceased must, in their Lordships' opinion, be considered independently. This may be so in some cases even in questions of status. In a judgment of the Board in *Khoo Hooi Leong v. Khoo Hean Kwee* ([1926] A.C. 529), where the claim of a child to be legitimate by the law of a community in which polygamy was recognised and practised was considered, Lord Phillimore, who delivered the judgment of the Board, said (*ibid.* 543): “ In deciding upon a case where the customs and the laws are so different from a British ideas a court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married. This principle was admitted by the cannon law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America.” Two other cases may be mentioned. In *Seedat's Executors v. The Master (Natal)* ([1917] S.A.L.R. (A.D.) 302) the Supreme Court of South Africa held, in a learned judgment by Sir James Rose-Innes C.J., that they could not recognise as valid in Natal a polygamous marriage of the deceased entered into in India before he became domiciled in Natal, but that the children of this marriage, who were all born in India while their parents were domiciled there, were entitled to be treated as legitimate children. Accordingly, while the widow was not entitled to exemption in the matter of succession duty but, on the contrary, was liable to the rate appropriate to a stranger in blood, the rate of duty attributable to the children's share of the succession was held to be that borne by lawful children of a testator. Again in *In re Bischoffsheim* ([1948] Ch. 79; 64 T.L.R. 36; [1947] 2 All E.R. 830) Romer J. had to consider the question of the legitimacy for the purposes of succession under the will of an English testator of a child born in New York of English

parents who were domiciled in New York at the time of the child's birth. A question might have been raised as to the validity of the parents' marriage under English law, but in holding that the child was legitimate by the law of New York at the time of his birth and therefore entitled to be treated as a lawful child of his mother under the will, Romer J. adopted the view ([1948] Ch.92)

“ that where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (*i.e.*, the domicile of his parents at his birth) will be recognised by our courts; and that, if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation.”

It would be a strange result that in the converse case where a marriage of the parents was recognised as valid the children should be deprived of their rights of succession because of a difficulty in working out the rights of the wife.

In their Lordships' view the West African Court of Appeal reached a right conclusion. They have accordingly humbly advised Her Majesty to dismiss the appeal. The appellant must pay the costs of the respondents other than the Administrator-General, who was not represented before the Board.

Solicitors: *Rexworthy, Bonser & Wadkin; Hatchett Jones & Co.*

ALHAJI IBRAHIMAH OF SEKONDI APPELLANT
AND
MAMMA GARIBA AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1954 Oct. 18

Lords Cohen and Keith of Avonholm,
Mr. L. M. D. de Silva

Equitable estoppel—Interference with decisions of Native Tribunals.

Where a Native Court of Appeal did not affirm the decision of the Native Court of first instance the rule in *Ntah v. Bennieh* [1931] A.C. 72 does not apply. Having regard to the difference of opinion between the two Native Courts a wider discretion lay in the Land Court to review the relevant evidence.

LORD COHEN. The main question at issue in this appeal is whether a house at Old Zongo in the Gold Coast (hereinafter referred to as “ the old house ”) was in the year 1911 the property of one Salamatu (alias Salam Attah Mami Attah or Krama or Kramo Atta) or of her husband Mallam Gariba.

All the parties to this litigation are by birth or adoption members of the same family which is part of the Hausa tribe and Moslem by religion. The respondents (hereinafter referred to as “ the plaintiffs ”) are children of Mallam Gariba. The first two plaintiffs are his sons by another wife Fati Wangara. The third plaintiff is his daughter by a third wife whose name does not appear in the evidence. The appellant (hereinafter referred to as the defendant) is the adopted son of Salamatu.

It is common ground between the parties that at some time after the marriage of Salamatu to Mallam Gariba they lived together in the old house. Fati Wangara also appears to have lived there. It is further common ground that at some date prior to the year 1911 Mallam Gariba left Old Zongo and went abroad to " the French Ivory Coast " leaving his wives and family at Old Zongo. He never returned to the Gold Coast and died in the year 1935.

In the year 1911 the Government of the Gold Coast decided to move the members of the Hausa tribe residing at Old Zongo to a new site (hereinafter referred to as " New Zongo "). They made a plot of ground at New Zongo available to each family so removed and paid compensation to cover the cost of rebuilding the various homes. In pursuance of this policy a site was made available to Salamatu and she was paid £190 compensation for the old house. The defendant contends that this site and that sum were paid to her as the owner of the old house. The plaintiffs contend that the old house was the property of Mallam Gariba and that Salamatu was accountable to him and after his death to his heirs for the new house erected at New Zongo.

There were extensive building operations on the new site. They were commenced by Salamatu and continued by the defendant after her death which occurred in 1935 shortly after the death of Mallam Gariba.

Salamatu, the plaintiffs and the defendant all lived in the new house and no dispute appears to have arisen between the parties until the year 1947 when the defendant's sister one Suttley applied for her portion of the estate of her mother Salamatu. The then priest of New Zongo, one Lemanu Moru, proposed to divide the new house between the defendant and others but the first plaintiff objected. On the 24th February, 1948, the plaintiffs issued in the Native Court " B," Western Province, Sekondi, a summons by which they claimed to eject the defendant from the new house which they alleged had been the property of Mallam Gariba.

When the matter came before the Native Court " B " the first plaintiff gave evidence himself and called as witnesses the Siriki Zongo who, their Lordships were informed was head of the Hausa tribe in New Zongo, and his mother Fati Wangara.

Most of the first plaintiff's own evidence was plainly hearsay. Counsel were unable to tell their Lordships to what extent under the Law of the Gold Coast hearsay evidence is admissible in the native Courts but the question is not of great importance since the material evidence of Siriki Zongo was plainly not hearsay. The relevant portions of his evidence were as follows:

" I am Siriki Zongo. I know both parties. All houses at Zongo were built by my permission. When Government removed us from Old Zongo each house owner was paid reasonable sum for re-building. An amount of £190 was paid in respect of Mallam Gariba's house to me and I gave same to his slave domestic by name Salamatu whom Mallam Gariba married. When we removed I gave her a plot on which a house should be built. Mallam Gariba had been gone away. Mallam Gariba then having heard his house had been broken he remitted £50 to add to that which Government paid and built a new house. Plaintiffs were then young; the money was given to Salamatu who built the house. When Salamatu died myself and my priest gave the properties to Defendant to look after until plaintiffs are grown to have possession. About 4 months ago plaintiff reported that my priest had divided the estates between the defendant and others. I found he had no authority. I summoned him before my elders, was found guilty and as a result he

ordered to return an amount of £76 collected in respect of the house in dispute, and the priest was destooled. . . . Mallam Gariba's money was paid to me and I gave to Salamatu. I did not receive Receipt for the money I paid to her. . . . It is about 37 years since new Zongo was established. You were given the house and the children to look after. It was so done by me and my elders after one week of Salamatu's death."

The only material facts to which Fati Wangara deposed were that Salamatu had told her that Siriki Zongo had given her some money (presumably the £190) and that the first plaintiff married some 20 years before her evidence was given, *i.e.*, in 1928.

The defendant also gave evidence and called as witnesses the priest Lemanu Moru, Andrew Essien who built part of the new house and Petteh Esson who moved part of the old house and built the first part of the new house. Much of the defendant's evidence was hearsay but he deposed to the building of the first house on the new site by Esson and to its replacement by what he called the swish building containing some 26 rooms. He also deposed to the contract with Essien saying:

" Mr. Essien prepared the plan in my name Ibrahimah. The plan was proved. Kofi Ackon took the contract of the building and erected same. The contract was £354. Agreement was prepared in presence of witnesses. The £354 was workmanship, excluding building materials which my mother provided. In course of the building my mother broke the contract and was sued before Police Magistrate's Court for balance of £125 6s. 3d. My mother felt sick and I was given an Attorney to represent her. I did. It was found that $\frac{3}{4}$ of the work was done and so £49 10s. was ordered to be paid by me to Ackon. The amount was paid. While my mother was alive I was responsible for the house. I completed the building after the death of my mother."

He also said that he gave some rooms to let, that he pledged part of the house and paid debts, subsequently redeeming the part pledged. He further deposed that he collected the rents and did not pay anything to the plaintiff though he allowed the plaintiff to live in a house on the site " because he is my mother's rival son." He put in three plans of buildings to be erected on the new site dated respectively 6th April, 1922, 11th September, 1924, and 20th July, 1942. In all of them the buildings were described as the property of Salamatu or of the defendant. There was no evidence as to how this description came to be inserted but there can be no doubt that the orders for the buildings were given by Salamatu or by the defendant.

Two other documents were put in. The first was the contract dated the 20th November, 1924, for the work referred to in the passage their Lordships have cited from the defendant's evidence. This certifies that Salamatu had engaged Ackon to build her a storey house. The other was a power of attorney dated the 13th January, 1928, executed by Salamatu who was described as " seised of and entitled to the messuage and tenement and the uncompleted block building erected thereon situate and being in Hausa Zongo (*i.e.* the new house) " and authorising the attorney to mortgage the premises on her behalf as security for a loan of £300.

The priest Lemanu Moru said he had been told by Salamatu that the building in dispute was hers and that he signed as witness the agreement for the loan of £300. This agreement was not produced. He also deposed that he knew Salamatu before she married Mallam Gariba and that he knew her in the old house and that it was her property. Essien deposed that he had built a house for Salamatu.

Esson confirmed that he had moved the iron sheets and boards from the old house to the new house and that Salamatu had said that the old house was hers.

It was on this evidence that on the 30th March, 1948, the Native Court " B " gave judgment. The judgment summarised shortly the evidence given on behalf of the parties and it should be noted that the summary of the evidence for the plaintiffs included the statement by Siriki Zongo that Salamatu had cared for the plaintiffs from their infancy and that as the plaintiffs were " little grown " at the death of Salamatu the property after her death was given to the defendant to manage the estates until such time as the plaintiffs would attain the age of puberty.

The actual decision of Native Court " B " is summed up in the following extract from their judgment:

" The only question for this Court to consider is whether the property is Mallam Gariba's or Salamatu's (both deceased). To this question it has been evident that the compensation of £190 paid for the Old Mallam Gariba's house put this new building up by Salamatu. Going strictly into the question of the right of succession, there is little difficulty in determining it as Mallam Gariba died before Salamatu, but since it is admitted by parties that plaintiffs are children of the late Mallam Gariba and defendant an adopted child of Salamatu, and both have been living in the premises to the present date, this Court in its opinion find that plaintiff's action to oust defendant entirely from occupation should fail and in dismissing the action without costs, orders that parties should continue to live in the premises, and that the rooms should be divided among themselves. Action therefore dismissed each to pay his own costs."

The *ratio decidendi* is a little obscure but it is, their Lordships think, clear that Native Court " B " must have preferred the evidence of Siriki Zongo to that of the priest Lemanu Moru as to the ownership of the old house.

Both sides appealed to the Native Court of Appeal (Native Court " A " Sekondi Area). The duties of the Native Court of Appeal are defined in section 50 of the Native Courts (Colony) Ordinance 1944. This section makes it clear that the hearing before the Native Court of Appeal is a rehearing and that the Court may admit such further evidence as it sees fit. When the case came before the Native Court of Appeal on the 15th October, 1948, no new witnesses were called but the defendant and the first plaintiff made statements on oath. The defendant said that the first plaintiff was fully grown before Salamatu's death having then three children and that since her death he had been in possession of the premises for thirteen years without interference from the plaintiffs. The Native Court of Appeal reversed the decision of Native Court " B " saying that there was no proof to convince the Court that the old house belonged to Mallam Gariba. They plainly preferred the evidence of the priest to that of Siriki Zongo. They had not of course seen either of these witnesses but they relied on the documents, the evidence of Petteh Esson, the collection of the rents by the defendant, the evidence of Essien and the obvious falsity of the statement by the Siriki Zongo that when Salamatu died he handed over the property to the defendant because the plaintiff's were " little grown." In the result they dismissed the plaintiffs' action with costs.

The plaintiffs appealed to the Supreme Court of the Gold Coast, Western Judicial Division, Land Court. On the 4th August, 1949, Ragnar Hyne J., delivered judgment dismissing the appeal. He summarised the evidence at

considerable length and then proceeded to consider the contention advanced by counsel for the plaintiffs that as the Native Court of Appeal took no evidence it would not be justified in reversing the judgment of Native Court " B " except on strong grounds. He made the following citation from a judgment which their Lordships have been unable to trace:

" An Appeal Court is not debarred from coming to its own conclusion on the facts, and where a judgment has been appealed from on the ground of the weight of evidence the Appeal Court can make up its own mind on the evidence, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from overruling it if, on full consideration it comes to the conclusion that the judgment is wrong."

He expressed the view that the case before him really was one in which the judgment of Native Court " B " was impugned as being against the weight of evidence and that the passage cited was therefore applicable. Applying it to the evidence he had summarised he reached the same conclusion as the Native Court of Appeal and for substantially the same reasons. Like that Court he laid great stress on the documentary evidence.

The plaintiffs appealed to the West African Court of Appeal. That Court came to the conclusion that the trial Court (Native Court " B ") was right in its findings of fact as to the main issue in the case, namely the respective rights of Mallam Gariba and Salamatu in the old and new houses with which the case was concerned and in its conclusion from the evidence that both parties to the litigation had some rights in the property now in dispute. Delivering the judgment of the Court Sir Mark Wilson, C.J., said:

" The trial Court found, and we agree with their view, that the original house in which the predecessors of the parties resided in the Old Zongo at Sekondi was the property of Mallam Gariba and that the later house built by Salamatu in the New Zongo, called the " swish " house, was built with the compensation money paid by the Government for the old house on the demolition of the Old Zongo, and that the plaintiffs (who are the children by other wives of Mallam Gariba) therefore have rights in the property by succession under Mohammedan Law. But the trial Court also found (as we infer from the passage of their judgment quoted above) that Salamatu also had rights in the present property which consists of the " swish " house with additions and improvements, and that the defendant as her adopted son succeeded to those rights." He continued:

" Being in agreement with these findings we should have been disposed to restore the judgment of the Native Court " B," subject to its being varied so as to set out clearly and precisely the respective rights of the plaintiffs and of the defendant in the property. Unhappily, we are not in a position to make such a variation, since, although it is clear that the plaintiffs and the defendant each have some rights in the property, the exact nature and extent of those rights must obviously be governed by Mohammedan law in its local application. As to this, and any possible variations we have had nothing to assist us, either in the evidence on record or in the arguments of counsel."

In the result the appeal was allowed, the judgment of the Land Court set aside and the matter remitted to the Land Court, Sekondi " with the direction that the Land Court shall proceed on the basis of the above

findings of fact of the Native Court " B " as approved by this Court, and shall—

" (A) after taking evidence, including evidence as to the capital expenditure on the property as it now stands, define the respective rights to be enjoyed by the plaintiffs and the defendant in accordance with Mohammedan law, as locally applied, in House No. 23/19, and the compound thereof, situate at George Street, Hausa Zongo, Sekondi;

" (B) after inspecting the premises, make an appropriate order partitioning the property between the plaintiffs and the defendant according to those rights, and make and give all necessary consequential orders and directions."

From this decision the defendant appealed to this Board. Mr. Albery on his behalf invited their Lordships to restore the judgment of Ragnar Hyne, J., in the Land Court for the reasons he gave in his judgment and in the alternative he submitted that the doctrine of equitable estoppel applied in the Gold Coast and that the plaintiffs having allowed Salamatu and the defendant to expend their money on the property without questioning their title thereto could not now be heard to deny that title. This point had not been raised in the Courts below and in the course of the argument Mr. Albery found himself compelled to admit that the Record did not disclose facts which would bring the doctrine into operation. None the less he invited their Lordships if they were against him on the first point to insert a qualification in the Order of the West African Court of Appeal which would enable the defendant to raise the point in the resumed hearings in the Land Court. Their Lordships would have felt a difficulty in allowing so belated an attempt to raise a new point but in view of the conclusion they have reached on the first point they do not find it necessary to reach a conclusion on the alternative submission.

Their Lordships approach the main point under some difficulty for the West African Court of Appeal have not given their reasons for rejecting the conclusion reached by Ragnar Hyne, J., in the Land Court after a careful summary of the relevant evidence. They think however that the West African Court of Appeal must have been relying on the observations of Lord Atkin when delivering the Judgment of the Board in *Abakah Nihah v. Aduah Bennieh* [1931] A.C.72. Lord Atkin said at page 75:

" By colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong, and their Lordships fail to find such proof in the present case."

In that case the Provincial Commissioner to whom an appeal had been preferred had reversed the decision of the Native Court and Lord Atkin said at page 76:

" . . . in any case in view of the legislation referred to, it appears quite irregular to have extended the dispute so as to give the Commissioner, on appeal, original jurisdiction over land which had never been in dispute before the native tribunal, and as to which there

was no reason for interfering with their jurisdiction if the dispute had been raised before them."

Their Lordships respectfully agree with the opinion of the Board in the case cited as to the respect that ought to be paid to decisions of the Native Courts in matters such as the present but in that case there was no Native Court of Appeal and the facts of the present case are very different from those in the case cited.

Had the Native Court of Appeal affirmed the decision of Native Court " B " it would have needed a strong case to justify an interference with that decision but having regard to the difference of opinion between the two Native Courts their Lordships think that a wider discretion lay with the Land Court especially bearing in mind that section 50 of the Native Courts (Colony) Ordinance, 1944, provides that the Native Appeal Court may rehear the cause and admit further evidence. It is no doubt still the case that great importance in matters of credibility must be attached to the opinion of the Court that saw the witnesses; but in the present case the evidence of Siriki Zongo especially as to the age of the plaintiffs at the time of the death of Salamatu is at least as unsatisfactory as that of the priest Lemanu Moru. In these circumstances documentary evidence becomes important. The documentary evidence in the present case though not conclusive seems consistent with the case of the defendant and lends no support to that of the plaintiffs. Looking at the matter as a whole their Lordships agree with the careful summary of the evidence by Ragnar Hyne, J., and with the conclusion to which he came.

Their Lordships regret that the decision which they feel bound to reach does not necessarily dispose finally of the dispute between the parties. The action was an ejectment action and this must necessarily fail since their Lordships have come to the conclusion that the old house was the property of Salamatu and not of Mallam Gariba. It is however to be observed that the West African Court of Appeal who took the opposite view thought that the defendant might none the less have some rights in the property in accordance with Mohammedan law as locally applied. It is possible that that law may give some rights to the plaintiffs even though the old house was Salamatu's property, but that issue does not arise in this appeal and must be left to future determination if a claim is made.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, set aside the Judgment of the West African Court of Appeal and restore the Order of Ragnar Hyne, J., in the Land Court. Since the respondents who resisted the appeal were granted leave to contest this appeal in *forma pauperis* there will be no order as to the costs of the appeal to the Board or as to the costs in the West African Court of Appeal.

SAID AJAMI

APPELLANT

AND

COMPTROLLER OF CUSTOMS

RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1954] 1 W.L.R. 1405

West Africa (Nigeria) Exchange control—Prohibition of export of notes of foreign legal tender—Whether notes legal tender—Expert evidence on foreign law—Competency of experienced bank manager—“Specially skilled”—Exchange Control Ordinance, No. 35 of 1950 (Nigeria), s. 22 (1). Evidence—Expert—Foreign law—Competency of experienced layman—“Specially skilled”—“To the best of my knowledge.”—Exchange Control.

Not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert witness. Accordingly, the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law.

Vander Donckt v. Thellusson (1849) 8 C.B. 812, 814, approved.

There is nothing in sections 56 and 57 of the Evidence Ordinance of Nigeria which enacts in section 56 that the evidence of a person “specially skilled” on a point of foreign law is admissible as expert evidence, which is opposed to that view. The knowledge which entitles a person to be deemed “specially skilled” on some points of foreign law may be gained in appropriate circumstances by a person whose profession is not that of law.

Where, therefore, it was established that a branch bank manager, who had been engaged in banking business in Nigeria for 24 years, had to, and did, in the course of his business keep in touch with current law and practice with regard to notes that were legal tender in French West Africa, his evidence that a number of French colonial bank notes which the appellant had admittedly attempted to export from Nigeria were at the time legal tender in French West Africa was admissible to, and did, prove that fact, and the appellant had therefore contravened section 22 (1) of the Exchange Control Ordinance, 1950, of Nigeria, which prohibited the exportation, amongst other things, of “any notes of a class which are . . . legal tender in the United Kingdom . . . or in any other territory.”

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 16 of 1953) from a judgment of the West African Court of Appeal (Verity P. (C.J., Nigeria), O. Jibowu and Coussey JJ.) (February 19, 1952) dismissing an appeal from a judgment of the Supreme Court of Nigeria (Bairamian J) (November 19, 1951). The Supreme Court had by its judgment dismissed on appeal from a judgment in the magistrates court (August 11, 1951) in favour of the respondent.

The respondent, who was the Comptroller of Customs of Nigeria, claimed in the magistrates court against the appellant a penalty of £61,778 2s. 6d. and the forfeiture of 9,884,500 French colonial franc notes on the ground that the appellant had on June 15, 1951, attempted to export the said notes, the exportation of which was prohibited by section 22 (1) of the Exchange Control Ordinance, 1950. On this appeal the appellant did not dispute that he attempted to export 9,884,500 notes from Nigeria on June 15, 1951. It was further not disputed that the respondent was entitled to succeed in this appeal if it was held that section 22 (1) of the Exchange Control Ordinance prohibited the exportation of the 9,884,500 notes.

Section 22 (1) prohibited the exportation amongst other things, of: “any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory . . .”

It was not disputed in this appeal that French West Africa came within the meaning of the word “territory” in section 22 (1).

It was contended by the appellant that the evidence led by the respondent in the magistrates court did not establish a fact sought to be proved in, and held to be proved by the courts in Africa, namely, that the notes in question were legal tender in French West Africa on June 15, 1951. That was the sole

point raised by the appellant and the sole point for decision by their Lordships of the Board.

1954. July 27, 28, *Ralph Milner and Biden Ashbrooke* for the appellant.
B. J. M. MacKenna Q.C. and *D. A. Grant* for the respondent.

The following cases were referred to in argument: *Vanker Donckt v. Thellusson* ([1849] 8 C.B. 812); *The Sussex Peerage Case* ([1844] 11 Cl. & Fin. 85); *Reg. v. Dent* ([1843] 1 Car. & K. 97); *In the Goods of Whitelegg* ([1899] P. 267); *Wilson v. Wilson* [1903] P. 157); *Cooper-King v. Cooper-King* ([1900] P. 65); *Barford v. Barford and McLeod* ([1918] P. 140; 34 T.L.R. 306); *In re Todd Shand v. Kidd* ([1854] 19 Beav. 582); *Cartwright v. Cartwright and Anderson* ([1878] 26 W.R. 684); *Lazard Brothers & Co. v. Midland Bank Ltd.* ([1933] A.C. 289, 298; 49 T.L.R. 94); *Jacker v. International Cable Co. Ltd.* ([1888] 5 T.L.R. 13); *Miller v. Babu Madho Das* ([1896] L.R. 23 I.A. 106); *Third National Bank of Chicago v. Cosby* ([1877] 41 Upper Can.Q.B. 402); *Third National Bank of Chicago v. Cosby* ([1878] 43 Upper Can.Q.B. 58); and *Buffum v. Harris* ([1858] 5 Rhode Is. 243, 250).

November 8. The judgment of their Lordships was delivered by MR. L. M. D. de SILVA, who stated the facts set out above, and continued: It was necessary to call an expert to prove that the francs were legal tender in West Africa on June 15, 1951, and the expert evidence called by the respondent was that of one Mr. Greenway. The whole of his evidence, given in examination-in-chief consisted of the following: "Manager, Barclay's Bank, Kano, in banking business 32 years, 24 years in Nigeria, I look at these notes, they are to the best of my knowledge French colonial franc notes, they were legal tender in French West Africa on June 15 this year. On that day these francs were worth 490 to £1 English note. The English value of 9,884,500 francs is therefore, £20,172."

He was not cross-examined and no evidence was led by the appellant to contradict what he said. After the respondent had closed his case the appellant did not give evidence, nor was any evidence led on his behalf.

The appellant concedes that Mr. Greenway is a credible witness, but contends that upon the facts deposed to by him he cannot be regarded in law as a competent expert witness. It is further contended that even if it be held that Mr. Greenway was competent to give evidence as an expert, he has so qualified his evidence that it cannot be regarded as proving the facts sought to be established.

It has been argued strenuously that upon a matter which involves a question of law no person who is not a professional lawyer could be regarded as a competent expert. Their Lordships do not agree. In *Vander Donckt v. Thellusson* ([1849] 8 C.B. 812, 814) it was held that a person who though not a lawyer, had become conversant with a point of foreign law by "carrying on a business which made it his interest to take cognisance" of the point, was competent witness on that point. Their Lordships share this view. A number of other cases were cited to their Lordships which, although they contain observations relevant to the facts of each case do not, in their Lordships' view, qualify in any way the principle stated in the case referred to above. Their Lordships do not propose to refer to each of these cases separately. A principle which emerges from them considered together is that not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a

competent expert on a question of foreign law.

Their Lordships observe that there is nothing opposed to the views they have expressed above in the relevant statute law of Nigeria, which is to be found in sections 56 and 57 of the Evidence Ordinance of Nigeria and is to the following effect:

“ 56.—(1) When the Court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, or as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

57.—(1) Where there is a question as to foreign law the opinions of experts who in their profession are acquainted with such law are admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.

(2) Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, in the case of trial with a jury, be decided by the judge alone.”

The Ordinance enacts that the evidence of a person “ specially skilled ” on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed “ specially skilled ” on some points of foreign law may, in their Lordships’ opinion, be gained in appropriate circumstances by a person whose profession is not that of the law.

In the case before them, their Lordships have to be satisfied on two points before they can regard Mr. Greenway as competent. Firstly, that he conducted a business which made it his interest to take cognisance of what notes were legal tender in French West Africa. Secondly, that he did in fact take cognisance of what notes were legal tender in that country.

It would have been prudent for the respondent to have led evidence more clearly directed to establishing both these points. As the recorded evidence is very much compressed their Lordships have had some difficulty in arriving at a conclusion.

It appears from a notification in the *Gazette* of November 9, 1950, that Barclays Bank had been appointed an “ authorised dealer in foreign currency,” within the meaning of that term in the Exchange Control Ordinance (No. 35 of 1950) of Nigeria. It is also clear from sections 5 and 42 (to which their Lordships do not think it necessary to make detailed reference) of that Ordinance that dealings in foreign currency could normally be conducted only by an “ authorised dealer.”

It is difficult to imagine that an “ authorised dealer ” would not keep himself informed as to the notes that were legal tender in French West Africa, an adjoining territory, unless special circumstances existed which rendered it unnecessary for him so to do. No such special circumstances have been proved or even suggested in the evidence in the case.

It was suggested by counsel for the appellant that the *Gazette* had not been properly produced in the courts below as there is no notice in the record of the occasion when this was done. There is, however, a reference to the fact that Barclays Bank was an authorised dealer in the judgment of the magistrates’ court, and a reference to the *Gazette* itself in the judgment of the Court of Appeal. Their Lordships are of the view that the *Gazette* was

properly before the courts in Africa although no entry has been made in the record of its production.

Council for appellant argued with force that, although it has been shown that Mr. Greenway was a manager of a branch of Barclays Bank, it has not been shown that as part of his duties he kept in such close touch with the currency of French West Africa as to make him competent to give the evidence which he did give. After anxious consideration their Lordships are of the opinion that the argument should not be accepted. Mr. Greenway is a manager of a branch of Barclays Bank in Nigeria, and has been in banking business for 32 years, 24 years of which have spent in Nigeria. He has been regarded without challenge by the courts below as a credible witness, and he must also be regarded as a person with a sense of responsibility. Therefore the opinion which he has expressed cannot be the result of mere conjecture. It has been suggested by counsel for the respondent that upon a fair view of the evidence as a whole it must be presumed that Mr. Greenway was speaking from adequate personal experience. This suggestion their Lordships accept.

It has also been contended that the use of the words "to the best of my knowledge" by Mr. Greenway so qualified his evidence as to render it of no probative value. Their Lordships do not agree. The meaning of the words mentioned could be best appreciated by the judge who saw the witness and heard the evidence given and the qualification cannot be said to deprive the witness's evidence of all probative value. No attempt was made by the appellant to contradict what Mr. Greenway said, and their Lordships are of the view that his evidence must be held to have established the facts to which he deposed.

For the reasons given their Lordships are of the opinion that it must be held that Mr. Greenway was a person who in the course of his business had to, and did, keep in touch with current law and practice with regard to notes that were legal tender in French West Africa. They are of the opinion that the notes of which exportation was attempted must be held to be notes which were legal tender in French West Africa on June 15, 1951. They will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

Solicitors: *Hatchett Jones & Co.*; *Charles Russell & Co.*

UNITED AFRICA COMPANY LIMITED APPELLANTS
 AND
 SAKA OWOADE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1955] 2 W.L.R. 13

1954 Dec. 13

Lords Oaksey, Keith of Avonholm
 and Mr. L. M. D. de Silva

*West Africa—Vicarious liability—Master and servant—Fraud—Carriage of goods—Ordinary carrier—Conversion—Liability of master for theft by servant—In course of employment.
 Practice—Pleadings—Statement of claim—Need only state facts.*

Practice—Security for costs Form—“Enter into” good and sufficient security—Bond not necessary—Deposit of Cash—Appeal to Privy Council—Privy Council—Appeal—Vicarious Liability—Fraud.

A master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment.

Where, therefore, the appellant company, general merchants, had expressly committed to servants of the respondent, a transport contractor, at his request, goods for carriage by road, and the servants stole the goods, and the evidence established that that conversion took place in the course of their employment, the respondent was liable to the appellants for the value of the goods.

Lloyd v. Grace Smith & Co. [1912] A.C. 716; 28 T.L.R. 547 applied.

Cheshire v. Bailey [1905] 1 K.B. 237; 21 T.L.R. 130 considered.

So far as the statement of claim is concerned, the pleadings need only state facts and not contentions of law.

On an application by the appellant company to the court below for leave to appeal to the Privy Council it was ordered as a condition of granting leave that the appellants “do enter into good and sufficient security . . . in the sum of £500 . . .”:

Held, that the deposit of £500 in cash was as good as, if not better than, a bond, and was a sufficient compliance with the order of the court to “enter into” good and sufficient security. On the strict wording of the order only the appellant company itself could enter into security, and in cases where the appellant was not a person of substance a bond would be of much less value than the actual sum.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 30 of 1952) from a judgment of the West African Court of Appeal (May 15, 1951) allowing an appeal by the respondent from a judgment of the Supreme Court of Nigeria (Judicial Division of Lagos) (March 30, 1950) in favour of the appellants for £4,732 13s. 4d. The West African Court of Appeal gave judgment for the respondent. It was also an appeal from an order of the West African Court of Appeal (November 19, 1951) refusing the appellants final leave to appeal to His late Majesty in Council from the judgment of May 15, 1951. Special leave to appeal to Her Majesty in Council against both the judgment and the order was granted by Her Majesty at a Council held on April 9, 1952.

The appellants were general merchants in Lagos and elsewhere in West Africa. The respondent owned lorries and was a transport contractor. In February 1948, the respondent came to the appellants' premises and saw certain of their employees and solicited employment to carry goods from Lagos to the appellants' branches up-country. He introduced to the appellants' employees two men whom he said were his driver and clerk, and stated that when the appellants had goods for him to carry they should give them to the driver and clerk. The clerk in question attended at the appellants' premises on two occasions in March and April, 1948, and on each occasion was given certain goods, namely cigarettes and brandy, the total value of which was £4,777 9s. 4d., for carriage to two branches up-country. The goods were never delivered to the two branches up-country and the lorry driver and clerk were subsequently convicted of stealing them.

The appellants issued their writ on March 2, 1949, claiming £4,777 9s. 4d. the value of the goods. The statement of claim was delivered on April 11, 1949, and the defence on April 22, 1949. The case came on for hearing on February 27, 1950.

The appellants' counsel in opening the case said that the appellants put

their case in two alternative ways, first they said that the respondent was a common carrier who had failed to deliver the goods, and secondly they said that he was liable on the basis of *respondet superior*. That phrase was used both by counsel and by the trial judge as covering a conversion or detention of the goods by the respondent's servants acting in the course of their employment and for which it was claimed by the appellants that the respondent was liable. The appellants called two witnesses who established the facts already recited. The case was then adjourned to March 14. When the hearing was resumed counsel for the respondent elected to call no evidence and submitted that he had no case to answer since the appellants had not proved that the respondent was a common carrier, and he alleged that no other case was open to the appellants on the pleadings. The trial judge (Reece J.) reserved judgment, and his reserved judgment was given on March 30, 1950. The judge held that the goods had been delivered to the respondent's servants in the course of their employment and stolen by them in such capacity, and gave judgment for the appellants for £4,732 13s. 4d. There was nothing in the judgment to show why that figure was substituted for £4,777 9s. 4d., but it appeared probable that this was due to some oversight. Upon the question of the pleadings, the judge said that the pleadings should contain, and contain only, the material facts relied upon and not contentions of law, and that the statement of claim did contain allegations of the facts material to their alternate case for conversion.

The respondent appealed to the Court of Appeal and the case was heard on May 15, 1951, by Verity P. (C.J. Nigeria), Lewey J.A. and De Comarmond J. The Court of Appeal held that the form of the pleadings was such that the appellants were only entitled to rely upon non-delivery by a common carrier, and that as they had not proved that the respondent was a common carrier their case must fail. The Court of Appeal therefore gave judgment for the respondent.

As the sum involved exceeded £500 the appellants were entitled, under the provisions of the relevant Order in Council to appeal to His late Majesty in Council subject to fulfilment of certain conditions, one of which was the provision of such security for the respondent's costs as should be fixed by the Court of Appeal. The Court of Appeal on July 2, 1951, fixed the security at £500 and also ordered the appellants to pay £50 into court to cover the costs of the preparation of the record. Pursuant to that order the appellants, within the time stated in the order of the Court of Appeal, paid into court to the credit of the appeal the sum of £550. The relevant portion of the order of the Court of Appeal giving conditional leave to appeal was in the following terms:

“ It is ordered that conditional leave to appeal in the above matter to His Majesty's Privy Council be granted to the United Africa Company Limited the plaintiffs/appellants upon fulfilment within three months from the date hereof of the following conditions.

(A) that the plaintiff/appellants, the United Africa Company Limited do deposit in court the sum of £50 for the preparation of the record of appeal and for the despatch thereof to His Majesty's Privy Council.

(B) that the plaintiffs/appellants, the United Africa Company Limited, do enter into good and sufficient security, to the satisfaction of the court, in the sum of £500 for the due prosecution of the appeal and the payment of all such costs as may become payable to Sake Owoade, the defendant/respondent . . .”

The respondent took the point that paragraph (B) of the order could only be fulfilled by the provision of a bond and that payment of the sum of money mentioned, namely, £500 into court was not a compliance with the order.

The matter came before the Court of Appeal and the judgment of the court was given on November 19, 1951, by Jibowu J. The judgment was that the payment into court was not a compliance with the order, and the Court of Appeal therefore refused leave of appeal to His late Majesty in Council.

The appellants petitioned for special leave to appeal to Her Majesty in Council against both the substantive judgment of May 15, 1951, and also against the order of November 19, 1951, refusing leave to appeal from the said judgment. On April 9, 1952, the appellants were granted special leave to appeal to Her Majesty in Council against both judgment and order.

1954. Nov. 1, 2, 3, *T. G. Roche* for the appellants.

Phineas Quass Q.C. and *S. N. Bernstein* for the respondent.

December 13. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts as set out above and continued: As the substantive appeal turns almost entirely upon the form of the pleadings it is necessary to set them out in full. They are as follows:

“ No. 1 Suit No. 51/49

CIVIL SUMMONS

BETWEEN

THE UNITED AFRICA CO. LTD.	. . .	PLAINTIFF
	AND	
SAKA OWOADE	. . . . .	DEFENDANT

To Saka Owoade of Alade Street, Isale Ijebu, Ibadan, or c/o John Holt & Co. Ltd., Ibadan (Produce Department).

You are hereby commanded in His Majesty's name to attend this court at Tinubu Square, Lagos, on Monday the 28th day of March, 1949, at 9 o'clock in the forenoon to answer a suit by The United Africa Co. Ltd., of c/o Messrs. Irving & Bonnar, Barclays Bank Chambers, Lagos, against you.

The plaintiff's claim against the defendant is in the sum of £4,777 9s. 4d. whereof £4,732 13s. 4d. is value of 40 cases Guineas Gold Cigarettes and £44 16s. is cost of four cases of Jules Charrent brandy delivered and accepted by the defendant's clerk and lorry driver on behalf of the defendant on or about March 15, 1948, and April 13, 1948, as common carriers for transporting to the plaintiff's station at Ilorin which he has failed to deliver.

Issued at Lagos the 2nd day of March 1949	£	s.	d.
Summons	25	0	0
Service	5	6	6
	£25 5 6		

(Sgd.) FRANCIS H. BAKER
Senior Puisne Judge

TAKE NOTICE: That if you fail to attend at the hearing of the suit or at any continuation or adjournment thereof, the court may allow the plaintiff to proceed to judgment and execution."

" No. 2
STATEMENT OF CLAIM

1. The plaintiffs are a limited liability company carrying on the business *inter alia* of wholesale suppliers of goods in Lagos and elsewhere. The defendant is a produce assistant to Messrs. John Holt & Co. Ltd., in Ibadan, and also owns lorries and carries on a road transport business as a common carrier.

2. In February, 1948, the defendant introduced his clerk and a lorry driver to the clerk to the plaintiffs who deals with despatch of goods up-country and also introduced the said clerk and lorry driver to the plaintiffs' storekeeper. The defendant requested at the same time that the plaintiffs should entrust him with freight of their goods to stations up-country.

3. In March, 1948, the plaintiffs entrusted goods to the value of £4,777 9s. 4d. to the clerk to the defendant for carriage and delivery to places up-country.

4. The said goods were never delivered to their destinations and the said clerk and lorry driver to the defendant were later convicted of the theft of the said goods.

5. The defendant is liable as a common carrier to make good to the plaintiffs the value of the said goods but has failed to do so.

Wherefore the plaintiffs, claim as per writ of summons.

Dated at Lagos this 11th day of April, 1949.

(Sgd.) IRVING & BONNAR
Plaintiffs' Solicitors."

" No. 3
DEFENCE

STATEMENT OF DEFENCE

1. The defendant denies paragraphs 2, 3, 4 and 5 of the plaintiffs' statement of claim and puts the said plaintiffs to their very strict proof.

2. The defendant admits paragraph 1 of the plaintiffs' statement of claim save and except the averment that he is a common carrier which he denies and puts the said plaintiffs to their strict proof.

3. The defendant says that the person alleged to be his clerk in paragraph 3 was not and has never been his clerk is one who touts for passengers and loads to be carried to certain places and is in no way an agent of the defendant.

4. The defendant became aware of paragraph 4 after the prosecution of his driver and the said tout Simeon Dejo.

5. The defendant avers that he is not a common carrier.

6. The defendant says that his driver did not have the said defendant's consent before the said goods of the plaintiffs were entrusted to him, nor was it done with this knowledge.

Dated at Lagos this 22nd day of April, 1949.

(Sgd.) JOHN TAYLOR
Defendant's Solicitor."

The Court of Appeal in their judgment held that the writ did not comply with the provisions of Ord. 2, r. 2, of the Supreme Court (Civil Procedure) Rules which laid down that a writ of summons should state briefly and clearly the subject matter of the claim and the relief sought for. In their Lordships' opinion the writ did do both these things since it was clearly shown that the appellants' complaint was that they had entrusted goods to the value of £4,777 9s. 4d. to the respondent's servants and that they had never been delivered, and it also showed the relief claimed, namely, judgment for the value of the goods. However, even if this were not so, any defect in this respect was cured by the statement of claim.

So far as the statement of claim is concerned, in their Lordships' opinion the trial judge was correct in stating that the pleadings need only state facts and not contentions of law.

Paragraphs 2 and 3 contain all the allegations of fact necessary to establish that the goods were delivered to the respondent's servants acting in the course of their employment for delivery to the appellants' premises up-country. In paragraph 4 it is stated that the goods were never delivered to their destination and the clerk and lorry driver of the respondent were later convicted of the theft of the said goods. In the judgment of the Court of Appeal it was suggested that this pleading did not comply with Ord. 22, r. 8, of the Civil Procedure Rules, the material part of which reads: "Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly."

The alternate cases submitted on behalf of the appellants at the trial were not founded on separate distinct facts. The facts were the same, namely that the goods had been delivered to the respondent's servants acting in the course of their employment and had not been delivered but had been stolen by the said servants. If the respondent were a common carrier then he would be liable for the non-delivery unless he could establish one of the very few excuses available to a common carrier, such as act of God. If he were not a common carrier he could, of course, escape liability by showing that the goods were lost without any fault on his part. The distinction between the case as against a common carrier and as against an ordinary carrier lay not so much in the facts to be established by the plaintiffs but the defences open to the respondent. In any case, paragraph 4 of the statement of claim did set out separately the alleged theft of the goods, which was not necessary to be established in the case relating to a common carrier but was a material factor in a case of conversion or detinue.

Upon these pleading points their Lordships find themselves in agreement with the view of the judge at the trial.

There was no question of surprise, since the appellants' counsel stated his contention in opening the case on February 27, 1950, and it was not until March 14, 1950, that the respondent's counsel made any objection. In such circumstances, if the judge thought that the pleadings were not sufficiently clear or did not adequately raise the case which the plaintiff desired to make he should have ordered them to be amended. But the judge, was, in their Lordships' view, entitled to hold, as he did hold after full consideration of the respondent's submission, that the appellants' contention was open upon the pleadings as they stood, and in this in their Lordships' judgment the judge was right. The facts stated in paragraphs 2, 3 and 4 of the statement of claim are sufficient to raise the question of the respondent's liability apart from any liability as a common carrier.

On October 28, 1954, the respondent amended his printed case and has

argued before their Lordships' Board that a principal or master cannot be liable for his agent's or servant's fraud unless the principal or master has been himself negligent. This argument was based principally upon the case of *Cheshire v. Bailey* ([1905] 1 K.B. 237; 21 T.L.R. 130).

In their Lordships' opinion, *Lloyd v. Grace Smith & Co.* ([1912] A.C. 716 28 T.L.R. 547) establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire v. Bailey* ([1905] 1 K.B. 237) it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and by arrangement with two thieves participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from *Lloyd v. Grace Smith & Co.* ([1912] A.C. 716).

In the present case the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out, and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in each case whether the wrong was committed in the course of the servant's employment, and in the present case their Lordships are of opinion that upon the uncontradicted evidence the conversion of the appellants' goods took place in the course of the employment of the respondent's servant.

As Her Majesty in Council has granted special leave in this case the question as to the adequacy of security only directly affects the question of costs, but it may have some general importance. In their Lordships' view it is too narrow a construction of the words of the order to treat the actual deposit of the sum in which the appellants were ordered to find security as insufficient on the ground that the appellants did not "enter into good and sufficient security." The sum of money was as good as if not better than, a bond, and on the strict wording of the order only the appellant company itself could enter into security, and in cases where the appellant was not a person of substance the bond would be of much less value than the actual sum.

For these reasons their Lordships will humbly advise Her Majesty that the appeals should be allowed and judgment entered for the appellant company for £4,777 9s. 4d. The respondent must pay the costs before their Lordships Board and in the courts below.

Solicitors: *Linklaters & Paines; A. L. Bryden & Williams.*

CHIEF J. M. KODILINYE AND ANOTHER . . . APPELLANTS
AND
PHILIP AKUNNE ANATOGU AND ANOTHER . . . RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1955] 1 W.L.R. 231

1955 Feb. 14

Viscount Simonds, Lords Oaksey, Tucker,
Somervell of Harrow and Mr. L. M. D. de Silva

West Africa (Nigeria)—Land—Ownership—Statutory transfer of land to Crown—Subsequent abandonment under statute as amended—Effect—Title to ownership reverting to original owners—Usufructuary and occupancy rights intermediately acquired not affected—To be decided in independent proceedings—Declaration and injunction—Desirability of formal order embodying precise language of relief granted—Niger Lands Transfer Ordinance, 1945, s. 14 (now s. 15 of c. 149 of the Laws of Nigeria, 1948 Rev.).

In 1882, confirmed by an instrument in 1884, certain land, including that now in dispute known as Ugborimili, situate at Onitsha, Nigeria, was granted by a Native Chief to the National African Co. Ltd. which company was subsequently merged in the Royal Niger Co., who succeeded to their title to the suit land. The grant reserved certain farming, fishing and occupancy rights. In 1916 the Niger Lands Transfer Ordinance was passed, vesting in the Governor in trust for His Majesty as from January 1, 1900, certain specified lands belonging to the Niger Co., including the suit land. By Ordinance No. 22 of 1945, the Ordinance of 1916 was amended and the Governor was empowered to abandon all the right, title or interest vested in him by the Ordinance of 1916 in the trust lands. In December, 1948, the Governor made an order abandoning as from January 1, 1949, all right, title or interest in the suit land. Section 14 of the Ordinance of 1916 (as amended by Ordinance Nos. 22 and 61 of 1945) provided that:

“ Where the Governor abandons all the right, title or interest vested in him by virtue of this Ordinance in any vested trust lands or part thereof . . . then such abandonment shall have effect as if such vested trust lands or part thereof had never been included in the instrument . . . by which the same were originally transferred to the company.”

The respondents, in a representative action on behalf of the Onitsha tribe or family, alleging that the Native Chief in 1882 had transferred the suit land to the company on behalf of the Onitshas, and that pursuant to the abandonment order of the Governor it reverted to them on January 1, 1939, claimed a declaration of title to the land and an injunction to restrain the appellants, the Obosi tribe or family (a number of whom had, between 1882 and 1945, entered on the suit land and built houses thereon, which had given rise to numerous legal proceedings as to their rights), from “ interfering with or disturbing the plaintiffs’ ownership and possession of the said land.”

On appeal by the appellants against the orders of the courts below granting the declaration and injunction claimed:

Held, (1) that there were no grounds for interfering with the concurrent findings of fact that the respondents were the lawful owners to whom the title in the land reverted on the abandonment by the Crown and entitled to the declaration; but (2) that, the only issue in the action being the ownership or radical title to the land, nothing could or should have been decided which would in any way affect the usufructuary rights, if any, of people on the land or any portions thereof, and the injunction would be varied by omitting the words “ and possession ” from the injunction granted.

Section 14 of the Niger Lands Transfer Ordinance, 1916, as amended, dealt only with the title to ownership of the land and was not to be construed as compelling the court to disregard all events which had happened in the period between 1882 and 1949, in so far as they might affect any rights of use and

occupation in respect of such land as might have been acquired or have accrued by acquiescence or otherwise during those years.

It is desirable—whatever the rules of the Supreme Court of Nigeria may permit—that a successful party should obtain a formal order embodying the precise language of the relief granted to him by the judge in cases in which a declaration of title and/or an injunction has been granted.

Judgment of the West African Court of Appeal varied.

APPEAL (No. 39 of 1951) from a judgment of the West African Court of Appeal (November 14, 1950), affirming a judgment of the Supreme Court of Nigeria, Onitsha Judicial Division (October 1, 1949).

The following facts are taken from the judgment of the Judicial Committee: This appeal concerned a dispute between two tribes or more accurately, families as to the title to part of an area of land called Ugborimili which was bounded in the west by the river Niger and lay between the Ndende stream in the north and the river Idemili in the south. Those two tribes or families are hereinafter referred to as the Onitshas and the Obosis. The Onitshas (the respondents to the present appeal) were the plaintiffs in a representative action brought by them against the Obosis (the present appellants) claiming a declaration of title to the disputed land and an injunction.

In 1882 certain land (including that now in dispute) was granted by one Orikagbue to the National African Co. Ltd. The grant was evidenced by the production of a certificate dated October 8, 1884, confirming the grant of 1882. That document was Ex. 53 in the case. The National African Co. Ltd. was subsequently merged in the Royal Niger Co., who succeeded to their title in the land. On October 26, 1896, a further grant of a portion of the land included in the 1882 grant was made by Orikagbue and four others to the Niger Co. That was Ex. 54. Those grants expressly reserved certain farming, fishing and occupancy rights.

In 1916 the Niger Lands Transfer Ordinance (c. 86) was passed, vesting in the Governor and his successors in office in trust for His Majesty as from January 1, 1900, the lands belonging to the Niger Co. specified in the first schedule thereto. Certain portions of such lands were, however, reserved to the Niger Co. and were referred to in the fourth schedule. Included in the list of agreements in the first schedule were instruments No. 72 and No. 40, which were Exs. 53 and 54 referred to above. The date 1894 in instrument 72 was a mistake for 1884. Between 1882 and 1945 it appeared that a number of persons entered on the land in dispute and built houses thereon. That had given rise to numerous legal proceedings as to their rights or as to the payment of rent or tribute. The Onitshas, through their legal advisers, protested to the Government with regard to their failure to prevent such encroachments since the land had become vested in them in 1916. In 1945, by Ordinance No. 22/1945 the Ordinance of 1916 was amended. Section 4 empowered the Governor by order to abandon all the right title or interest vested in him by the Ordinance of 1916 in the whole or any part of the lands called the "vested trust lands." Under that authority the Governor made an order (No. 29/1948) dated December 11, 1948, abandoning as from January 1, 1949, all the right, title or interest in a part of the vested trust lands specified in instruments 72 and 40. The portion abandoned was the area south of the green line running east and west of Ex. 10, which was the plan put in evidence and showing the area now in dispute.

Section 14 of chapter 86 (as amended by Ordinances Nos. 22 and 61/1945) provided as follows with regard to the effect of such divesting order:

“ Where the Governor abandons all the right, title or interest vested in him by virtue of this Ordinance in any vested trust lands or part thereof in accordance with the provisions of this Ordinance then such abandonment shall have effect as if such vested trust lands or part thereof had never been included in the instrument, agreement or document, as the case may be, by which the same were originally transferred to the company.”

The only issue before the court was who were the lawful owners to whom the title in the lands in dispute reverted on the abandonment by the Crown on January 1, 1949.

The Onitshas based their claim on traditional evidence as to the migration of their tribe from Benin and their conquest of the Ozeh people who were driven out by them. They said that having thus acquired the land, Orikagbue on their behalf transferred it to the National African Co. and the Niger Co. by the instruments Exs. 53 and 54, and that the ownership of the land reverted to them on January 1, 1949.

The trial judge (Manson J.) granted the respondents a declaration of title to the suit land, and also an injunction restraining the appellants “ and their people of Obosi from interfering with or disturbing the plaintiffs’ ownership and possession of the said land.” On appeal the West African Court of Appeal (Blackall P., Verity (C.J. Nigeria), and Lewey J.A.) affirmed that decision.

1955. Jan. 12, 13, 17, 18 and 19. *Sir Hartley Shawcross Q.C.*, *Dingle Foot Q.C.* and *R. K. Handoo* for the appellants.

S. Cope Morgan Q.C. and *F. R. McQuown* for the respondents.

Feb. 14. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts as set out above and continued: It is interesting, having regard to the appellants’ case as presented to the Board, to see what has been their attitude to this document Ex. 53 at various stages of the proceedings. By their defence and at the trial they denied that Orikagbue was an ancestor of the respondents. They said that he was an Obosi man residing at Onitsha where he was practising as a native doctor and that he contracted for himself and the Obosi people. This issue having been decided against them by the trial judge, who accepted the evidence, *inter alios*, of Orikagbue’s own son that his father had no connection with the Obosis, and that he and the four other signatories to Ex. 54 were all members of the Ogbo family (*i.e.* Onitshas), the appellants subsequently contended that Ex. 53 was inadmissible and should never have been received in evidence. This was reason No. 2 in their case. On the hearing of this appeal this contention was abandoned, but at one stage it was suggested that Ex. 53 had been annulled by the later agreement Ex. 54. Ultimately it formed the basis of their submission that it was a vital piece of evidence recognising their usufructuary title to the land with regard to which the trial judge had so misdirected himself as to require that the case should be sent back for a new trial.

The trial occupied 11 days, and 36 witnesses, were called. The judge (Manson J.) in a careful and lucid judgment decided the issue of fact as to who were the lawful owners of the land in dispute in favour of the respondents (the Onitshas) and granted them the declaration asked for, *viz.*, “ a declaration of title to all that piece or parcel of land known as Ugborimili situate at Onitsha, in the Onitsha Division.” No formal order appears to have been drawn up. This, it seems, is not necessary under the rules of the Supreme Court of Nigeria unless specifically applied for, the

minute of the judgment taking the place of the formal order or decree. The area to which this declaration relates is the area shown on Ex. 10 below the green line.

On appeal to the West African Court of Appeal the judgment of the trial judge was upheld, the court merely stating that the evidence fully supported his findings.

On this issue there are accordingly concurrent findings of fact as to which it is conceded there are no grounds which would warrant their review by the Board.

The trial judge, however, not only made the declaration already referred to, but granted an injunction. He said: "I also grant the injunction sought." The injunction sought was as follows: "An injunction to restrain the defendants and their people of Obosi from interfering with or disturbing the plaintiffs' ownership and possession of the said land." The judge went on to say:

"The defendants must in no way interfere with the beneficial enjoyment by the plaintiffs of the above area. The defendants are occupying many houses and other buildings on the land. The plaintiffs do not ask for an order of ejectment of defendants. If they want an order they must apply for it. In the meanwhile the defendants are liable to pay to the plaintiffs rent for the use and occupation of the plaintiffs' land. If plaintiffs demand rent, the defendants must pay it unless they remove their buildings and vacate the plots."

Here again, no formal order seems to have been drawn up, but the language used by the judge, coupled with the reference to "possession" in the injunction asked for, might well be interpreted as going far beyond the only issue in the action, viz., the ownership or radical title to the land. Unfortunately, the judge was not asked to modify the form of order or to clarify the position. Nor was this matter ever raised in the Court of Appeal. None the less, their Lordships having had their attention drawn to this point feel compelled to make some observations with regard thereto.

The only issue having been as to ownership nothing could or should have been decided which would in any way affect the usufructuary rights, if any, of individuals or of families or tribes to the land in dispute or any portions thereof, or as to whether any such rights are or are not conditional upon payment of rent or tribute. All such matters can only be decided in proceedings in which such issues are properly raised.

The appellants relied on Ex. 53 which states "He (*i.e.*, Orikagbue) asked that the Abutshi (*i.e.* Obosi) people might be allowed to use the land for raising yams, corn, etc., and to fish from those parts of the bank which were not in the occupation of the company, . . . he also asked that if any of his sons or daughters wished for a portion of the land for farming purposes that they should be allowed and that these requests were acceded to." They contended that this was evidence of recognition of a previous grant to the Obosi people under which they would at any rate be entitled to occupy the land in dispute, even if the ownership reverted to the Onitshas. They further relied on several passages in the evidence of the plaintiffs' witnesses and in their pleadings to the like effect.

Their Lordships express no view on these matters, which may require consideration in the light of further evidence directed to these issues and to questions of native law and customs if and when they arise in proceedings in which they call for decision. They do, however, consider that it is right that they should express their view as to the proper construction of section 14 of

the Niger Lands Transfer Ordinance as amended (which now appears as section 15 of chapter 149 of Laws of Nigeria, 1948 edition) which has been set out above. In their opinion this section only deals with the title to ownership of the land, and is not to be construed as compelling the court to disregard all events which have happened in the period between 1882 and 1949 in so far as they may affect any rights of use and occupation in respect of such land as may have been acquired or have accrued by acquiescence or otherwise during those years.

No case has been made out for a new trial, but their Lordships consider that the form of the injunction and the language used by the judge in connection therewith require that the order for the injunction should be varied so as to follow the declaration by omitting the words "and possession" in the injunction sought and granted by the judge.

Their Lordships would stress the desirability—whatever the rules may permit—of a successful party obtaining a formal order embodying the precise language of the relief granted to them by the judge in cases in which a declaration of title and/or an injunction has been granted.

For these reasons their Lordships will humbly advise Her Majesty that the order for an injunction granted by the judge be varied by omitting the words "and possession," but save as aforesaid the judgment do stand.

The appellants must bear their own costs of this appeal and pay to the respondents one half of their costs.

Solicitors: *Watkins, Pulleyn & Ellison; Rexworthy, Bonser & Wadkin.*

THE STOOL OF ADANSI APPELLANT
AND
THE STOOL OF BRENASE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1956] 1 W.A.L.R. 6

1955 Apr. 19

Lords Tucker, Somervell of Harrow
and Mr. L. M. D. de Silva

Appeal.

Concurrent findings of fact—Refusal to grant adjournment to enable appellant to call witness—Miscarriage of justice.

Held: (1) The concurrent findings on the facts of the Courts below, *prima facie* entitle the respondent to a dismissal of the appeal.

(2) The granting of an adjournment for the purpose of calling a witness is essentially a matter for the exercise of his discretion by the trial Judge.

L. M. D. DE SILVA. This is an appeal from a decision of the West African Court of Appeal affirming a decision of the Supreme Court of the Gold Coast dismissing an action for declaration of title to land.

In the action the Stool of Adansi, represented by the appellant, sued the Stool of Brenase, represented by the respondent, for a declaration of title to land. The land in dispute, it is agreed, is correctly delineated in the plan Exhibit No. 1 produced in the case and is bounded on the East by the river Prah.

The action originated in the Asantehene's Court (Grade "A") but by

reason of certain judicial decisions and procedural steps, the correctness of which is not disputed, came to trial before the Supreme Court of the Gold Coast in November, 1949. The learned Trial Judge dismissed the action summarising his observations thus: "In conclusion I would say that the plaintiff's claim to any declaration for title has neither been evidenced by any root or by any evidence upon which any Court could come to any reasonable conclusion that they were entitled as owners to exclusive possession."

On appeal to the West African Court of Appeal Coussey, J. (with whom two other judges sitting with him concurred) agreed generally with the Trial Judge and concluded his judgment with the words: ". . . I would dismiss the appeal on the ground that the plaintiffs have failed to prove a root of title or any title or that they have had such exclusive possession of the land as would entitle them to a declaration in their favour confirming a title."

The concurrent findings on the facts of the courts below, *prima facie*, entitle the respondent to a dismissal of this appeal.

The first question is whether the appellant can bring himself within any of the recognised exceptions to this rule. If not the appeal must fail. The appellant sought to rely on an exception formulated by Lord Thankerton in the judgment of the Board in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 namely:

"(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

Seeking to bring the case within the ambit of the exception, counsel for the plaintiff-appellant has argued strenuously that there has been a miscarriage of justice caused by failure on the part of the courts below to give adequate weight and to draw proper inferences from two documents Exhibits 3 and 6 produced on behalf of the appellant. These exhibits, he contended, almost conclusively, if not conclusively, entitled the appellant to succeed. The courts below have in fact not only not drawn inferences favourable to the appellant's Stool, but have drawn inferences adverse to it, from the exhibits. Counsel for the appellant contended that these inferences are unsustainable.

By the Exhibits Nos. 3 and 6 the Chief of the Brenase (respondent Stool) in the year 1909 after renouncing in favour of the Government title to certain specified land which lay on the right (Western) bank of the Prah river, renounced "all claim or rights we may have possessed to other lands or property situated on the right bank of the Prah river in the Southern and Central Provinces of Ashanti." It is argued that as the respondent Stool had renounced their rights the appellant Stool was entitled to succeed. This argument is clearly erroneous and ignores the principle correctly adopted by both courts below that "a plaintiff can succeed only upon the strength of his title and not upon the weakness of his opponent's title." Moreover the two documents prove that in the year 1909 the respondent Stool was dealing

with the land which is the subject matter of this action. It was possible to take the view that the documents, which undoubtedly established at least dealing with certain rights to the land, supported other oral evidence that those rights had in fact been exercised by the respondent Stool before the renunciation of 1909—evidence which negated the appellant's case that prior to 1909 the appellant Stool had exercised rights over the land to the exclusion of all others. Both courts took this view of the documents, and their Lordships are quite unable to say that it is erroneous. There is accordingly no ground for re-opening the concurrent findings of the Court below.

Counsel for the appellant complained that the Trial Judge had refused to grant an adjournment to enable the appellant to call a witness, who was said to be a linguist of the paramount chief of Ashanti, to give evidence as to history and tradition. The granting of an adjournment for the purpose of calling a witness is essentially a matter for the exercise of his discretion by the trial judge. In the case before their Lordships the Trial Judge has given a number of reasons for refusing an adjournment. The Court of Appeal agreed with these reasons. There has been nothing said which satisfies their Lordships that in refusing an adjournment the Trial Judge exercised his discretion wrongly.

It was held by the Trial Judge that “ under these agreements (Exhibits Nos. 3 and 6) the plaintiff Stool can acquire no interest in the land unless they can show that they have had a subsequent assignment of these rights from the Government ” and that the plaintiff-appellant had not established or endeavoured to establish such an assignment. The Court of Appeal held that “ the plaintiff had no rights under these agreements.” It was suggested before their Lordships for the first time that there is evidence that the appellant Stool provided the money which the Government paid to the respondent Stool, and that as a matter of law it should be held that the Government held the land in trust for the appellant Stool. Their Lordships cannot entertain this argument because even if the submission be correct in law, the facts upon which it is based are disputed, and there is no finding by the courts below that the money was provided by the appellant Stool. Moreover the submission now made to their Lordships for the first time involves a view of the facts directly opposed to the facts sought to be established by the appellant in the courts below namely that the respondent Stool had had no rights in the land in question at any time. The appellant asked for an order for retrial for the purpose of dealing with the submission, but in their Lordships' opinion there is nothing which would justify such an order.

One other point argued should be mentioned. The learned Trial Judge held that the land acquired from the respondent Stool appeared to have been abandoned by the Government and that on abandonment it reverted to the respondent Stool. It was argued as a matter of law that this view was wrong. Their Lordships do not find it necessary to express an opinion on this point of law as they are of the view that, even if the learned Trial Judge's view of the law was wrong, it did not affect his finding on the facts that the appellant had failed to establish title to the land.

Their Lordships are of opinion that the case before them does not come within the exception referred to above to the rule relating to concurrent findings on facts or within any other exception. They are of opinion that the concurrent findings should be upheld. For these reasons they will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

CHIEF KWAME KWANIN APPELLANT
AND
CHIEF KOJO EWUAH RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1956] 1 W.A.L.R. 10

1955 June 7

Lords Radcliffe, Somervell of Harrow
and Mr. L. M. D. de Silva

Declaration of title to land—Concurrent findings of fact will not be reopened—Res judicata—Extent of land in previous action—Lack of precision in description—Assessor—No opinion ex facie curiae—Practice and procedure.

Held: (1) The description of the land in the previous suit was not sufficiently precise, (if at all it was precise) to be capable of founding an estoppel in the present action.

(2) The contention of counsel for the appellant that the assessor gave no opinion *ex facie curiae* either at the close of the addresses of counsel or before or after judgment was not supported by the record. It is not satisfactory that a defect in procedure which is said to invalidate the judgment in a trial should be imputed by instructions to counsel: if it occurred, it should have been proved to the court by affidavit in the usual way.

LORD RADCLIFFE. This is an appeal from a Judgment of the West African Court of Appeal at Accra, Gold Coast, dated 5th February, 1953, which dismissed the appeal of the appellant, Chief Kwame Kwanin, from a Judgment of the Supreme Court of the Gold Coast, Lands Division, dated 18th July, 1950. The action out of which the appeal arises concerns a dispute over the title to certain lands situate in Denkyire State, Central Province, Gold Coast which are said to cover an area of some 56 square miles; and the appellant and the respondent, Chief Kojo Ewuah, represent respectively the Stools of Obuasi and Nyinawusu, on whose behalf the contending claims to the land are put forward.

The original plaintiff in the action was Chief Kofi Kuran on behalf of the Nyinawusu Stool. He died during the course of the proceedings, which were begun as long ago as 14th August, 1945, and the respondent, Chief Kojo Ewuah, has been substituted in his place. By the Writ and Statement of Claim in the action the plaintiff claimed a declaration of title to lands which he described as " known and called Apunpun otherwise known as Buakyi-Krome, Twapiase, Gyapon-Krome, Ekakyerenyansa, Eneko, Nkwantanum and the stream called ' Kunité, ' " together with damages for trespass and an injunction. The effect of the judgment of the Lands Division of the Supreme Court, dated 18th July, 1950, was to grant him a declaration of title to the whole area that he claimed and £25 for damages. The effect of the Court of Appeal judgment, dated 5th February, 1953, was to confirm this declaration, though in this case the land intended to be covered by it was identified by the Court as " the area enclosed within the green and pink lines shown on the plan, Exhibit 1, which has been signed by the President of this Court."

It is sufficient to say of this description that the plan in question had been prepared for the purposes of the action by a surveyor, Joseph Annu-Esuman, with the assistance of the rival parties and that the plan thus prepared was duly proved in the course of the trial. It shows the village, Nyinawonsu, which may be taken as the head village of the plaintiff's stool, lying on the E. side of the plan, close to the Ofin river, and almost due W.

of it, on the W. side of the plan, lies the village, Oboasi, the head village of the defendant's stool. A green border indicates the extent of the lands west of the Ofin River which were claimed by the plaintiff: a pink border to the E. of it indicates the E. boundary of the lands claimed by the defendant. Thus the area in dispute can be seen by reference to the plan to be enclosed within a pink border on the E. and a green border on the W. and S., and it is this area of land that their Lordships understand to be affected by the declaration of title which has been granted by the Court of Appeal.

The appellant is therefore inviting the Board to review two successive judgments which have upheld the respondent's title to disputed land. Subject to two points which will be noticed later, his appeal is nothing but an attempt to reopen and reverse concurrent findings of fact which have been made against him. Their Lordships are satisfied that this is not a case in which it would be right or in accordance with established practice that they should undertake such a review. Briefly, the trial involved the calling of numerous witnesses on both sides, apart from the plaintiff, Kofi Kuran, and the appellant Kojo Ewuah. The evidence of these witnesses provided plenty of material upon which a judge could properly conclude that the plaintiff's title to the whole area had been made good. It also provided a certain amount of material in support of the appellant's claim to, at any rate, part of the area. At the close of the evidence the trial Judge, Windsor-Aubrey J. who sat with an assessor, decided that he preferred the evidence of the plaintiff and his witnesses and concluded that he had made out his title to the whole area that he claimed. The assessor arrived at the same opinion. When the case went to the Court of Appeal it is evident that the Court was invited to review the burden and effect of the evidence given at the trial and to uphold the appellant's contention that it was insufficient to support the plaintiff's title. This contention the Court rejected with the finding "In addition to the traditional evidence, plaintiff-respondent adduced clear evidence of effective occupation by his subjects and licensees, and of the collection of tributes and rents from tenants who occupy farming or village sites within the area in dispute."

It remains to notice two points upon which the appellant relied as constituting errors of law on the part of the trial Judge and therefore as entitling him to a reversal of the judgment, even though it had to be said that the facts themselves were covered by concurrent findings. The first point relates to a judgment given on the 4th May, 1917, in proceedings before the Native Tribunal of Jukwa under the Omanhin Kojo Nkwantabissa II of Denkera, Gold Coast Colony, Central Province. It is common ground that the parties to these proceedings were the predecessors of the appellant and respondent respectively in the right of their respective stools. The appellant claims that the 1917 judgment constitutes an estoppel *per rem judicatam* in his favour and that it precluded the plaintiff in this action from disputing his title to all that part of the area within the green and pink boundaries which is shaded on the reference plan, Exhibit 1. The shading was inserted by the hand of the trial judge.

This 1917 judgment is included in Exhibit A, which also records part of the 1917 proceedings. The purport of them was a claim by Chief Kweku Sebbe, the plaintiff's predecessor, that certain lands styled "the lands and River Kwarantin" were his property, and not the property of Chief Kofi Fori, the appellant's predecessor, who was asserting title to them. The judgment concluded that Kweku Sebbe had failed to prove his title to "the land and the River Kwarantin," and that the claim of Kofi Fori ought to be upheld by the Court.

This judgment could only be material for the purpose of the present action if it could be clearly established what were and what was the extent of the lands described as "the land and the River Kwarantin." This the evidence at the trial entirely failed to achieve. There is no River Kwarantin marked by the surveyor on his plan, though there is a "Kuranti Pond" and "Kuranti lands" close to the south end of the shaded area on the east side. The trial judge could do no more than do his best to construe the words used in the 1917 judgment aided by such factual evidence of topographical features and nomenclature as could properly be put before him. After hearing some conflicting evidence from several witnesses, not all of which was necessarily admissible or relevant, he came to the conclusion and so found that "the judgment of 1917 does not include the land now claimed by the plaintiff, except perhaps for a minute distance in one direction which does not merit serious consideration." His assessor's opinion, as separately recorded in writing, coincided with this. The assessor did not think that the 1917 case related at all to the land now in dispute. The Court of Appeal were no less positive. They regarded the judge's view as supported by ample evidence on the record and had no doubt that the subject matter of the 1917 suit was outside the area covered by the present action.

Their Lordships' view is that the appellant must fail on this point. It is quite clear that, even if the concurrent findings of the Courts in the Gold Coast were not to be treated as conclusive, the identification of "the lands and River Kwarantin" is not sufficiently precise, if it is precise at all, to be capable of founding an estoppel in the present action. That in itself is sufficient to make further consideration unnecessary. But their Lordships think it well to add, since the matter was fully argued before them, that the weight of the evidence appeared to them very much to favour the view taken by the Courts in Africa, that the area of dispute in 1917 whatever its exact boundaries, lay substantially outside the area of the present dispute. The considerations that support it are not affected by the fact that some of the map measurements directed by the trial judge were a departure from the measurements mentioned in the 1917 judgment.

The second point bears upon the procedure at the trial, which, as has been said, was conducted with the aid of an assessor. According to the printed record of the case the hearing of the evidence and of counsel's addresses on behalf of the parties was concluded on 16th March, 1950: on 12th April, 1950, the trial judge recorded in writing and signed the assessor's opinion on the issues involved in the evidence: and on 18th July, 1950, the judge delivered his judgment, in the course of which he referred briefly to the assessor's opinion as confirming his own. On the face of this no defect of procedure is apparent. The appellant's counsel has however raised before the Board the argument that the trial was defective because the assessor's opinion was not delivered in open court in the presence of the parties. He raises the point, which is in the first instance a question of fact, on instructions from the appellant's legal representatives in Africa: and it is evidently the same point as that which is presented in paragraph 1 (a) and (b) of the grounds of appeal dated 4th November, 1950, prior to the hearing before the Court of Appeal. These were as follows:

"(a) The assessor gave no opinion *ex facie curiae* either at the close of the addresses of counsel on the 16th March, 1950, or before or after the judgment of the Court on the 18th July, 1950.

(b) The assessor's recorded opinion appearing on the record on the

12th April, 1950, was unknown to the defendant-appellant and or his counsel until the receipt of certified true copy of the proceedings herein on or about the 24th September, 1950."

All this may be an accurate statement of the facts. But it is not the view of the facts which was taken by the Court of Appeal in dismissing the appeal. What they said was "The contention of counsel for the appellant that the assessor gave no opinion *ex facie curiae* either at the close of the addresses of counsel or before or after the judgment, is not supported by the record. It would appear that after counsel for the parties addressed the Court, the hearing was adjourned to 12th April, 1950, on which date the opinion of the assessor was recorded by the judge."

With matters in this state it would be wrong for their Lordships to deal with the point as if it were proved before them that the assessor's opinion had not been delivered *ex facie curiae*. It is not satisfactory that a defect in procedure which is said to invalidate the judgment in a trial should be imputed by instructions to counsel: if it occurred, it should have been proved to the Court by affidavit in the usual way. No doubt it would be open to the Board, on its own motion, to require further information from the Gold Coast as to what did take place, a course which was followed in *Mahlikilili Dhalamini and Others v. Rex* [1942] A.C. 583, where a somewhat similar point was raised with regard to opinions given in a criminal trial in Swaziland.

In that case however the relevant enactment positively required that opinions should be given in open court. There is no corresponding requirement in the Civil Procedure Ordinance of the Gold Coast. Their Lordships have not been able to discover any reason for thinking that, even supposing the facts to be as stated in the appellant's grounds of appeal, the conduct of his case was prejudiced at the trial or his right of appeal impaired. In those circumstances their Lordships do not propose to take any further action on the point suggested. They think it desirable however to invite the attention to the legal authorities in the Gold Coast to the point that has been raised. *Prima facie* at any rate it seems incongruous that any material, such as an assessor's opinion, which ostensibly forms part of the record of a trial should not be available to the parties before or at the time when judgment is given. It may well merit consideration whether procedure on this point needs further regulation, so that for the future no doubts can arise on the point.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

NANA ATTA KARIKARI AND ANOTHER . . . APPELLANTS

AND

NANA OWARE AGYEKUM II . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1955] 3 W.L.R. 125

West Africa—Appeal to Privy Council—Competency—Petition for dismissal—Appeal on costs only—Incompetent—“Matter in dispute”—Special leave—West African (Appeal to Privy Council) Order in Council, 1949–50, art. 3 (a) (b).
Privy Council—Appeal—Competency—Costs.

By article 3 of the West African (Appeal to Privy Council) Order in Council 1949–50:

“Subject to the provisions of this Order, an appeal shall lie: (a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, . . . ; and (b) at the discretion of the court, from any other judgment of the court . . . if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision.”

Having regard to the general position of appeals for costs only—that they will be entertained by the Board only in very exceptional circumstances—the words “matter in dispute” in article 3 (a) of the Order in Council must be construed as meaning matter in dispute in the proceedings other than costs. The article cannot be construed as conferring an appeal as of right where *prima facie* no appeal would be entertained whatever the amount in issue.

Accordingly, where the matter in issue on an appeal to the Board was as to costs only—a sum of £736 allowed by the West African Court of Appeal in respect of the preparation of a plan in proceedings relating to possession of land—the appeal was not within article 3 (a) and was dismissed as incompetent.

Inglis v. Mansfield (1835) Cl. & Fin. 362; *Credit Foncier of Mauritius v. Paturau* (1876) 35 L.T. 869; *Donald Campbell & Co. v. Pollak* [1927] A.C. 732; and *Sauvageau v. Gauthier* (1874) L.R. 5 P.C. 494 considered. While in theory at any rate appeals as to the incidence and quantum of costs might come within the provisions of paragraph (b) of article 3 of the Order in Council, or be the subject of special leave by the Board, there were no facts in the present case which justified the granting of special leave.

PETITION for dismissal of appeal.

This was a petition, by the respondent to this appeal, seeking to have the appeal struck out on the ground that the leave to appeal to Her Majesty in Council which the West African Court of Appeal had purported to grant to the appellants pursuant to article 3 (a) of the West African (Appeal to Privy Council) Order in Council, 1949–50, was incompetent.

By article 3 of the Order in Council:

“3. Subject to the provisions of this Order, an appeal shall lie: (a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and (b) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision.”

The petitioner, as plaintiff, had in 1950 instituted proceedings for trespass upon a recovery of possession of certain lands. On March 3, 1951, by an order made in those proceedings by the Supreme Court the plaintiff was directed to prepare a plan of the area in dispute. On June 14, 1952, the Supreme Court (Dennison J.) gave judgment for the plaintiff against the defendants, whose appeal from that judgment to the West African Court of Appeal was dismissed on March 31, 1953.

Meanwhile, the taxation of the petitioner's bill of costs, which claimed in respect of the preparation of the plan a total of £869 12s., had been

proceeding before the registrar of the Supreme Court. The taxing officer took the view that the order for survey specifically limited the survey to a much smaller area than that actually surveyed, and he reduced the sum claimed to £9. Upon review, the judge held that the taxing officer had not used his wide discretion improperly and he refused to interfere.

The petitioner appealed from that decision to the West African Court of Appeal (Foster-Sutton P., Coussely J.A. and Windsor-Aubrey J.) who, on February 14, 1954, allowed the appeal and allowed £736 12s. in respect of the costs of preparing the plan.

Leave to appeal from that judgment was sought by the appellants to this appeal under article 3 (a) of the Order in Council, and was granted on March 15, 1954.

By this petition the respondent to the appeal submitted that the leave to appeal was incompetent since: (a) the decision of the West African Court of Appeal was not a final judgment of the court of the character specified in article 3 (a) of the Order in Council; (b) an appeal does not lie for costs alone, as was decided in *Inglis v. Mansfield* (1835) 3 Cl. & Fin. 362, 371; (c) no error of law was alleged and, in fact, no principle of law was involved; and (d) the court did not purport to act under article 3 (b), but the question involved in the appeal was not of a character specified in article 3 (b), and was of a character which Her Majesty in Council would not entertain.

1955. May 2, 3. *Phineas Quass Q.C.* and *Kesho Narayan* for the petitioner.

S. P. Khambatta Q.C. and *L. S. Fletcher* for the respondents to the petition.

June 7. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW: This is a petition to dismiss this appeal on the ground that the leave granted by the West African Court of Appeal pursuant to article 3 (a) of the West African (Appeal to Privy Council) Order in Council, 1949-50, was incompetent.

[His Lordship stated the terms of article 3 and continued:] The petitioner a plaintiff in 1950 instituted proceedings for trespass and recovery of possession of certain lands. The plaintiff succeeded. The defendants appealed and the appeal was dismissed. The present question arises on taxation of costs. The petitioner submitted his bill of costs for taxation. Under the Gold Coast Courts Ordinance, s. 13, and Order 7 of the First Schedule, the registrar acts as taxing master subject to review by the court. The West African Court of Appeal Ordinance, s. 3, provides that an appeal to the Court of Appeal as to costs only shall not lie except by special leave.

The phrase "as to the costs only" normally refers to the incidence of costs, but it would seem to cover disputes as to quantum on taxation unless there is some special provision dealing with the latter.

This petition is concerned with two items of costs for a surveyor's fees and labourers' wages, amounting in all to some £870, incurred in the preparation of a plan. There had been an order by consent for the preparation of a plan and the taxing officer took the view that having regard to the terms of that order a much smaller and less expensive plan was all for which the petitioner could claim. He reduced this sum to £9. The judge upon review held that the taxing officer's discretion had not been exercised improperly and he refused to interfere. The petitioner appealed to the Court of Appeal, who allowed some £736 in respect of the two items of costs.

It was from this order that leave to appeal to the Privy Council was

granted as of right under paragraph 3 (a) of the Order in Council. The first question is whether an appeal is within that paragraph when the matter in dispute is as to costs only.

This is an appeal as to quantum on taxation. If, however, such an appeal is within the paragraph it would seem impossible to contend that an appeal as to liability for the whole costs would not also be within it.

Appeals as to costs are in a special category. In 1835 Lord Brougham, in *Inglis v. Mansfield* ((1835) 3 Cl. & Fin. 362, 371), said. "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone;" In *Credit Foncier of Mauritius v. Paturau and Others* ((1876) 35 L.T. 869, 870) Sir Barnes Peacock said: "But appeals are not allowed to Her Majesty in Council merely for the sake of costs." These statements require qualification. In a judgment of the Board delivered by Turner L.J. in an appeal from the Court of Arches it is said that an appeal might lie if the discretion had not been fairly exercised or there had been mistake. In *Donald Campbell & Co. v. Pollak* ([1927] A.C. 732) the House of Lords decided that notwithstanding the general rule of practice of the House of Lords that no appeal lies for costs only, an appeal would be entertained if an error of law was alleged.

It is, however, sufficient for the question of construction that such appeals would only be entertained in very exceptional circumstances. It has long been held that costs cannot be added to the sum in dispute in the proceedings in order to make up the minimum sum in such a provision as is contained in article 3 (a). This is because costs, although in dispute and finally dealt with in the judgment, are outside the scope of the rule. The article is one conferring an appeal as of right based on quantum. It cannot, in their Lordships' opinion, be construed as conferring such a right in cases where *prima facie* no appeal would be entertained whatever the amount in issue. Having regard to the general position of appeals on costs as stated above it is natural to construe the words "matter in dispute" as meaning matter in dispute in the proceedings other than costs.

Their Lordships are therefore of opinion that the West African Court of Appeal were wrong in treating the application as one falling under article 3 (a).

The procedure adopted by the petitioners is that stated to be correct in *Sauvageau v. Gauthier* ((1874) L.R. 5 P.C. 494, 500). In that case the question was also whether the appeal was within the words of a provision similar to article 3 (a). The appeal came on and the respondent took as a preliminary objection the point that the case did not fall within the provision dealing with appeals as of right under which leave had been granted. In the course of the judgment Sir James Colville said:

"the proper course, when such a question as this arises, is to come hereby petition as early as possible, and before the cases are lodged, and the expense of preparing those cases is incurred, in order to bring the point before their Lordships, and to get the appeal dismissed. It is then open to their Lordships to recommend [to] Her Majesty either to dismiss the appeal, in which case the parties are not put to the expenses of preparing for the hearing; or to grant special leave to appeal."

It seems clear to their Lordships that in theory at any rate appeals as to the incidence and quantum of costs might come within the provisions of paragraph (b) of article 3, or be the subject of special leave by the Board. Their Lordships are clear that in the present case there are no facts which

would justify the granting of special leave.

For the above reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The respondents to the petition must pay the costs of the present hearing and of the appeal.

Solicitors: *A. L. Bryden & Williams; Herbert Oppenheimer Nathan & Yandyk.*

HARIET JOHNSON APPELLANT

AND

BAFUNKE ADEREMI (FORMERLY JOHNSON NOW A
MARRIED WOMAN) AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1955) 13 W.A.C.A. 297

1955 June 27

Lords Radcliffe, Somervell of Harrow
and Mr. L. M. D. de Silva

Action for probate of will in solemn form—Form of summons—Joinder of additional parties as appellants by West African Court of Appeal—Undue influence and lack of testamentary capacity—Evidence required to prove will invalid.

The appellant was the defendant in the original action in the Supreme Court, Nigeria. In that action the Court found for the defendant and pronounced the will of the testator to be invalid and declared that the testator died intestate. The West African Court of Appeal reversed that decision pronouncing the will to be valid. In order to determine the appeal it allowed parties to be added as appellants who were not parties to the original suit.

For the appellant the main arguments were that the form of summons by which the action was instituted was the wrong one and the proceedings were null and void, and that the West African Court of Appeal had not power to add as parties to the appeal persons who were not parties to the original action.

Held: The form of summons issued to institute the action was incorrect but it was too late to raise any objection. The West African Court of Appeal had power to add parties as appellants who were not parties to the original suit. There was insufficient evidence to pronounce the will to be invalid.

Cases referred to:

(1) *Ingall v. Moran* [1944] 1 K.B. 160.

(2) *Hilton v. Sutton Steam Laundry* [1946] K.B. 65.

Privy Council Appeal No. 4 of 1953.

APPEAL from the West African Court of Appeal. W.A.C.A. Civil Appeal No. 3470.

LORD RADCLIFFE. In this appeal the appellant is the widow of Alfred Latunde Johnson (hereinafter referred to as "the testator") and she was the defendant in certain proceedings instituted in the Supreme Court of Nigeria to establish the validity of a will and codicil of the testator dated respectively 27th November, 1943, and 27th July, 1945. The purpose of the appeal is to reverse a judgment dated 23rd November, 1951, of the West African Court of Appeal, the effect of which was to grant probate in solemn form of the will and codicil. By this judgment the Court of Appeal set aside a judgment dated 23rd February, 1951, of the Supreme Court of Nigeria which had found that the will was not executed according to law and declared it to be null and void.

Of the respondents on the record the effective parties are Bafunke Aderemi and Olusegun Johnson, two illegitimate children of the testator, who were added as parties to the proceedings by an order of the Court of Appeal. The other respondents are the executors appointed by the joint operation of the will and codicil. These respondents started the proceedings as plaintiffs in the Supreme Court of Nigeria; but they have not taken any active part or appeared before the Court since judgment was given at the trial. It is the effective respondents who are hereinafter referred to as "the respondents."

On the hearing of this appeal a substantial part of the appellant's case was rested on two technical points arising out of procedure in the Courts in West Africa. First, it was submitted that all judgments and orders in the action ought to be treated as null and void because the form of summons which had been issued to institute the suit was the wrong one for its purpose, and no judgment for or against proof of a will in solemn form could validly be given in a suit so commenced. Secondly, it was submitted that the proceedings in the Court of Appeal ought to be treated as void and its judgment set aside, because the order which had added the respondents as parties for the purpose of the appeal was incompetent; and, without them as parties, there would have been no appeal at all.

Neither of these points was taken at any stage prior to the hearing before this Board. If the first was to be taken at all, it should have been taken at an early stage, once the Statement of Claim had placed beyond doubt what was the nature of the relief sought. If the second was to be raised, it should have been raised at the beginning of the hearing in the Court of Appeal. Since, now that they have been argued, neither of the points commends itself to their Lordships as having any more merits in substance than it has in time of presentation, it is not necessary to give them more than a brief notice.

The form of summons employed by the plaintiffs in the suit was one that called upon the defendant to show cause why an order should not be made for the administration of the property of the testator under the direction of the Court. It can be accepted, as the appellant now argues, that this form, which is, in effect, "A2. Administration Summons" in the First Schedule of the Supreme Court (Civil Procedure) Rules was not the appropriate instrument to start a probate suit designed to obtain proof of a will in solemn form. Such a suit should be begun by a writ of summons analogous to the writ issued to begin a suit in respect of an ordinary claim (see Order 48, para. 16 of the Supreme Court Rules). The purpose of an administration summons is to obtain the Court's direction as to the proper administration of an estate, testate or intestate: it is not its function to raise an issue depending on contested facts as to testamentary capacity or the substantial validity of a will. Nevertheless it is impossible to suppose that in this case it made any difference to anyone that the suit was begun in this form. Even before the issue of the summons the appellant had lodged a caveat: the Statement of Claim made it quite clear that the object of the suit was to obtain a grant of probate in solemn form: and, the Statement of Defence raised the three issues of lack of due execution, undue influence and absence of testamentary capacity, which were appropriate defences to a probate action but would have had no place in an administration summons properly so called. Had the technical point been taken at an early stage that the relief asked for by the Statement of Claim was not within the range of the relief covered by the summons, the Court would either have exercised its power under Order 33 of the Rules to amend the summons or would have put the plaintiffs to the somewhat barren exercise of abandoning the existing

proceedings and issuing a writ. As however no such point was taken and the trial proceeded to judgment without either side apparently troubling about the matter, it is idle to suggest that the judgment is now to be regarded as a nullity. A case of this sort has no true relation with the line of authorities represented by *Ingall v. Moran* (1) and *Hilton v. Sutton Steam Laundry* (2), in which the Court has dismissed the actions of plaintiff administrators who had not obtained letters of administration at the date of issuing their writs, on the ground that they had launched actions inherently incompetent which could not be rendered competent *ex post facto* by the obtaining of the necessary grant. In this case, on the contrary, the executors were fully competent to institute a probate action at the date of the administration summons: and to treat the action as competent from the date of the summons prejudices no defence of the appellant, such as the statutory rights of limitation that were in question in the English cases.

Secondly, it was argued that the Court of Appeal had no jurisdiction to make an order to add the respondents as parties, having regard to the fact that the suit in question was in substance a probate action; or, alternatively, that in making the order the Court exercised its discretion so wrongly and "injudicially" that the order ought to be reviewed and reversed on appeal. What happened was that, no action being taken by the executors by way of appeal against the Supreme Court judgment refusing probate, the respondents made an application *ex parte* to the Court of Appeal, asking that they should be added as defendants to the suit for the purpose of prosecuting an appeal. They stood to gain substantially under the terms of the will and it was obvious that they were interested to maintain its validity. The Court, finding nothing in the West African Court of Appeal Rules, 1950, which dealt specifically with the situation before them, resorted to the general authority of rule 42, which provides that when there is no provision in the Rules recourse may be had to the procedure and practice for the time being in force in the Supreme Court in England. There is no doubt that, generally speaking, it is the practice of the Court of Appeal to allow a person who might have been a party to a suit to conduct an appeal against a judgment that affects his interest and to be added as a party for this purpose (see *Annual Practice 1954*, p. 1244).

The appellant submitted however that it was wrong to apply this practice to the present case, for the respondents, who had stated in their application that they were both absent from Nigeria at the time of the proceedings in the Supreme Court would not have been treated as persons bound by the judgment in the probate suit and would therefore have been free to institute fresh proceedings to establish the will and codicil if they so desired. Their Lordships see no validity in the distinction suggested. On the contrary it seems an obviously convenient course that persons interested who wish to question a judgment affecting their interests, as the respondents did, should be enabled to carry the judgment to appeal without going through the more elaborate course of starting new proceedings with the necessity of a fresh trial at first instance. In any event the point canvassed is quite insufficient to affect the jurisdiction of the Court of Appeal to add parties.

It is necessary now to say something about the substance of what was at issue in the action. The trial Judge found that the will dated 27th November, 1943, was not executed according to law and declared it to be null and void: he also declared that "so far as this 1943 will is concerned" the testator died intestate. The grounds upon which he based these findings were three; that the will was not duly executed in accordance with the Wills Act 1837, since the witnesses to the testator's signature were not both

present at the same time to witness execution, that the testator's mental condition was not such as to support a proper testamentary capacity at the time of signing, and that he was in fact coerced or unduly influenced in the making of his will by Agnes Jokotade, the mother of the two respondents.

All these findings were reversed by the Court of Appeal. In their judgment, which was delivered by Lewey J. A., they made a full review of the evidence and of the legal principles applicable to it. Their Lordships have found this judgment satisfactory and convincing in its handling of the different issues and, since they are in complete agreement with its conclusions, they content themselves with making one or two observations on the aspects of the evidence that were particularly canvassed before them.

Only two of the three grounds which had commended themselves to the trial Judge were argued on the present appeal, the appellant's counsel rightly conceding that the evidence did not allow him to maintain the case that the will had not been duly executed as required by the Wills Act. There remained the issues of undue influence and lack of testamentary capacity.

As to the latter, there was in truth no evidence to support the appellant's case. Sometime before 1943 the testator had suffered from a form of stroke: his friend and medical adviser, Dr. Maja, put the date of it as far back as 1928-29. About September, 1943, he had an attack which the appellant in her evidence describes as "another attack of stroke." He was attended, apparently, both by Dr. Maja and another friend and doctor, Dr. Omololu, and the latter in his evidence describes the testator as suffering from physical and mental exhaustion in 1943. In any event it seems that the doctors recommended a period of rest after the attack of September, 1943, and the testator accordingly retired for some weeks to a farm in the country. It was after his return from this rest that the will of 1943 was executed.

The only circumstances that can be added to these facts on behalf of the appellant's case are that a stroke may cause a progressive impairment of judgment, and in the case of a hard worker, such as the testator was said to have been, the deterioration is likely to be accelerated: while there was some evidence that, after the testator's return from his rest at the farm, he showed a sullen or suspicious attitude towards his wife and servants. On the other hand, any probative value which these facts might have had, taken by themselves, must be next to nothing in face of the evidence of both doctors, who are called on different sides at the trial, that the testator's mental condition in 1943 was normal, and the evidence of Mr. Bright Wilson, a solicitor and personal friend, who witnessed the will, that he was well and normal at the time of execution. In fact, the testator continued in active practice as barrister and solicitor during and after 1943, telling his friend Dr. Omololu that he was prepared to die in harness.

In their Lordships' opinion these considerations dispose of the issue as to testamentary capacity. They agree with the view expressed by the Court of Appeal that the evidence adduced by the appellant is really of value upon the question of undue influence rather than upon the question of testamentary capacity. And here too the appeal must fail.

The story that appears from the evidence is a sad one and there is no need to review again the circumstances that cannot but be distressing to the appellant herself and to the members of the testator's legitimate family. The 1943 will and the 1945 codicil showed a much larger proportion of the testator's considerable fortune bequeathed to the respondents, the children of Agnes Jokotade, than to the testator's lawful children by the appellant. In these dispositions there is a marked change from the dispositions of an earlier will made in 1939 and indeed the appellant's own testamentary

benefits are reduced by the later will. The case which was sought to be made at the trial was that this later will and codicil were executed under the undue influence of Agnes Jokotade. The trial Judge so found. It is sufficient to say that, when all the evidence as to the testator's conduct and situation has been reviewed, it falls far short of what would be needed to support such a finding, and the Court of Appeal were right when they said at the conclusion of their judgment " the defendant-respondent cannot be said to have substantiated the charge of undue influence and . . . the learned Judge was wrong in finding against the will on that ground."

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.

Appeal dismissed.

LAGOS CHAMBER OF COMMERCE (INC.) . . . APPELLANTS
 AND
 REGISTRAR OF COMPANIES AND ANOTHER . . . RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1955) 72 R.P.C. 263

1955 July 26

Lords Oaksey, Morton of Henryton
 Keith of Avonholm and Mr. L. M. D. de Silva

Companies—Name resembling that of the plaintiff so as to cause deception—Injunction.

The appellants sought to obtain an injunction against the first respondent prohibiting him from proceeding with the registration of a change of the second respondents' name from " Association of Merchants and Industrialists " to the " African Chamber of Commerce."

Held (by the Supreme Court and the Court of Appeal) that the change of name applied for by the second respondent does not so closely resemble the name of the appellants as to be calculated to deceive.

Held: (1) (on appeal to the Privy Council—upholding the decision of the Supreme Court and Court of Appeal) that when the two names are contrasted having regard to all the surrounding circumstances there is not such likelihood of deception as to make it right that the injunction should be granted.

(2) There is no difference of principle for the present purpose between non-profit making organisations such as Chambers of Commerce and trading companies.

(3) The question in each case is: " Have the appellants proved facts that are calculated to lead to the belief that the business of the respondents is the appellants' business."

LORD OAKSEY. This is an appeal by special leave from a judgment of the West African Court of Appeal (Foster Sutton, P., Verity, C.J., and Coussey, J.A.) delivered on the 17th day of November, 1952, dismissing the appellants' appeal from the judgment of the Supreme Court of Nigeria (Robinson, J.) delivered on the 8th day of May, 1951, dismissing the action brought by the appellants against the respondents.

The appellants in this action sought to obtain an injunction against the first respondent prohibiting him from proceeding with the registration of a change of the second respondents' name from " Association of Merchants and Industrialists " to the " African Chamber of Commerce."

It is convenient to set out the material sections of the Companies Ordinance.

“ COMPANIES ORDINANCE.

LAWS OF NIGERIA, 1948. Cap. 38.

- (1) No company shall be registered by a name which
- (a) is identical with that by which a Company in existence is already registered or so nearly resembles that name as to be calculated to deceive, except when the Company in existence is in the course of being dissolved and signifies its consent in such manner as the Registrar requires or
- (b) contains the words ‘ Chamber of Commerce ’ unless the Company is a company which is to be registered under a licence granted in pursuance of section 21 of the Ordinance without the addition of the word ‘ Limited ’ to its name . . .
- (4) Any company may by special resolution, and with the approval of the Registrar, change its name.
- (5) When a company changes its name the Registrar shall enter the new name in the register in the place of the former name and shall issue a certificate of incorporation altered to meet the circumstances of the case.”

It was common ground that both the appellant and the second respondent fell within the class of companies dealt with in section 21.

The appellants are an Association established for the purposes of the promotion of Trade and Commerce in Nigeria and under their Articles any person, firm or company established in trade in the Western Provinces of Nigeria and the Colony of Lagos can become a member of the Association.

On the 23rd of June, 1950, the appellants who had been for many years known as the “ Lagos Chamber of Commerce,” were incorporated under the provisions of the Companies Ordinance of Nigeria, as “ The Lagos Chamber of Commerce (Incorporated).”

Most of the large companies in Nigeria were members of the appellants and the members were of many different nationalities. Nineteen member companies were wholly owned or managed and directed by Africans.

Many letters inaccurately addressed have been delivered to the appellants and accepted by them and a substantial proportion of these were addressed to “ Secretary, Chamber of Commerce, Lagos.”

It appears that the second respondent was in 1950 engaged in Lagos in substantially the same activities as the appellants under the name of Association of Merchants and Industrialists.

On the 26th of June, 1950, the appellants’ solicitors were notified by the first respondent that an application had been made to him by the second respondents for the registration of their Association under a different name, namely, “ African Chamber of Commerce ” and asked whether the appellants had any objection to the proposed registration.

On the same date the appellants objected to the registration but in spite of their objection the first respondent wrote on the 2nd August, 1950, to the appellants as follows:

“ The Lagos Chamber of Commerce (Incorporated).

With reference to your letter No. 248 of the 10th ultimo, I have to state that after further considering the matter I have arrived at the

conclusion that the name ' African Chamber of Commerce ' does not so nearly resemble the above-mentioned name ' as to be calculated to deceive.'

2. In the circumstances, I am proceeding with the registration of the change of name of the ' Association of Merchants & Industrialists ' to ' African Chamber of Commerce.' If, however, your Company is aggrieved by this registration, you are at liberty to apply to the Court for an Order that the registration be invalidated."

The appellants thereupon brought the action out of which this appeal arises.

Mr. Justice Robinson in the Supreme Court and the West African Court of Appeal are agreed in finding that the change of name applied for by the second respondent does not so closely resemble the name of the appellants as to be calculated to deceive and their Lordships are not prepared to differ from them.

It has been argued for the appellants that companies such as Chambers of Commerce which are not formed for the purpose of making direct profit stand upon a different footing from ordinary trading companies, that correspondence has in the past been inaccurately addressed to the appellants as for instance Chamber of Commerce, Lagos, and that if such inaccurate methods of address continue to be used it may lead to confusion between the appellants and the second respondent, that the word " African " may be taken to have a geographical signification and that as Lagos is in Africa the name Lagos Chamber of Commerce may be confused with the name African Chamber of Commerce.

Their Lordships are not however satisfied that when the two names are contrasted having regard to all the surrounding circumstances there is such likelihood of deception as to make it right that the injunction should be granted. They are not satisfied that the word " African " will be taken to have a geographical signification or that if it is it will lead to deception. Africa it is true includes Lagos but it is a very large continent which includes many countries and a Chamber of Commerce formed to serve the continent of Africa if such were a possibility would be a very different Chamber to one formed to serve Lagos and its surrounding territories.

In their Lordships' opinion there is no difference of principle for the present purpose between non-profit making organisations such as Chambers of Commerce and trading companies and they consider that inaccurate forms of address which have been used in the past will not necessarily continue when two Chambers of Commerce as such are established.

Their Lordships do not find it necessary or useful to refer to the number of cases which have been decided in English Courts on the analogous provisions of the English Act since each case depends upon its own facts. The question in each case is as Viscount Simonds said in *Office Cleaning Services Ltd. v. Westminster Window and General Cleaners Ltd.*, 63 R.P.C. 39 " Have the appellants proved facts that are calculated to lead to the belief that the business of the respondents is the appellants' business."

On this question having considered all the facts which may be taken to be in evidence their Lordships are of opinion that the appellants have not proved such facts.

Their Lordships were invited by counsel for the first respondent to lay down the rule that the Registrar is not entitled to consider any evidence, his duty being merely to compare the proposed name of the company asking

for registration or change of name with the names of other companies on the Register. Their Lordships do not find it necessary to deal with this argument, which was not raised in the Courts below and is inconsistent with several cases in the English Courts.

For these reasons their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must pay the costs of both respondents on the appeal.

SAMUEL ALADESURU AND OTHERS APPELLANTS
 AND
 THE QUEEN RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1955] 3 W.L.R. 515; [1956] A.C. 49

1955 July 27
 Oct. 19

Lords Tucker, Somervell of Harrow and
 Mr. L. M. D. de Silva

West Africa—Criminal law—Appeal—Grounds—“ That judgment against weight of evidence ”—Inaccurate phrase—Strict compliance with statutory language essential—That “ verdict . . . is unreasonable or cannot be supported having regard to the evidence ”—West African Court of Appeal Ordinance (Laws of Nigeria, 1948, c. 229), ss. 10, 11 (1).

Criminal Law—Appeal—Grounds of appeal—“ Against weight of evidence ”—Inaccurate phrase.

The West African Court of Appeal Ordinance (Laws of Nigeria, 1948 c. 229), provides in section 11, which follows the language of the English Criminal Appeal Act, 1907, that: “ The Court of Appeal on any such appeal (from the Supreme Court) against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence . . . ”

The appellants, having been convicted by the Supreme Court of Nigeria on charges of knowingly as directors of a bank making and publishing a false balance sheet, stated as the first ground of appeal in their application for leave to appeal to the West African Court of Appeal, which was granted by that court, “ that judgment is against the weight of evidence.” At the hearing of the appeal the Court of Appeal struck out that ground, among others, as being “ no ground of appeal in criminal matters ”:

Held, that in order to succeed an appellant must show, in the words of the statute, that the verdict is “ unreasonable or cannot be supported having regard to the evidence.” It is not a sufficient ground of appeal to allege that “ the verdict is against the weight of evidence ”; that phrase is inaccurate and cannot properly be substituted for the words of the statute. The Ordinance gave no appeal on such ground, and the Court of Appeal was entitled to require strict observance of its provisions, but that did not mean that in a proper case the Court of Appeal would not give leave to appeal or review the evidence if a *prima facie* case was shown that the verdict appealed from was one which no reasonable tribunal could have arrived at.

Statement in Archbold’s *Criminal Pleading, Evidence and Practice*, thirty-third edition, at p. 346, that “ it is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence,” approved.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 45 of 1954), by special leave, from a judgment of the West African Court of Appeal (July 29, 1953), affirming a judgment and sentence of the Supreme Court of Nigeria (May 11, 1953).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The appellants were convicted in the Supreme Court of Nigeria on two counts of an indictment which charged them being directors of the Standard Bank of Nigeria Ltd. in one count with making, and the other with publishing, the balance sheet of the bank as at March 31, 1952, showing certain particulars which were false to their knowledge with intent to deceive any member, shareholder or creditor of the bank contrary to section 436 (a) of the Criminal Code (Laws of Nigeria, 1948). Their appeal to the West African Court of Appeal was dismissed and they were granted special leave to appeal therefrom by Order-in-Council dated April 13, 1954.

The main ground of appeal was that the West African Court of Appeal had struck out certain of the appellants' grounds of appeal in their notice of application for leave to appeal without hearing argument thereon, and had thereby deprived the appellants of a right of appeal granted by statute whereby justice had been denied to them. The ground with regard to which particular complaint was made was ground No. 1 of the notice dated May 11, 1953, which was "that judgment is against the weight of evidence."

Section 10 of the West African Court of Appeal Ordinance (Laws of Nigeria, 1948, cap. 229) gave a right of appeal from convictions by the Supreme Court as follows:

" 10. A person convicted by or in the Supreme Court . . . may appeal to the Court of Appeal—

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Appeal, or upon the certificate of the judge who tried him . . . that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal."

Section 11 provided:

" (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

In their judgment the West African Court of Appeal stated:

" The first ground of appeal that ' judgment is against the weight of evidence ' is no ground in criminal matters but is an appropriate ground in civil matters where verdicts are to be arrived at by preponderance of evidence. In criminal matters the proper ground of appeal is that ' the verdict is unreasonable or cannot be supported having regard to the evidence ' . . . Even if we had granted an amendment of the ground of appeal, we would not have been disposed to hear arguments on facts."

Christopher Shawcross Q.C. and *David Kemp* for the appellants.

J. G. Le Quesne for the respondent.

LORD TUCKER announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed, and that they would give their reasons later.

October 19. Their Lordships' reasons for dismissing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: It will be observed that the language of the West African Court of Appeal Ordinance follows that of the English Criminal Appeal Act, 1907, under which it has long been established that the appeal is not by way of re-hearing as in civil cases on appeals from a judge sitting alone, but is a limited appeal which precludes the court from reviewing the evidence and making its own valuation thereof. The position is correctly stated at page 346 of the 33rd edition of Archbold's *Criminal Pleading, Evidence and Practice* as follows: "In order to succeed an appellant must show, in the words of the statute, that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence." It is also to be observed that an appeal on this ground does not lie as of right but only by leave of the court.

On the present appeal before the Board no attempt was made to establish that this case was one of the exceptional cases, a few of which have arisen from time to time in England, in which a criminal verdict has been set aside as one which no reasonable tribunal could have found. The complaint is that the Court of Appeal were wrong in ruling out ground No. 1 as incompetent or in the alternative that, if not stated with strict accuracy, it was a denial of justice to reject this ground merely because it bore "a wrong label."

Under the West African Court of Appeal Rules, 1950 (Rules of Court No. 2 of 1950), dealing with "Criminal Appeals," it is provided by rule 49 that where, on a notice of application for leave to appeal being duly served leave to appeal has been given, it shall not be necessary for the appellant to give any notice of appeal, but the notice of application for leave shall be deemed to be a notice of appeal.

In the present case the notice of application for leave was dated May 11, 1953, and contained five grounds. Having, no doubt, previously considered the application and the papers in the case, the court on July 21, 1953, announced that leave was granted. The notice of application accordingly became the notice of appeal, but the court was clearly entitled to reject any particular ground which was not within the terms of the statute. This they did with regard to No. 1. In their judgment they referred to the difference between civil and criminal appeals in this respect and added: "This difference has been pointed out by this court times without number and so we have no sympathy for any appellant who still puts up a wrong ground of appeal. Even if we had granted an amendment on the ground of appeal we could not have been disposed to hear arguments on facts." The court was entitled to require strict observance of the provisions of the statute so as to put a stop to attempts, which had evidently become prevalent, to review the findings of fact by the Supreme Court. The appellants were represented by counsel, and the notice of application for leave to appeal, although signed, as required by the rules, by the appellants personally, has every appearance of legal authorship. With regard to the reference to an amendment, there is nothing before their Lordships to show that counsel for the appellants in the Court of Appeal made any application to amend ground No. 1, so as to

make it accord with the terms of the statute, or that at any stage he suggested that his real case was that the verdict was wholly unreasonable. But on any view it may well be that on the facts it was not a case in which any court would have given the necessary leave on the ground of unreasonableness, and in fact it was not contended to the contrary before their Lordships.

A number of cases, most of them from the early English Criminal Appeal Reports, were cited by counsel for the appellants in the headnotes of which the phrase had thus been treated as synonymous with "reasonable or which cannot be supported having regard to the evidence." There can be no doubt that this phrase is inaccurate and is one which cannot properly be substituted for the words of the statute, although it has in one or two cases found its way into the judgments, though always with qualifying language. It should by now be appreciated that the Nigerian Ordinance gives no appeal on such ground, but this does not mean that in a proper case the Court of Appeal will not give leave to appeal or review the evidence if a *prima facie* case is shown that the verdict appealed from is one which no reasonable tribunal could have arrived at.

Their Lordships do not sit as a Court of Criminal Appeal and it certainly has not been established in the present case that the West African Court of Appeal acted in a manner which would warrant their intervention by way of advise to Her Majesty on the ground of any fundamental defect in the administration of criminal justice.

There was a second ground of appeal which can be quite shortly dealt with. It was said that there was no sufficient evidence that the appellants were properly appointed directors of the Standard Bank of Nigeria Ltd.

Paragraph 68 of Table A in the first schedule to the Companies Ordinance (chapter 38 of the Laws of Nigeria, 1948), which applies in this case, is as follows: "The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association." Section 76 (1) of the Companies Ordinance provides: "Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and send to the Registrar a copy thereof, and from time to time notify to the Registrar any change among its directors or managers."

It was contended on behalf of the appellants that the production of the determination in writing of the majority of the subscribers to the memorandum of association was the only proper proof of the appointment of the directors, and that no such document having been put in evidence no case had been made out by the prosecution. Documents marked "B" "C" and "D" were put in evidence. These were all statutory documents. "B" is the return required by section 76 and is dated October 11, 1950. It is signed by the appellant Aladesuru as director and contains the names of the other two appellants as directors. "C" is a similar return dated May 14, 1952, signed by the appellant Aladesuru as director and containing the names of the other two appellants as directors. "D" is a return of share capital and shares of the bank as required by Part II, section 27, of the Ordinance. It is presented and signed by Aladesuru as director and secretary and gives all three appellants as directors as at September 19, 1951. Another statutory document marked "E" signed and presented by the appellant Akinsanya as director and containing a return of allotments between August 28 and September 19, 1951, was also put in evidence. This document contains the names of all three appellants as allottees of 2,000 ordinary

shares each. "H2," a share certificate dated December 22, 1951, signed by the appellant Ladejo as chairman and by the other two appellants as directors, and the original balance sheet, in respect of which the charges were laid, signed by the appellants, Aladesuru and Ladejo as directors and Akinsanya as manager, were also in evidence.

In conclusion there was the oral testimony of a witness named Enuodu, who was bills manager at the bank between August, 1950, and September, 1952, that all three appellants were directors of the bank during that period. None of the appellants gave evidence at the trial. They were content to rest on the submission of no case by their counsel.

Their Lordships do not consider it necessary in the present case to express any opinion as to whether it is essential in order to establish a breach of section 436 of the Criminal Code of Nigeria to prove that the accused person has been duly appointed and is properly qualified to act as a director, or whether it is sufficient—as contended by counsel for the Crown—to show that he has been acting in that capacity, since they are of opinion that, assuming proof of due appointment is required, there was abundant evidence in the present case from which the court could draw the inference that the appellants had been duly appointed directors of the Standard Bank of Nigeria Ltd.

For these reasons their Lordships have humbly advised Her Majesty that these appeals should be dismissed.

Solicitors: *Rexworthy, Bonser & Wadkin; Charles Russell & Co.*

ELIZABETH ANIMA APPELLANT
AND
AKWASI AHYEYE (SUBSTITUTED FOR KWAME
DWAS, DECD.) RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1956] 2 W.L.R. 299; [1956] A.C. 604

1955 Oct. 25, 26, 27
Dec. 13

Lords Radcliffe, Tucker
and Mr. L. M. D. de Silva

West Africa (Gold Coast)—Jurisdiction—Suit relating to land—Supreme Court—Concurrent jurisdiction with Native Courts—Consent order—"Judgment" Execution—Discretion—No power to review consent order—Native Courts (Ashanti) Ordinance (Laws of the Gold Coast, 1936 Rev., c. 80), ss. 7, 35; 1st Sch.—Courts Ordinance (Gold Coast) Laws of the Gold Coast, 1936 Rev., c. 4.

Practice—Settlement of action—Enforcement.

An action instituted in the Divisional Court of the Supreme Court of the Gold Coast by the respondent against the appellant and others for declaration of title to a house was settled and the terms of the settlement embodied in a minute headed "Court notes of compromise and order thereon," which concluded "Judgment accordingly" and was signed by the judge. On an application by the respondent to issue execution against the appellant on that consent judgment, the appellant contended, *inter alia*, (1) that under section 7 and the first schedule of the Native Courts (Ashanti) Ordinance a Native Court B had jurisdiction over the subject-matter of the case and that consequently the Divisional Court had had no jurisdiction to make the consent order, and (2) that the minute was the record of a compromise agreement upon which

proceedings were stayed and not a judgment on which execution could be issued:

Held, (1) that the effect of section 14 of the Courts Ordinance of the Gold Coast is to confer on the Supreme Court a wide jurisdiction concurrent with the Native Courts over matters in which the Native Courts have jurisdiction. Section 17 (b) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 of the Native Courts (Ashanti) Ordinance comes into operation, but the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only " whenever it shall appear to the Divisional Court . . . that any civil cause or matter . . . is one properly recognisable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established " (section 35). The court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will then be its duty to stop proceedings and refer the parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist and to ask for a decision on the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. Accordingly, assuming that this was a case in which the Native Court B had jurisdiction, neither party had endeavoured to oust the jurisdiction of the Supreme Court, by bringing the requisite circumstances, if they existed, to the notice of that court, and its judgment was therefore the judgment of a court of competent jurisdiction.

(2) The minute was a minute of a judgment on which execution could issue. The combined effect of the terms and the order was to make the obligations of parties in each of the terms of settlement enforceable by execution unconditionally, that was, enforceable against each of them by execution whether or not the obligations of other parties in other terms had been fulfilled. Further, the court had no jurisdiction subsequently to review the consent order. The words " judgment or decision given by him " in ord. 41 in the Third Schedule to the Courts Ordinance, which deals with the power of a court to review a judgment, refer to a judgment or decision of a court for reasons stated, and while a consent judgment or order might in appropriate proceedings be set aside on a ground such as fraud, it could not be reviewed under ord. 41.

The court had, under ord. 43, r. 26, a discretion whether to allow or refuse an application for execution of a judgment after the expiration of six years (the period relevant here), and in the present case there was nothing to show that the discretion had been exercised unjudicially.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 6 of 1953) from a judgment of the West African Court of Appeal (Gold Coast Session) (January 9, 1952), affirming a judgment of the Supreme Court of the Gold Coast, Ashanti (sitting as a Divisional Court at Kumasi (March 30, 1950), granting an application of the respondent (plaintiff) to issue execution against the appellant (defendant) on a consent judgment entered in the Divisional Court on March 23, 1939.

By a writ of summons dated November 10, 1938, the plaintiff instituted the present suit against four defendants; (1) Kwame Amankwatia (Bantamahene), (2) Kwame Atta, (3) J. B. Abiadoo, and (4) the appellant, claiming a declaration of title to the compound house situate on leasehold premises No. 23, Bantama, Kumasi, and £120 damages for trespass, wrongful sale, use and occupation. The particulars of claim stated that (i) about 20 years previously the first defendant had given the land on which the compound house stood to the plaintiff, and no ground rent had ever been demanded or paid; (ii) the plaintiff had left the compound house in charge of one John Mensah and through him had regularly paid the town rate of £2; (iii) on the plaintiff's return to Kumasi he found that the

compound house had been sold by the first defendant through the second defendant to the fourth defendant (the appellant), the third defendant being the auctioneer, and (iv) neither the plaintiff nor John Mensah had been served with a writ of summons before the compound house was sold.

The case came before Bannerman J., in the Divisional Court, Kumasi, on March 23, 1939. Before any statement was made by way of defence the parties settled the case upon terms which were recorded in the court notes of the proceedings as follows:

** This case is, by consent settled as follows:

1. The fourth defendant is to give up possession of the house in dispute within a fortnight from today's date.
2. The first defendant is to pay the fourth the sum of £30 2s. being purchase price. This amount is to be paid within a fortnight from today's date.
3. The plaintiff is to pay the first defendant the sum of £11 16s. within a fortnight from today's date.
4. The plaintiff wholly and unconditionally abandons his claim for £120 damages in his writ of summons.
5. The plaintiff unconditionally withdraws the case against the second and third defendants with costs.
6. The plaintiff is to receive the sum of £12 12s. from the first defendant being assessed costs herein.
7. The plaintiff is to pay the fourth defendant the sum of £7 upon production of receipts by the court for ground rents.

Judgment accordingly. (Signed) WOOLHOUSE BANNERMAN.**

After the signature of Bannerman J., the presiding judge there followed the signatures of the parties or their representatives except that of the second defendant, who was not present, and as to whom no question had arisen or arose on this appeal.

A motion *ex parte* by the appellant to set aside the order made on March 23, 1939, or for direction was withdrawn on May 25, 1939. A further motion *ex parte* by the appellant to construe the order of March 23, 1939, or for direction was withdrawn with leave on July 3, 1939.

On July 12, 1939, the appellant gave notice of a motion praying the court to review the order of March 23, 1939. An affidavit of the appellant in support of the said motion for review, after referring to the previous proceedings and the terms of the consent order, stated, *inter alia*, as follows: (1) That she was prepared to give up possession of the compound house but the first defendant had failed to pay the £30 2s. to her as ordered by the court. (2) That the plaintiff had disappeared and the appellant could not find his whereabouts to pay her the £7 ground rents as ordered by the court. (3) That the appellant was being pressed for payment of ground rents and water rates in respect of the house. (4) That in view of the failure of the first defendant and the plaintiff respectively in complying with the order of the court the appellant prayed for special leave to review the order of March 23, 1939.

The appellant's motion for review was heard before Bannerman J. on July 24, 1939, and the judge's decision thereon was recorded as follows: "By the court: If the first defendant has failed within the time-limit to pay the £30 2s. to the fourth defendant then the fourth defendant should retain possession of the house. (Signed) WOOLHOUSE BANNERMAN, Judge."

On November 27, 1940, the plaintiff gave notice of a motion for an order to restrain the appellant from alienating the property in dispute. In his affidavit in support of the motion the plaintiff referred to the previous proceedings and stated, *inter alia*, that he had a few days after the order of March 23, 1939, tendered "through the first defendant," the sum of £6

15s. to be given to the appellant but that she had refused to accept it. On December, 3, 1940, the plaintiff's motion to restrain the appellant from alienating the property was heard by Fuad J., and dismissed.

On February 16, 1950, the plaintiff gave notice of a motion for leave to proceed to execution against the appellant, and for the substitution of the name of Nana Kwaku Gyawu III Bantamahene for that of the first defendant (now deceased), in respect of the " judgment " of March 23, 1939. In his affidavit in support of the motion the plaintiff stated, *inter alia*, that the judgment against the appellant had remained unsatisfied for over six years, and the plaintiff now desired to proceed to execution against the appellant, and, that execution had not been issued owing to the plaintiff's illness.

On February 22, 1950, the plaintiff's motion for leave to proceed to execution was heard, before Jackson J., and was dismissed. The judgment was recorded as follows: " Court: There is nothing in the judgment upon which the plaintiff can proceed to execution against either Elizabeth Anima or Kwame Amankwatia and it follows his successor in title. Without calling upon the defendants I dismiss the motion. The defendants waive any question of costs. (Signed) J. JACKSON, Judge."

On March 13, 1950, the plaintiff gave notice of a motion for review of the order of February 22, 1950. In his affidavit in support of his motion to review the plaintiff stated that he approached the appellant on several occasions to produce receipts for ground rents, and to accept the sum of £7 ordered to be paid upon production of receipts for ground rents by the " consent settlement " of March 23, 1939; that he was still prepared to pay the said sum of £7 or any sum or sums since accruing if ordered by the court so to do, and that the appellant was still in possession of the premises.

An affidavit sworn by one Akosua Mansah, described as " the mother and lawful attorney " for the appellant, indicated that the appellant relied upon the order of Bannerman J. of July 24, 1939, in answer to the plaintiff's application for leave to proceed to execution.

By a judgment dated March 30, 1950, Jackson J. gave his decision on the plaintiff's motion for review of the judgment of February 22, 1950. The judge decided that upon payment into court of a sum of £30 2s. to be deposited in favour of the appellant, the plaintiff should have leave to issue execution against the property No. 23, Bantama, Kumasi.

The appellant appealed against the decision of Jackson J. of March 30, 1950, to the West African Court of Appeal. In her grounds of appeal she relied on the order of Bannerman J. of July 24, 1939, and, *inter alia*, contended that the judgment appealed against was in effect a review of the said order of July 24, 1939, and that it was not competent for Jackson J. to review or vary the order of another judge of concurrent jurisdiction.

On January 9, 1952, the West African Court of Appeal (Foster-Sutton P. Coussey and Manyo-Plange JJ.) upheld the judgment of Jackson J. given on March 30, 1950.

On June 27, 1952, final leave to appeal to Her Majesty in Council was granted. By an order or revivor made on June 24, 1954, Her Majesty in Council ordered that the respondent should be substituted in place of the plaintiff, now deceased.

1955. October 25, 26, 27. *Gilbert Dold* and *Miss J. R. Bisschop* for the appellant.

Ralph Millner for the respondent.

The following cases were referred to in argument: *Archie Kwow v. Ohene Essien Eku II* (2 W.A.C.A. 180); *Kojo Amuakwa v. Kwamin Anyan* (3

W.A.C.A. 22); *Djabartey v. Benkumhene Antwi Awua II* (4 W.A.C.A. 202, 207); *Mensah v. Cobbina* (5 W.A.C.A. 108); *Agyeman and Others v. Panin* (6 W.A.C.A. 11); *Tsuru v. James Nortei Yebuah* (7 W.A.C.A. 172); *Koffee v. Chief Kwesi Brento* (10 W.A.C.A. 92); *Dashwood v. Dashwood* ([1927] W.N. 276); *In re Clements* ([1901] 1 K.B. 260); *Agbeyegbe v. Ikomi* ([1953] 1 W.L.R. 263); *Lamb (W. T.) & Sons v. Rider* (64 T.L.R. 530; [1948] 2 All E.R. 402); *Akisatan Apena of Iporo v. Akinwande Thomas* ([1950] A.C. 227); *In re Staines* ([1886] 55 L.J.Ch. 913); *Peacock v. Bell & Kendal* ([1667] 1 Saund. 69); *Howard v. Gosset* ([1845] 10 Q.B. 359, 453); *Australasian Automatic Weighing Machine Co. v. Walter* ([1891] W.N. 170); *Huddersfield Banking Co. Ltd. v. Henry Lister & Sons, Ltd.* ([1895] 2 Ch. 273, 275, 277, 283, 284); *In re South American and Mexican Co.* ([1895] 1 Ch. 37, 43; 11 T.L.R. 21); *Kinch v. Walcott* ([1929] A.C. 482, 493).

MR. L. M. D. DE SILVA: This is an appeal from a judgment of the West African Court of Appeal dated January 9, 1952, affirming a judgment of the Supreme Court of the Gold Coast, Ashanti (sitting as a Divisional Court at Kumasi), dated March 30, 1950, granting an application of the respondent to issue execution against the appellant on a consent judgment entered in the Divisional Court on March 23, 1939.

The respondent instituted the action in the Divisional Court on November 10, 1938, against the appellant and three other defendants for declaration of title to a house and for £120 damages "for wrongful sale, trespass, use and occupation." He alleged in the particulars of claim filed with the writ that the first defendant had "given" him a land "about 20 years" previously and that the first defendant had (date unstated) sold the house to the fourth defendant (the present appellant). The second and third defendants appear to have been made parties on the basis that they had been concerned with the sale. It will appear that it is not necessary to determine what precisely was the basis of the respondent's action against each or all of the defendants.

Before any statement was made by way of defence the parties settled the case, and the following minute was made by the court on March 23, 1939, under the heading "Court Notes of Compromise and Order thereon."

"This case is, by consent, settled as follows:

1. The fourth defendant is to give up possession of the house in dispute within a fortnight from today's date.

2. The first defendant is to pay the fourth defendant the sum of £30 2s. being purchase price. This amount is to be paid within a fortnight from today's date.

3. The plaintiff is to pay the first defendant the sum of £11 6s. within a fortnight from today's date.

4. The plaintiff wholly and unconditionally abandons his claim for £120 damages in his writ of summons.

5. The plaintiff unconditionally withdraws the case against the second and third defendants with costs.

6. The plaintiff is to receive the sum of £12 12s. from the first defendant being assessed costs herein.

7. The plaintiff is to pay the fourth defendant the sum of £7 upon production of receipts by the court for ground rents. Judgment accordingly. (Signed) WOOLHOUSE BANNERMAN."

After the signature of Woolhouse Bannerman J., the presiding judge,

there followed the signatures of the parties or their representatives except that of the second defendant who was not present. No question regarding him arose or arises on this appeal.

It was argued by the appellant that there was a Native Court with jurisdiction over the subject-matter of the case and that consequently the Divisional Court of the Supreme Court had no jurisdiction to make the order set out in the preceding paragraph. It is necessary in dealing with this argument to consider the combined effect of section 7 of the Native Courts (Ashanti) Ordinance (c. 80, Laws of the Gold Coast, 1936, Revision volume II, p. 1249), and of sections 14 and 17 of the Courts Ordinance of the Gold Coast (Laws of the Gold Coast, volume I, pp. 31 and 32). Section 7 of the Ashanti Native Courts Ordinance is to the following effect:

“ 7. (1) Every Native Court shall have full jurisdiction and power, to the extent set forth in the order establishing it and subject to the provisions of this Ordinance in all civil and criminal cases in which all the parties are natives and the defendant was at the time when the cause of action arose resident or being within the jurisdiction of the court or in the case of a criminal matter is accused of having wholly or in part within the jurisdiction of the court, committed or been accessory to the committing of an offence.

(2) For the purposes of the preceding sub-section the governor may by order grade Native Courts and prescribe the jurisdiction and power which is to be set forth in the orders establishing the Native Courts of each grade.

Except in so far as the governor may by such an order otherwise direct there shall be four grades of Native Courts, namely, grades A, B, C, and D, and the jurisdiction and power which shall be set forth in the orders establishing Native Courts of these grades shall not without the permission of the governor exceed those prescribed in the First Schedule.”

Under the First Schedule (p. 1262) of the Native Courts Ordinance, Native Courts of Grade B have “ Such jurisdiction in suits relating to the ownership, possession, or occupation of land within the area of its jurisdiction as may be stated in the order establishing the Native Court.” It is contended that, by reason of the provision just stated, a Native Court of Grade B has jurisdiction over the subject-matter of this case.

Section 14 of the Courts Ordinance of the Gold Coast is to the following effect: “ The Supreme Court shall be a superior court of record, and in addition to any other jurisdiction conferred by this or any other Ordinance, shall within the Gold Coast and subject as in this Ordinance mentioned, possess and exercise all the jurisdiction powers and authorities which are vested in or capable of being exercised by His Majesty’s High Court of Justice in England.”

Section 17 is to the following effect:

“ Notwithstanding anything in this Ordinance contained the Supreme Court shall not exercise jurisdiction: . . . (b) in Ashanti in any civil cause or matter subject to the provisions of section 35 of the Native Courts (Ashanti) Ordinance, save and except in accordance with the proviso to such section, or in any cause or matter within the jurisdiction conferred on the Ashanti Chief Commissioner’s Court by sections 62 and 64 of this Ordinance.”

Section 35 of the Native Courts Ordinance referred to in section 17 (b) set out above is to the following effect:

“ Whenever it shall appear to the Chief Commissioner’s Court or the Divisional Court, or a magistrate’s court that any civil cause or matter brought before it is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established under the provisions of this Ordinance, such Chief Commissioner’s Court or Divisional Court or magistrate’s court as the case may be shall stop the further progress of such civil cause or matter before it and refer the parties to a competent Native Court as the case may be; and the court shall thereupon order such costs as it shall deem fit.”

There follows a proviso giving a list of cases in which “ the obligations as to stoppage and reference ” are not to apply. Their Lordships do not find it necessary to refer to this proviso.

The appellant argued that the present suit was one “ relating to the ownership, possession or occupation of land ” within the meaning of those words in the schedule to the Courts Ordinance set out above, and that there existed a Native Court Grade B which had jurisdiction over the subject-matter of this case. The question whether the suit was one “ relating to the ownership, possession or occupation of land ” was disputed by the respondent, but assuming that it was, it does not appear on the face of the record that “ a Native Court with Jurisdiction ” over the subject-matter of this case “ has been established ” (section 35). The record does not contain an “ order establishing ” (section 7 (2) above) such a court, and consequently if such a court has been established the extent of its jurisdiction is unascertainable by reference to the record. Furthermore it does not appear on the face of the record, except in so far as it can be inadequately suggested from their names, that all the parties were natives.

It is said, however, by the appellant, that the facts were not in dispute when the point was taken for the first time before the West African Court of Appeal although there is nothing in the judgment of that court or elsewhere in the record which supports that suggestion. Their Lordships do not find it necessary to consider further what the facts were in view of the opinion they have formed as to the bearing of the sections set out above upon this case.

Their Lordships are of opinion that the effect of section 14 is to confer on the Supreme Court a wide jurisdiction including jurisdiction concurrent with the Native Courts over matters in which the Native Courts have jurisdiction. Section 17 (above) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 (above) comes into operation. It is necessary to determine exactly when, if at all, section 35 does so in any particular case.

Their Lordships are of the view that the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only “ whenever, it shall appear to the Divisional Court that any civil cause or matter is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established ” (section 35). The court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will be then its duty to stop proceedings and refer the

parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist, and to ask for a decision upon the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. If it were otherwise, it would be open to a party conscious of the existence of the requisite circumstances not to bring them to the notice of the court until judgment had been pronounced and then, if the judgment be adverse to him, to seek to defeat the judgment on the ground of lack of jurisdiction. Their Lordships are of opinion that section 35 has been framed to avoid such a possibility and that, though in the generality of cases jurisdiction depends on the existence of absence of prescribed circumstances whether or not the court is conscious of them, under section 35 jurisdiction is ousted only when the prescribed circumstances have become apparent, or have been made apparent, to the court. In the case before their Lordships the trial judge proceeded to judgment and it must be presumed that it did not appear to him that the circumstances requisite for an ouster of jurisdiction were present. Neither party endeavoured to oust jurisdiction by bringing such circumstances if they existed, to his notice. Their Lordships are therefore of opinion that the judgment of the trial court was the judgment of a court of competent jurisdiction.

It was next argued by the appellant that the minute set out in the preceding paragraph was the record of a compromise agreement upon which proceedings were stayed, and not a judgment upon which execution could be issued. It was further argued that in any case the obligation of the fourth defendant to give up the house under clause 1 (above) did not arise until she had been paid £30 2s. by the first defendant under clause 2. Their Lordships do not agree with either of these arguments.

Their Lordships are of the opinion that the minute of March 23, 1939, is the minute of a judgment on which execution can issue. The minute contains the terms of settlement followed by the order " judgment accordingly " of the court. The combined effect of the terms and the order is, in their Lordships' opinion, to make the obligations of parties in each of the terms of settlement (as contain them) enforceable by execution unconditionally, that is to say, enforceable against each of them by execution whether or not the obligations of other parties in other terms have been fulfilled. The benefit to accrue to each party is defined and, if he does not receive it, the right to obtain it by proceeding to execution is given to him. Parties no doubt were induced to undertake obligations, partly at least, by the fact that other parties also undertook obligations. But the fulfilment of obligations in any one term of settlement was not made a condition for the performance of obligations in any other. Thus regarded, the duty of the fourth defendant to give up possession of the house within a fortnight of March 30, 1939, was not dependent on the payment of her of £30 2s., by the first defendant. If the first defendant failed to pay the money within the stipulated fortnight the fourth defendant could issue execution against him, but her duty to give up the house remained unaffected. Their Lordships are of the view that this is the true meaning of the terms of settlement. It could be no other unless words are read into the terms making the performance of the first term conditional upon the performance of the second. It is not admissible to introduce such words.

Those concerned with the settlement of actions might with advantage

Section 35 of the Native Courts Ordinance referred to in section 17 (b) out above is to the following effect:

“ Whenever it shall appear to the Chief Commissioner’s Court the Divisional Court, or a magistrate’s court that any civil cause or matter brought before it is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established under the provisions of this Ordinance such Chief Commissioner’s Court or Divisional Court or magistrate’s court as the case may be shall stop the further progress of such civil cause or matter before it and refer the parties to a competent Native Court as the case may be; and the court shall thereupon order such costs as it shall deem fit.”

There follows a proviso giving a list of cases in which “ the obligations as to stoppage and reference ” are not to apply. Their Lordships do not find it necessary to refer to this proviso.

The appellant argued that the present suit was one “ relating to title, ownership, possession or occupation of land ” within the meaning of the words in the schedule to the Courts Ordinance set out above, and that there existed a Native Court Grade B which had jurisdiction over the subject-matter of this case. The question whether the suit was one “ relating to title, ownership, possession or occupation of land ” was disputed by the respondent, but assuming that it was, it does not appear on the face of the record that “ a Native Court with Jurisdiction ” over the subject-matter of this case “ has been established ” (section 35). The record does not contain an “ order establishing ” (section 7 (2) above) such a court, and consequently if such a court has been established the extent of its jurisdiction is unascertainable by reference to the record. Furthermore it does not appear on the face of the record, except in so far as it can be inadequately suggested from their names, that all the parties were natives.

It is said, however, by the appellant, that the facts were not in dispute when the point was taken for the first time before the West African Court of Appeal although there is nothing in the judgment of that court or elsewhere in the record which supports that suggestion. Their Lordships do not find it necessary to consider further what the facts were in view of the opinion they have formed as to the bearing of the sections set out above upon this case.

Their Lordships are of opinion that the effect of section 14 is to confer on the Supreme Court a wide jurisdiction including jurisdiction concurrent with the Native Courts over matters in which the Native Courts have jurisdiction. Section 17 (above) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 (above) comes into operation. It is necessary to determine exactly when, if at all, section 35 does so in any particular case.

Their Lordships are of the view that the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only “ whenever, it shall appear to the Divisional Court that any civil cause or matter is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established ” (section 35). The court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will be then its duty to stop proceedings and refer the

parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist, and to ask for a decision upon the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. If it were otherwise, it would be open to a party conscious of the existence of the requisite circumstances not to bring them to the notice of the court until judgment had been pronounced and then, if the judgment be adverse to him, to seek to defeat the judgment on the ground of lack of jurisdiction. Their Lordships are of opinion that section 35 has been framed to avoid such a possibility and that, though in the generality of cases jurisdiction depends on the existence of absence of prescribed circumstances whether or not the court is conscious of them, under section 35 jurisdiction is ousted only when the prescribed circumstances have become apparent, or have been made apparent, to the court. In the case before their Lordships the trial judge proceeded to judgment and it must be presumed that it did not appear to him that the circumstances requisite for an ouster of jurisdiction were present. Neither party endeavoured to oust jurisdiction by bringing such circumstances if they existed, to his notice. Their Lordships are therefore of opinion that the judgment of the trial court was the judgment of a court of competent jurisdiction.

It was next argued by the appellant that the minute set out in the preceding paragraph was the record of a compromise agreement upon which proceedings were stayed, and not a judgment upon which execution could be issued. It was further argued that in any case the obligation of the fourth defendant to give up the house under clause 1 (above) did not arise until she had been paid £30 2s. by the first defendant under clause 2. Their Lordships do not agree with either of these arguments.

Their Lordships are of the opinion that the minute of March 23, 1939, is the minute of a judgment on which execution can issue. The minute contains the terms of settlement followed by the order " judgment accordingly " of the court. The combined effect of the terms and the order is, in their Lordships' opinion, to make the obligations of parties in each of the terms of settlement (as contain them) enforceable by execution unconditionally, that is to say, enforceable against each of them by execution whether or not the obligations of other parties in other terms have been fulfilled. The benefit to accrue to each party is defined and, if he does not receive it, the right to obtain it by proceeding to execution is given to him. Parties no doubt were induced to undertake obligations, partly at least, by the fact that other parties also undertook obligations. But the fulfilment of obligations in any one term of settlement was not made a condition for the performance of obligations in any other. Thus regarded, the duty of the fourth defendant to give up possession of the house within a fortnight of March 30, 1939, was not dependent on the payment of her of £30 2s., by the first defendant. If the first defendant failed to pay the money within the stipulated fortnight the fourth defendant could issue execution against him, but her duty to give up the house remained unaffected. Their Lordships are of the view that this is the true meaning of the terms of settlement. It could be no other unless words are read into the terms making the performance of the first term conditional upon the performance of the second. It is not admissible to introduce such words.

Those concerned with the settlement of actions might with advantage

study the judgment of Slade J. in the case of *Green v. Rozen* ([1955] 1 W.L.R. 741; [1955] 2 All E.R. 797) where will be found a discussion on the advantages and disadvantages of the different formulae which can be used for this purpose.

The next point argued by the appellant is that a note recorded by Bannerman J. on July 24, 1939, namely, "If the first defendant has failed within the time limit to pay the £30 2s. 0d. to the fourth defendant then the fourth defendant should retain possession of the house" precludes the respondent from proceeding to execution on the earlier order of March 23, 1939. The note recorded was on an application by the appellant for a "review" of the order of March 23, 1939. It had been preceded by two applications by the appellant, both of which had been withdrawn. The first of these was an application made on May 11, 1939, asking on various grounds that the order of March 23, 1939, be set aside "or for direction". It was withdrawn on May 25, 1939. The next was an application made on June 16, 1939, "to construe the order made on March 23, 1939, or for direction." It was withdrawn on July 3, 1939. An application was then made on July 12, 1939, "to review" the order of March 23, 1939, and the note recorded on July 24, 1939, mentioned above was the result of that application. The appellant argues that the expression of the view amounts to an unconditional order that "the fourth defendant should retain possession of the house." This is disputed by the respondent. Their Lordships do not find it necessary to decide this question as they agree with the Court of Appeal that the learned judge had no jurisdiction to review the order of March 23, 1939, which was a consent order. The power of a court to review a judgment is contained in order 41 in the Third Schedule to the Courts Ordinance (Vol. 1, p. 123), and is to the following effect:

"Any Judge, Magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit."

Their Lordships are of opinion that in using the words "judgment or decision given by him" the legislature contemplated a judgment or decision formulated by a court for reasons, stated or unstated, which the court had thought to be sound. A court may review the judgment or decision when it thinks that some or all of those reasons need further consideration. The reasons for a consent judgment, frequently, as in this case (*vide* heading of proceedings of March 23, 1939, above), a matter of compromise, may never be known to the court and once acted upon, their soundness is not a matter for review by a court. A consent judgment or order may no doubt in appropriate proceedings be set aside on various grounds such as fraud but it may not be reviewed under order 31. Their Lordships think that the note of July 24, 1939, whether or not it purported to be itself an order was made without jurisdiction and in no way affected the order of March 23, 1939.

It was finally argued that the trial court had not exercised its discretion correctly in granting leave to the respondent to execute the judgment of March 23, 1939, after the lapse of more than six years and that the Court of Appeal had erred in confirming the order of the trial court.

An application for execution of a judgment after the expiration of six

years is governed by rule 26 of order 43 (Schedule to the Courts Ordinance, vol. 1, Laws of the Gold Coast, p. 129), which is in the following terms:

“ As between the original parties execution, otherwise than against the persons, may issue at any time within six years, and, against the person, at any time within two years from the date of the decree. After such periods respectively execution shall not issue without leave of the court, but no notice to the debtor before applying for such leave shall be necessary.”

It is clear that a court has a discretion whether to allow or refuse the application. It is for the court after considering all the circumstances that may be relevant judicially to exercise its discretion. The trial court has exercised it in the present case in favour of the respondent and the Court of Appeal has seen no reason to interfere with the trial court's order. In their Lordships' opinion nothing placed before them has been sufficient to sustain the argument that the courts below have exercised their discretion unjudicially although the relevant material to be found in the record is somewhat scanty.

The trial court in the course of dealing with the application said of the first defendant that a failure by him to pay the appellant the sum undertaken by him to be paid “ savours strongly of collusion between himself and Elizabeth Anima ” (the appellant). Their Lordships do not consider that the available evidence justified the expression of this view. The imputation ought not to have been made. But, even so the fact remains that the judgment was unsatisfied, and in the matter of the exercise of discretion the only ground of substance urged by the appellant against the issue of execution appears to be that he had spent £400 in reconditioning the house. The trial court dealt with this point by stating that, as against this, the appellant had had the use of the house and profits therefrom for over ten years. There was probably substance in what the trial court said, but it does not appear from the record what these profits were, or might have been, or even what the size and state of the house was when the appellant entered into occupation. The allegation that she spent £400, however, does not appear in her affidavit of March 16, 1950, filed for the purpose of resisting the application for execution, and there does not appear to be any sworn testimony supporting it. It does not appear to their Lordships that the fact that she spent £400 on the house, in fact it was, was felt by the appellant to be a strong reason for not surrendering the house. Their Lordships do not think that a case has been made out for sending the case back for a fuller investigation of the point whether, in all the circumstances, the appellant is now sufficiently compensated by the payment to her of the £30 2s. ordered in the judgment of March 23, 1939.

It ought perhaps to be mentioned that the trial court had on February 22, 1950, refused an application for execution of the judgment of March 23, 1939. The reason given for the refusal was that “ There is nothing in the judgment (of March 23, 1939), upon which the plaintiff can proceed to execution.” Their Lordships do not think it necessary to offer any observations upon this view other than those already made earlier in dealing with the meaning and effect of the judgment of March 23, 1939. It was upon a review of its order of February 22, 1950, that the order under appeal was made on March 30, 1950.

In the course of the argument the appellant applied to place by affidavit further material before their Lordships upon the question whether there had been collusion between herself and the first defendant. No satisfactory

reason was given as to why it was not sought to place this evidence before the Court of Appeal for consideration whether it should be admitted or not. Their Lordships saw no reason why they should take the exceptional course of allowing the evidence to be produced for the first time before them and accordingly refused the application. This refusal has made no difference to the appellant, because, as already stated, their Lordships have formed the view that there were no sufficient grounds for holding that there had been collusion between the first defendant and the appellant.

For the reasons they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondent the costs of this appeal.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

THOMAS COLE CONTEH AND OTHERS APPELLANTS
AND
THE QUEEN. RESPONDENT

[ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE AND FROM
THE WEST AFRICAN COURT OF APPEAL]

[1956] 2 W.L.R. 277; [1956] A.C. 156;
[1956] 1 W.A.L.R. 49

1955 Dec. 15
1956 Jan. 11

Lords Oaksey, Tucker and
Somervell of Harrow

West Africa (Sierra Leone)—Criminal law—Conspiracy—To accuse of a crime—Proof of falsity of belief essential—Assessor—Interested in or connected with subject-matter of proceedings or parties—Right of objection. Criminal law—Conspiracy, Criminal Law—Practice—Assessor—Privy Council—Costs—Criminal cases—General rule.

The gist of the offence of conspiracy to accuse another of a crime is that the accusation should be false to the knowledge of those conspiring. Where, therefore, at the trial of the appellants, who were convicted on a charge of conspiracy to accuse certain persons of the crime of murder, the judge in the course of his summing up, while he had referred to evidence which, if believed, would support the agreement falsely to accuse, had nowhere referred to the necessity of proving the falsity of the belief, the conviction must be quashed.

At the beginning of the trial, which took place with two assessors, counsel for the accused objected to one of the assessors on the ground that he was married to a daughter of the principal person against whom the alleged conspiracy was directed (who was the principal complainant in the prosecution of the appellants), but the judge ruled that the objection was misconceived on the ground that there was nothing in the Courts Ordinance (Laws of Sierra Leone, 1946, rev., c. 50), which gave a right to object to an assessor's sitting on a case:

Held, that, notwithstanding the silence of the Ordinance, the objection was not misconceived. Either party, the Crown or the accused, was entitled to raise an objection to an assessor on the ground that he was interested in or connected with the subject-matter of the proceedings or those concerned so that it was undesirable for him to sit as an assessor. It would be for the judge to rule on the objection in his discretion.

The circumstances of this case did not justify a departure from the Board's general rule that in criminal case there would be no order as to costs.

APPEAL (No. 32 of 1955), by special leave, against: (1) A judgment and order of the Supreme Court of Sierra Leone (Criminal Special Sessions at

Kenema) (Marke J., sitting with two assessors) (December 30, 1953) whereby the appellants were found guilty and convicted of the offence of conspiracy to accuse four persons of the crime of murder and sentenced to varying terms of imprisonment with hard labour; and (2) an order of the West African Court of Appeal (January 18, 1954) refusing the appellants' application for an extension of time within which to apply for leave to appeal to the West African Court of Appeal.

The prosecution of the appellants for the offence of conspiracy to accuse of a crime was the sequel to an unsuccessful prosecution for murder and arose in the following circumstances.

On or about May 9, 1953, the dead body of one Siaffa Fogundia was found near Daru, in the chiefdom of Paramount Chief Samba, the principal complainant in the present proceedings against the appellants. Following the discovery, the police, on the sworn information of one of the appellants (and another person who had been convicted with the appellants but had died since the grant of special leave), arrested four persons and charged them with the murder of Fogundia. The police had received information alleging that all four accused had acted on the direction of Chief Samba, who was alleged to be a cannibal, but for some reason which was not clear Samba, although arrested, was not charged or tried.

The prosecution case—that Fogundia was killed for the purposes of cannibalism—was based mainly on the statements of the fourth accused, Momo Sao—who had twice confessed to the killing with the aid of his three co-accused, all of them said to be acting under Samba's direction.

At the trial, however, Momo Sao retracted, saying that he had thus incriminated himself and the others (complainants in the present case) at the instigation of the appellants all of whom he alleged, desired the removal of Samba from his position as Chief, and one of whom had promised him a cash reward for his false testimony.

The present appellants supported the prosecution, but the trial resulted in the acquittal of all four accused; and shortly after the appellants were prosecuted for the common law offence of conspiracy to accuse of a crime, Samba being the principal complainant.

At the commencement of the trial the appellants objected to one of the assessors, Chief Musa Gendemeh, who was married to the daughter of Chief Samba, the principal complainant, on the ground that in the interests of justice it would not be fair for him to sit on the case. The trial judge ruled that the objection was misconceived.

1955. December, 15. *Dingle Foot Q.C.* and *R. K. Handoo* for the appellants.

The Crown, who were represented at the hearing of the petition for special leave to appeal, did not file a printed case on the appeal or seek to support the conviction, but *J. G. Le Quesne* appeared as *amicus curiae* and on the question of costs.

[The following cases were cited in argument: *Waugh v. The King* ([1950] A.C. 203, 209, 212; 66 T.L.R. (Pt. 1) 554; *Teper v. The Queen* ([1952] A.C. 480, 485-486, 493; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447); *Perera v. The King* ([1951] A.C. 482, 484; [1951] 1 T.L.R. 829) *Shamdasani v. King Emperor* ([1945] L.R. 72 I.A. 189, 190, 195; 61 T.L.R. 448).]

December 15. LORD OAKSEY announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed and that they would give their reasons later.

1956. January 11. The reasons for their Lordships' decision were given by LORD SOMERVELL OF HARROW. This is an appeal, by special leave, against

a decision of the Supreme Court of Sierra Leone finding the appellants guilty of a conspiracy to accuse Paramount Chief Alfred Bockari Samba and others of having committed a crime, namely, murder.

The conviction was on December 30, 1953. On January 14 the appellants applied for extension of time to file notices of appeal, time having expired on the 10th. Leave was refused, and special leave was given to appeal against that refusal. Their Lordships, having decided to hear the appeal from the conviction, found it unnecessary to consider the refusal to extend the time or make any order thereon.

The present proceedings were a sequel to an unsuccessful prosecution for murder. On May 9, 1953, the dead body of a man called Fogundia was found within the chiefdom of Samba. On the sworn information of two of the present appellants four persons were charged with the murder. It was said that Samba was a cannibal and had directed the four to murder Fogundia. It is not clear why Samba, who was arrested, was not charged. This story was supported by one of the then accused until the trial. He then retracted and said that he had been bribed to give false testimony by the appellants, who wanted Samba's removal. The present appellants supported the prosecution, but the accused were acquitted. These proceedings followed, Samba being the principal complainant.

The gist of the offence charged is that the accusation should be false to the knowledge of those conspiring. It is, of course, no offence for people who believe that a crime has been committed to agree to take steps with a view to a prosecution.

The trial was one with assessors. The first submission on behalf of the appellants is that the judge failed to state clearly or at all the necessity of the prosecution establishing that the accused knew the accusation to be false. It is clear that some of the accused stated affirmatively that they believed in the accusation. Some may have merely denied that they were parties to any agreement.

Two passages from the summing up should be quoted:

“ To conspire to accuse any person of murder is to conspire to do an unlawful thing. The law does not say that you should not bring to the notice of the police any offence which you know to have been committed. If you know that an offence has been committed it is your duty and the duty of everyone to bring it to the notice of the police and the police will then investigate the matter. There is no need for two or more to join together, to make a bargain to accuse any person or persons of a crime. Such a conspiracy the law does not allow . . . ”

“ It is your duty to find out if there is evidence of any agreement by any of the accused with the other accused or with other persons not before you. To do something unlawful is to accuse the P.C. and three men of the murder of Siaffa Fogundia.”

In nearly every summing up in a case of any complexity it is possible to find sentences which in the calmer and more leisurely atmosphere of an appellate court can be shown to be capable of improvement. But here the defect goes to the root of the offence. It is true that in the course of his summing up the judge referred to evidence which, if believed, would support an agreement falsely to accuse. But nowhere is there a reference to the necessity of proving the falsity of the belief. The first of the two passages might well have been understood by the assessors as meaning that any agreement by two or more to make an accusation whether believed or

not would be an offence. The Crown did not file a case or seek to support the conviction.

Their Lordships are of opinion that the appeal succeeds on this ground. There were other grounds put forward, to only one of which is it necessary to refer. At the beginning of the proceedings counsel for the six accused objected to one of the assessors, Musa Gendemeh, on the ground that he was married to a daughter of Samba, the object of the alleged conspiracy and the first witness for the prosecution. The Solicitor-General opposed the objection and the judge ruled as follows: "I find that the objection is misconceived. There is nothing in the Ordinance, cap. 50, which gives a right to object to an assessor's sitting on a case, and if there were such a right I am not satisfied that sufficient reason has been given to disqualifying P.C. Musa Gendemeh sitting on this trial as an assessor."

Notwithstanding the silence of the Ordinance their Lordships are clear that the objection was not misconceived. It might or might not have been proper to accede to it. Either party, the Crown or the accused, is entitled to raise an objection to an assessor on the ground that he is interested in or connected with the subject-matter of the proceedings or those concerned so that it is undesirable for him to sit as an assessor. It would be for the judge to rule on the objection in his discretion. In small communities it may be difficult, of course, to find assessors who are wholly unconnected with everyone concerned. It may be that in this case there would have been a difficulty in getting another assessor. Apart from any such difficulty it would seem unfortunate that one of the assessors should have been related in the degree stated to the complainant.

Their Lordships have humbly advised Her Majesty that the conviction be quashed.

Counsel for the appellants contended that the appellants ought to be allowed their costs, but their Lordships do not think that the circumstances of the case justify a departure from the general rule and there will therefore be no order as to costs.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

MARY VANDERPUYE AND OTHERS APPELLANTS
AND
MARY AKUA BOTCHWAY RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1956] 2 W.L.R. 1080; [1956] A.C. 501

[1956] 1 W.A.L.R. 16

1956 Apr. 23

Lords Oaksey, Tucker, Cohen,
Keith of Avonholm and Mr. L. M. D. de Silva

West Africa (Gold Coast)—Jurisdiction—"Land cause"—Suit by children of "six-cloth" marriages—For determination of share in, and distribution of, estate of deceased father—Ga native customary law—"Succession" the real issue—Not a "land cause or matter"—No jurisdiction in Land Court to entertain appeal from decision of Native Court B—Native Courts (Colony) Ordinance, 1945 (Laws of the Gold Coast, 1951, c. 98), ss. 13, 46.

A suit brought by the appellants, who were children by six-cloth marriages of the deceased, in a Native Court B for the determination of their share in the

estate of the deceased according to Ga native customary law and for the distribution of the estate was a "succession case" and not a "land cause" relating to the ownership, possession or occupation of land. Accordingly, the Land Court, to which under section 46 of the Native Courts (Colony) Ordinance, 1945 appeal lies in a land cause from a decision of a Native Court of grade B, C or D, had no jurisdiction to entertain an appeal from the Native Court B's decision in favour of the appellants.

George Hagan v. Effuah Adum (1939) 5 W.A.C.A. 35 applied.

To determine into which category—succession case or land cause—a particular suit fell, the court must apply the test of what was the real issue between the parties and not look only at the wording of the plaint.

Arche Kwow v. Ohene Essien Eku II (1934) 2 W.A.C.A. 180 approved. Judgment of the West African Court of Appeal set aside.

APPEAL (No. 27 of 1952) from a judgment of the West African Court of Appeal (March 8, 1951) which dismissed the present appellants' appeal from a judgment of the Supreme Court of the Gold Coast (September 29, 1948) which had allowed an appeal by Joel Douglas Kwaku Botchway, the original defendant, from a judgment of the Native Court B of Ga (November 25, 1947).

The following facts are taken from the judgment of the Judicial Committee: The appellants were 17 of the children by "six-cloth" marriages of Jacob Vanderpuye, deceased, who died on October 5, 1918. On June 28, 1947, they commenced proceedings in Ga Native Court "B" Eastern Province, Gold Coast Colony, against Joel Douglas Kwaku Botchway, who was a first cousin in the matrilineal line of the deceased and had been appointed head of the family of the deceased pursuant to Ga native customary law. The appellants claimed the following relief: (a) A declaration of the share (gbena) to which they were entitled and the appropriation to them of such of the estate as represented the share to which they were entitled according to Ga native customary law. (b) An account of all rents and profits as had accrued to the estate since June 1935, and the payment to the appellants of such amounts as represented their share of the estate which might be found due.

On November 25, 1947, the Native Court delivered judgment in which it was declared that the interest of the six-cloth children of the deceased was the whole estate, but it was ordered that for the reasons stated in the judgment Mr. Botchway and his sister, the present respondent, should be permitted to occupy one room each in the Garden House, one of the properties forming part of the estate of the deceased, and that one-third of the rents accrued in the hands of the receiver and manager of the estate at the date of the judgment, after deducting outgoings, should be given to Mr. Botchway and the respondent. The court directed Mr. Botchway to file an account and ordered that the costs should be taxed and paid out of the estate.

Mr. Botchway appealed from that judgment to the Land Court at Accra. On September 29, 1948, despite an objection that the Land Court had no jurisdiction in the matter as it was a succession case, Smith J. allowed the appeal and substituted a declaration that the appellants were entitled to one-third of the property of the deceased and to an accounting from Mr. Botchway of one third of the rents and profits from December 1935, to 1946. He awarded costs to Mr. Botchway.

From the decision the appellants appealed to the West African Court of Appeal, including in their grounds of appeal the objection that the Land Court had no jurisdiction to hear Mr. Botchway's appeal as the matter was not a land cause or matter. On or about May 13, 1950, Mr. Botchway died.

and on January 30, 1951, the respondent as the duly appointed head of the family was substituted for him as respondent to the appeal. On February 1, 1951, the West African Court of Appeal (Blackall P., Lewey J.A. and Coussey J.) rejected the contention that the matter was not a land cause or matter, and on March 8, 1951, delivered judgment on the merits. They dismissed the appeal but set aside the order of the Land Court declaring the appellants' right to one-third of the property of the deceased and to an account of one-third of the rents and profits of the estate. They awarded costs to Mr. Botchway.

From that decision the appellants appealed to the Judicial Committee.

The main question for decision in the appeal were: (1) A preliminary question, whether the appeal from the Native Court, who awarded the whole estate to the children of the deceased, was to the District Commissioner's Court as being a suit concerning the succession to the property of the deceased or was to a Land Court of the Supreme Court as being a suit relating to the ownership, possession or occupation of land. If the answer to the preliminary question was that the appeal was properly brought to the Land Court; (ii) whether the Land Court was right in reversing the judgment of the Native Court on questions of fact and of native law; (iii) whether the West African Court of Appeal was right in the variation it made in the order of the Land Court.

1956. March 7, 8, 12. *T. G. Roche Q.C.* and *Gilbert Dold* for the appellants.

L. G. Scarman for the respondent.

The following cases, not referred to in the judgment, were cited in argument: *E. A. Solomon v. J. D. K. Botchway* ([1943] 9 W.A.C.A. 127); *A. V. Sackeyfia v. Ayichoe Tagoe* ([1945] 11 W.A.C.A. 73); and *Adu Kofi v. Chief Kwesi Brentuo* ([1944] 10 W.A.C.A. 92).

April 23. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above and continued; Mr. Roche, on behalf of the appellants, intimated that he would repeat the submission that the Land Court of the Supreme Court of the Gold Coast had no jurisdiction to entertain the appeal against the judgment of the Ga Native Court and would also submit that on the merits the judgment of the West African Court of Appeal was erroneous and misconstrued Ga native customary law.

Their Lordships heard argument first on the question of jurisdiction and, in view of the conclusion they reached on this point, did not find it necessary to go into the question of the correctness of the decision on the merits.

To appreciate the points argued on the question of jurisdiction their Lordships must refer not only to the provisions of the Native Courts (Colony) Ordinance (c. 98 of the Laws of the Gold Coast, 1951), which came into force on April, 1945, and was therefore the relevant ordinance when this suit was commenced, but also to the provisions of an earlier Ordinance, the Native Administration Ordinance (c. 111, 1928).

At the date of the last mentioned Ordinance the Native Court was called a Paramount Chief's Tribunal, and by section 43 of the Ordinance that tribunal was given jurisdiction only in relation to certain specified matters and "any other causes and matters by this Ordinance expressly assigned to a Paramount Chief's Tribunal or to a Divisional Chief's Tribunal." Among the matters referred to in section 43 (2) were "(c) Suits relating to the ownership, possession or occupation of lands situated within the State of such Paramount Chief . . . (f) Suits and matters relating to the succession to the property of any deceased native who had at the time of his death a fixed

place of abode within the State.”

The question under which head a particular suit fell might be important not only as deciding which native tribunal had jurisdiction in the matter but also because appeals in land causes lay to the Provincial Commissioner's Court whereas appeals in cases of succession lay to the Court of the District Commissioner: see, e.g. *Ekuah Mansah v. Kofi Ambradu* ([1941] 7 W.A.C.A. 204). This case followed the decision of this Board in *George Hogan v. Effuah Adum* ([1939] 5 W.A.C.A. 35). In the last-mentioned case it was argued (*ibid.* 39) that subhead (f) included only suits as to the right to succeed and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships rejected this contention, saying that they saw no reason for such a narrow construction of the words “suits and matters relating to the succession to the property,” as in their opinion, distribution of the property naturally came within the meaning of those words, and valuation of the estate was necessarily incidental to the ascertainment of the shares for the purpose of distribution.

It has been suggested that a case might fall under both headings, thus offering a litigant dissatisfied with the decision of a Native Court a choice of court to which to appeal. This argument has been rejected, and as their Lordships think rightly rejected, by the West African Court of Appeal. See, e.g. *Archie Kwow v. Ohene Essien Eku II* ([1934] 2 W.A.C.A. 180), where Kingdon C.J., said, when dealing with the question whether a cause was a suit relating to the ownership, possession or occupation of land, “in cases such as this the real issue between the parties must be the test and not merely the wording of the suit.” See also *Adu v. Dapaa* (not reported) decided in the West African Court of Appeal on March 2, 1950. In that case Smith J. said that it has long been the policy of appeal courts hearing appeals from Native Courts to look beyond the wording of the claim as brought and to decide the real matter in issue by a study of the whole record of the case. The inconvenience of allowing a choice of courts is manifest, since two Native Courts might simultaneously be exercising jurisdiction in relation to the same issue, one at the suit of a member of the family who relied on the location of the land, the other at the suit of another member of the family who relied on the fact that the deceased had a fixed place of abode within the jurisdiction of that other court.

The decision of this Board in *George Hagan v. Effuah Adum* ([1939] 5 W.A.C.A. 35) seems at first sight conclusive in favour of the appellants, but Mr. Scarman, for the respondent, submitted (1) that an alteration in the law had been effected by the 1945 Ordinance so that the decision in the case cited is not applicable; (2) that whereas in the present case only the quantum of the share is a live issue, in the case cited the right to succeed as well as the quantum of the share was in issue and that this established a vital distinction between the present case and the case cited.

To appreciate the first point their Lordships must refer to certain provisions of the 1945 Ordinance. Section 13, so far as material, provides as follows:

“ (1) Every Native Court shall have full jurisdiction and power to the extent set forth in the order of the Governor in Council establishing it and subject to the provisions of this Ordinance, in all civil and criminal causes in which the parties are persons subject to the jurisdiction of Native Courts.

(2) For the purpose of subsection (1) the Governor in Council may by

the order made under section 3 grade the Native Court thereby constituted and there shall be four grades of Native Courts, namely, grades A, B, C and D, and the jurisdiction and power of any Native Courts of these grades shall not exceed those prescribed in the First and Second Schedules hereto in respect of each such grade."

Section 14 draws a distinction between land causes and civil causes other than land causes, and provides that land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject-matter of the dispute is situated, whereas in other civil causes jurisdiction depends on the area in which the defendant was at the time the cause of action arose.

Part 8 of the Ordinance deals with appeals. Section 46 deals with appeals from a Native Court grade B or grade C or grade D, and provides that in a case such as the present, where there is no Native Court of Appeal constituted under section 3 of the Ordinance, the appeal is to the Magistrate's Court or in the case of a land cause, to the Land Court.

Section 2 (the interpretation section) provides that "Land Cause" and "Land Matter" means a cause or matter relating to the ownership, occupation, or possession of land, and that "Land Court" means a Land Court constituted and formed under the Courts Ordinance. Section 24 (2) of the Courts Ordinance provides for the establishment of a Land Court of the Lands Division of the Supreme Court.

Mr. Scarman pointed out that whereas in the earlier Ordinance there had been an express reference to succession, neither the jurisdiction section of the 1945 Ordinance nor the appeals section of that Ordinance contained any express reference to succession, and he submitted that if on the face of the pleadings it appeared that the matter did affect the ownership, possession or occupation of land, the matter was a land cause or matter within the meaning of the Ordinance.

Their Lordships think, however, that the distinction between the two Ordinances is in this respect apparent not real, for section 13 (2) brings in the Schedules to the Ordinance, and the second Schedule makes it clear that the jurisdiction of a Native Court may depend on the category into which a particular suit falls. The categories set forth in the Schedule are substantially the same as those appearing in paragraphs (a) to (f) of section 43 (2) of the Ordinance of 1928. It is plain, therefore, that the jurisdiction of a Native Court to deal with a matter depends on whether the cause is a suit relating to the ownership, possession or occupation of land or a suit relating to the succession to property of a deceased native. In their Lordships' opinion, therefore, the decisions under the earlier Ordinance still apply. They decided that a suit must fall into one category or the other and that in order to determine into which category a particular suit falls the court must apply the test of what is the real issue between the parties and not look only at the wording of the plaint. Accordingly, their Lordships hold that a cause is not a land cause within the meaning of section 46 of the 1945 Ordinance if the substance of the issue between the parties was succession to the property of a deceased native.

Mr. Scarman submitted that the substance of the present case is not succession since, as he said, the right of both parties to succeed as distinct from the quantum of the share had been determined in previous litigation. So far as the appellants were concerned, he said that that issue had been determined in their favour by the Supreme Court (East Judicial division) given on October 30, 1945, in the case of *P. R. Vanderpuye v. Botchway*, a

copy of which decision forms exhibit " A " in the present suit. So far as the respondent was concerned, he said that the issue had been determined in favour of Mr. Botchway and the respondent by decision of the Supreme Court given on June 28, 1935, in the case of *Ashong v. Solomon* as interpreted by a later decision of the Supreme Court in the case of *Botchway v. Solomon* given on December 7, 1935, copies of such decisions being exhibits " C " and " D " in this suit.

The parties do not appear to have treated these decisions as binding them on the question of entitlement. Before the Native Court the appellants appear to have claimed the right to the whole of the estate, and Mr. Botchway appears to have argued his right to succeed through his mother. It seems doubtful, therefore, whether the facts afford the necessary support for Mr. Scarman's argument. Their Lordships, however, prefer to base their decision that the suit was not a land cause, and that the Land Court had therefore no jurisdiction to entertain the appeal from the Native Court, on the wider ground that a suit for the determination of the share of the appellants and for the distribution of the estate is a succession case and not a case relating to the ownership, possession or occupation of land. Such decision is in accordance with what their Lordships consider to be the *ratio decidendi* of the Board in *George Hagen v. Effuah Adum* ([1939] 5 W.A.C.A.) and for the reasons already stated their Lordships think that that case is still relevant despite the enactment of the 1945 Ordinance.

The West African Court of Appeal thought that the present case was more analogous to *Archie Kwow v. Ohene Essien Eku II* ([1934] 2 W.A.C.A.) than to the case last cited. The Archie Kwow case is not fully reported, but it appears that the substance of the matter was a claim to a share of rents and the question was whether this was a land cause or a money cause action. There is nothing to indicate that the plaintiff's claim was based on any right of succession, and their Lordships are unable to derive any assistance from the case except so far as it decides that the court must look to the substance of the dispute between the parties in determining whether the cause is a land cause. For the reasons already stated, their Lordships are of opinion that the substance of the present dispute is a succession case.

Mr. Scarman asked their Lordships, in the event of their holding that the Land Court had no jurisdiction, to make a declaration to that effect and to send the matter back to the West African Court of Appeal. Their Lordships see no reason for making such an order. The necessary consequence of the lack of jurisdiction of the Land Court is that the order of the Native Court stands. Alternatively, he asked that there be inserted in the Order in Council some such words as " without prejudice to the right, if any, of the respondent to apply to the appropriate court in the Gold Coast for leave to appeal out of time from the order of the Native Court." Their Lordships see no reason for the insertion of any such words. If such right exists nothing in the order which their Lordships propose will prevent the making of the application to the proper court. Their Lordships desire to say nothing which could in any way fetter the discretion of that court in dealing with such application if made.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the orders of the West African Court of Appeal and of the Land Court be set aside, and the order of the Native Court be restored. The respondent must pay the costs of the appeals to the Land Court, the West African Court of Appeal and to this Board.

Solicitors: *A. L. Bryden & Williams: Sydney Redfern & Co.*

NANA OWUDU ASEKU BREMPONG III

AND ANOTHER APPELLANTS

AND

NANA DARKU FREMPONG II RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(Note: not reported)

1956 July 2

Lords Morton of Henryton, Radcliffe,
Somervell of Harrow and Mr. L. M. D. de Silva

Boundary dispute—Declaration of title to land—No reference to plan—Onus of proof—Plaintiff must succeed on strength of his case—Traditional history.

The appellants' story was that they were original settlers and the respondent's predecessors were migrants from Ashanti who had got whatever land they owned at Achiase through a grant from a former chief of the Aperade Stool. The respondent on the other hand maintained that his Stool also descended from original settlers, entitled to the Achiase lands of their own right. The Assessor who sat with the Judge at the trial accepted the respondent's tradition in preference to that of the appellants'. The judge did not express any disagreement with him on this point.

Held: (i) whilst there was no ground for taking a different view of the traditional evidence, there was too vague a relation between the ancestral stories and the proof of ownership of the area which was the subject of the claim to make it of any great importance which story was accepted and which was rejected.

(ii) The judgment ought to have been given according to the established principle in such cases, that a plaintiff must succeed on the strength of the evidence that supports his own title, not on any weakness in the evidence that might prove title in his defendant.

LORD RADCLIFFE. This appeal concerns a boundary dispute between plaintiffs who were claiming a declaration of title in respect of an area of land in the Gold Coast Colony on behalf of their two Stools, Amanfupong and Aperade, and a defendant who represented the Achiase Stool. The land, according to the plaintiffs, was the joint property of their Stools: according to the defendant it belonged to his Stool and had been his stool land from time immemorial.

At the trial of the action, which took place in the Supreme Court of the Gold Coast, Lands Division, the plaintiffs, the present appellants, were granted a declaration of title in the terms asked for by their Statement of Claim. The order in question was made on the 11th August, 1951. It is to be noted that neither in the Statement of Claim nor in the Order of the Court is there a reference to any plan by means of which it would be possible to identify the boundaries of the area in respect of which the declaration of title was thus granted. The description used is no more than a verbal description of the land as

“ that piece or parcel of land commonly known and called Amanfupong and Aperade land situate in the Western Akim District and bounded on the North by lands belonging to the Stools of Eduasa and Ewisa respectively, on the South by lands belonging to the Stools of Wurakessi, Jambra and Asantem respectively, on the East by lands belonging to the plaintiffs' Stool and Surassi Stool respectively and on the West by Okenkensu Stream and Wurakessi Stool land.”

There is nothing in the evidence which makes it possible to say that these are

adequate descriptions of boundaries and in fact an Order made in such form would do little to settle the title to any particular disputed area.

However that may be, the Order of the Supreme Court was reversed by judgment of the West African Court of Appeal dated 11th January, 1952 and the appellants' action stands dismissed. Before this Board they argued either that the Order of the trial Judge should be restored or that the case should be sent back to the Lands Division of the Supreme Court for a new trial.

In their Lordships' opinion there is no ground for interfering with the Order of the Court of Appeal and the appeal ought therefore to be dismissed. They will refer to so much only of the evidence given at the trial as is necessary to explain why this must be so. There is no point of law which bears upon the issue between the parties and the whole question is whether, upon a proper assessment of the evidence, the appellants had or had not made out their title to the "area" claimed. The trial Judge thought that they had, and then he founded himself upon a method of assessment which is quite plainly unsatisfactory. The Court of Appeal thought that they had not, and their Lordships do not differ from the Court of Appeal.

Both sides called a number of witnesses at the hearing. The bulk of their evidence can be grouped under three separate heads—tradition, acts of occupation and recognition of boundaries.

As is not unusual in these cases, there was a conflict between the traditions of the contending Stools as to how and in what right they came upon the lands which they now occupy. The appellants' story was that they were original settlers and the respondent's predecessors were migrants from Ashanti who had got whatever land they did own at Achiase through a grant from a former Chief of the Aperade Stool. The respondent on the other hand maintained that his Stool too descended from original settlers, entitled to the Achiase lands of their own right: the appellants, they said, had suffered conquest and dispossession at the time of the Denkyira wars some hundreds of years ago, at which time the Achiase men, having taken the winning side, had been installed by the Denkyiras as overlords of the surrounding land. The Assessor who sat with the Judge at the trial accepted the respondent's tradition in preference to that of the appellants'. The Judge did not express any disagreement with him on this point. Their Lordships see no ground for taking a different view: but in their opinion there is too vague a relation between these ancestral stories and the proof of ownership of the area which is the subject of Claim to make it of any great importance which story was accepted and which rejected in this case.

The effect of the rest of the evidence can be sufficiently stated in this way. The appellants called representatives of several Stools whose lands were said to border on the disputed area and they deposed that they had boundaries with the appellants and not with the respondent. But except for the testimony given for the Eduasa Stool no definition was afforded as to where these boundaries ran and this branch of the evidence therefore did not provide the useful proof that it might otherwise have done. The respondent too called representatives of two neighbouring Stools on the subject of contiguous boundaries, but it would nevertheless be very difficult to make out, at any rate from the printed record, where their own Stool lands were said to be and where it was that they believed that their boundaries coincided with those of the respondent.

There was evidence on both sides as to acts of occupation. But, apart from one or two disputed places, the evidence on this part of the case could

hardly be regarded as even conflicting. Rather it seemed to show that at different points in the area persons had started cultivation or founded settlements who in some cases looked to the appellants, in other cases to the respondent, as Stool owners of the bits of land which they occupied. Conceivably it was not impossible, but undoubtedly it would have been very difficult, for a trial Judge to extract from such evidence any pattern of asserted rights that would justify attributing a whole defined area to the Stool lands of one party or the other.

In any event the case called for a fairly close analysis of the considerable bulk of evidence and that weighing of the respective elements which the Judge who conducts the trial is specially qualified to perform. Unfortunately that is not the treatment which it received. The Assessor, as has been said, not only accepted the respondent's tradition as to his Stool's origin but seems also to have regarded the appellants as having lost all title to their lands at the time of the Denkyira conquest: and, on this basis, he regarded the appellants as having "no claim whatsoever" against the respondent. This is a very summary assessment of the effect of the evidence as a whole: and the learned Judge, while not disagreeing with the Assessor's view as to the traditional history, was probably right in saying that he was not prepared to decide the case on the strength of any traditional history. But he himself chose instead a determining test that is even more vulnerable. His decision seems to have been based on nothing more convincing than the fact that the appellants had twice before been litigants in respect of the disputed area, or some area related to it, while the respondent's Stool had not moved to assert their title in the Courts. In effect his *ratio decidendi* is contained in the one sentence of his judgment: "By reason of the two cases filed by the plaintiffs in respect of this land, and having regard to the fact that the defendants have never sought a declaration of title, I am satisfied that of the two parties it is the plaintiffs only who can be said to have acted timeously in asserting their rights, this being so the plaintiffs are entitled to the declaration sought and I so order."

To decide the case on this ground is to turn one item of evidence, relevant though not necessarily significant, into the whole determining issue of the case.

When the appeal was taken to the West African Court of Appeal the Court rightly rejected the reasoning of the trial Judge and held that judgment ought to have been given according to the established principle in such cases, that a plaintiff must succeed on the strength of the evidence that supports his own title not on any weakness in the evidence that might prove title in his defendant. Applying that test they found that the appellants had "signally failed" to discharge the onus which was upon them and accordingly reversed the judgment that had granted declaration of title.

It can be said that this again presents itself as a somewhat summary dismissal of a volume of evidence that certainly went some way towards supporting the appellants' claim: and it perhaps overstates the weaknesses in their evidence, if allowance is made for the fact that in cases of this kind standards of proof have to be adapted, it would seem, to the unavoidable vagueness of much of the subject matter. But, even so, their Lordships, who had the advantage of an exhaustive analysis of the evidence from counsel representing the respective parties, do not come to any different conclusion from that reached by the Court of Appeal.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs.

TECHIMANHENE APPELLANT
AND
WENCHIHENE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1956 July 9

Lords Morton of Henryton, Radcliffe
Somervell of Harrow and Mr. L. M. D. de Silva

Boundary—Executive decision—Right of appeal—Section 3 (3) of the Boundary Land, Tribute and Fishery Dispute (Executive Decisions Validation) Ordinance, c. 120.

LORD MORTON OF HENRYTON. In this case the respondent (plaintiff) represents the Stool of Wenchi and the appellant (defendant) represents the Stool of Techiman. The first question which arises is whether or not the judgment delivered by Quashie-Idun, J., in the Supreme Court of the Gold Coast, Ashanti, Land Court, did or did not come within the provisions of section 3 (3) of the Boundary, Land, Tribute and Fishery Dispute (Executive Decisions Validation) Ordinance, c. 120. Section 3 of the Ordinance is as follows:

“ 3.—(1) Any executive decision in a dispute or matter relating to the ownership or boundaries of any land or to tribute or fishery rights in Ashanti given, confirmed, or approved by the Chief Commissioners prior to the commencement of this Ordinance, and officially recorded in a Boundary Book is hereby validated and invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved.

(2) If in any case such confirmation or approval was given to a decision subject to any specified variations or modifications, such decision is hereby validated and invested with full and definite legal force and effect as so varied or modified.

(3) If in any case relating to the boundary of any land any doubt or question shall arise as to the correct interpretation or application of any such executive decision as aforesaid, the Court (which expression does not include a Native Court) may cause the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable. Where a boundary is, either as of first instance or on appeal, so fixed by the Supreme Court, no appeal shall lie from the Court's judgment with respect to such fixing.”

In order to determine the question already stated it is necessary to consider in some detail the course of the action and the pleadings of both parties. The proceedings began in the Asantehene's Court “ A,” and it will be convenient to refer to the respondent as the plaintiff and to the appellant as the defendant. The plaintiff's claim, as set out in his Summons, was “ for declaration of title to that portion of land lying and situate West of a straight line drawn from Wenchi Bonso (The “ Wenchi Hole ”) southwards to meet the river Tano, such that it crosses Road A.38 at a point 14.3 miles from the Techiman cross-roads.” The Statement of Claim was as follows:

“ 1. The Plaintiff herein is suing for and on behalf of and with the

authority of the Stool of Wenchi and the Defendant herein is sued as the representative of the Stool of Techiman.

2. By an Executive Decision dated the 5th February, 1899, and approved by Sir Donald Stewart on the 19th December, 1904, and further approved by Sir F. C. Fuller Chief Commissioner of Ashanti on the 12th August, 1905, and recorded in Volume 1 of the Boundary Book at page 2 the boundary line between the lands of the Plaintiff Stool and the Defendant Stool were therein defined as being:

‘ On the East commencing at the junction of the new boundary Wanki and Wam with the Tano River to a point where a straight line drawn from the funnel shaped hole where the Wankis are stated to have come from to its junction with the Tano River from this point follows the straight line to the Hole and from there to the head of the River Ayasu. The Ayasu River to its junction with the Subin River. This boundary to leave the hill on which the above hole is situated on the Wenchi side of the boundary.’

3. The said decision was validated by the provisions of the Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance Chapter 120.

4. The Defendant Stool has committed acts of trespass on the Plaintiff Stool’s land by its subjects farming thereon.

5. The Plaintiff claims for and on behalf of the Stool of Wenchi to establish title to the land situate and being to the West of the boundary line as described in paragraph 2 hereof and for the said boundary to be fixed in accordance with the provisions of Section 3 (3) of the said Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance Chapter 120.’

It should be added that the Executive Decision set out in paragraph 2 included a marginal note “ in a S.S.E. direction on a compass line of 195 degrees.” This note would appear to relate to the “ straight line drawn from the funnel shaped hole.”

It will be observed that by paragraph 5 the plaintiff added a claim, which did not appear in the Summons, for the boundary between the respective Stools of the plaintiff and the defendant to be fixed in accordance with the provisions of the section already set out.

The defence, as amended, was as follows:

“ 1. Defendant pleads to the Jurisdiction of this Honourable Court to entertain this Suit it being one relating to the ownership, possession or occupation of land held under Native tenure.

2. Defendant denies paragraphs 2 and 3 of the Statement of Claim herein and avers that in respect to the land subject of dispute herein there is in existence a prior Executive Decision given in his favour which will be produced at the trial.

3. Defendant denies the trespass alleged in paragraph 4 of the Statement of Claim filed herein.

4. Defendant avers that plaintiff is not entitled to the Relief he seeks from this Honourable Court, *i.e.* a declaration of title and the fixing of boundary as indicated in paragraph 5 of the Statement of Claim herein.

5. The defendant denies paragraphs 2 and 3 of the plaintiff’s Statement of Claim herein and avers that the boundary stated therein was not finally demarcated and is inconclusive.

6. That the defendant according to the findings of Mr. Hull Travelling Commissioner to the Colonial Secretary made in February 1897, Wankyi with its villages was adjudged to be the subjects of Tekyiman and the lands attached to the Stool of Tekyiman occupied by the defendant."

Before Quashie-Idun, J., evidence was called on behalf of both parties. The plaintiff's principal witness was a licensed surveyor, Mr. Anoff. He produced a plan marked " B " which he stated he had prepared in order to show the boundary between Wenchi and Techiman and stated " The boundary runs from the source of the Ayasu stream southwardly on a straight line until it reaches the river Tano. Northwardly the boundary follows the Ayasu stream up to the confluence of the Subin River. I took into account the note on the copy of the Executive Decision as to the direction of the compass. The plan is the correct interpretation of the Executive Decision. Owing to the movement of the earth there is a slight variation eastwardly in magnetic bearings. I took into account the magnetic variation since 1895 up to the time of the survey. The calculations were checked by the provincial surveyor, the funnel shaped hole is shown on the plan. The respective lands are marked on the plan." The cross-examination by Counsel for the defendant was recorded by the learned Judge as follows: " Note. Witness is shown a document and is asked whether the description stated therein is in accordance with the plan. Witness answers that the descriptions are in accordance with the plan."

The defendant also called a licensed surveyor, Mr. Simpson. He produced another plan, Exhibit " C," but his evidence in no way conflicted with the evidence given on behalf of the plaintiff and he made no criticisms of the plan " B." By his judgment, the learned Judge, after referring to the statement of claim and to the Executive Decision of 1899, continued as follows:

" It appears from the evidence that after the demarcation of the boundary, a dispute arose between the respective chiefs and the matter was drastically dealt with by the Authorities and the same recorded in the Boundary Book, a copy of which is Exhibit 3 tendered by the Defendant. The Plaintiff's claim is to have the boundary line as demarcated in the Executive Decision fixed by the Court in accordance with the provisions of Cap. 120.

The Plaintiff has caused a plan to be made which has been accepted in evidence as Exhibit ' B.' The Surveyor who made the plan has given evidence before me and I am satisfied that the plan conforms with the Executive Decision relied upon by the Plaintiff. It is contended on behalf of the Defendant that the Executive Decision is not conclusive as a quarrel arose over the boundary. According to Exhibit 3, to which I have already referred, it appears that the Wenchis while cutting the boundary by virtue of the Executive Decision went off the line of demarcation and a serious riot would have taken place. This in my view can neither nullify or modify the legal effect of the Executive Decision. A licensed Surveyor who was called as a witness by the Defendant has testified before me that the particulars of the boundary in Exhibit ' 1 ' which is a copy of the Executive Decision and signed by Sir John Maxwell, Chief Commissioner of Ashanti, agree with the Topographical Sheet on which the Plaintiff's Surveyor has shown the boundary between the parties.

I am satisfied that the boundary demarcated in 1899 and validated in

1904 and 1905 has not been altered, and that the Plaintiff has proved his case and is therefore entitled to judgment.

I order the boundary between the parties to be fixed and to conform with the boundary as indicated in the Plan Exhibit ' B ' as follows:

From the source of the Ayasu Stream southwestly on to a straight line until it reaches the River Tano. Northeastly the boundary follows the Ayasu Stream up to the confluence of the Subin River."

The defendant lodged a Notice of Appeal in which the grounds of appeal were as follows:

" (1) Because the judgment is against the weight of the evidence before the Court.

(2) Because the boundary relied upon by the plaintiff in his statement of claim before the Court is not a final one and consequently inconclusive.

(3) Because the Court wrongly construed the effect of executive decision and other evidence tendered at the trial which clearly prove that the executive decision relied upon by plaintiff-respondent is not final nor conclusive.

(4) Because the Court wrongly construed the effect of the plans tendered in evidence at the trial."

Later he added four further grounds of appeal which were as follows:

" 1. Because the Plans ' B ' and ' C ' tendered in evidence do not conform with the Boundary as laid down in Exhibits ' A ' and ' 1,' and the Court was wrong in deciding that they did.

2. Because the Plans Exhibits ' B ' and ' C ' were wrongly admitted in evidence, seeing that they were originally ordered by a Court which had no jurisdiction in the matter.

3. Because the Plan ' B ' on which the learned trial Judge placed great reliance was one-sided.

4. Because the trial was unsatisfactory.

5. Because the Plan Exhibit ' B ' does not show the true state of affairs, as the Surveyor on the ground did not clear and survey the whole line from the Funnel Shape Hole to the Tano River."

In the Court of Appeal Counsel for the plaintiff took the preliminary objection that the decision appealed against was given under section 3 (3) of cap. 120, and no appeal lay therefrom. This submission was upheld by the Court of Appeal whose Judgment was as follows:

" This appears to us to be an attempt to call in question the boundary fixed by the Court below under Section 3 (3) of Chapter 120—which expressly provides that there shall be no appeal from any such decision. If on the other hand the appellant's complaint is that no Judgment for a declaration of title has been given in favour of the plaintiff/respondent, as to which we express no opinion, this affords him no ground of appeal."

Their Lordships now return to the sub-section relied upon by the plaintiff. The questions which arise upon it are as follows:

(1) Is the present case one which relates to the boundary of any land?

(2) Has any doubt or question arisen as to the correct interpretation or application of the Executive Decision of 1899?

(3) Has the Court caused the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable?

If these questions are all answered in the affirmative, it is clear that the decision of the Court of Appeal was correct.

It is obvious, from the history of the case, as already set out, that the case relates to the boundary of land. It is equally obvious, their Lordships think, that the claim of the plaintiff for the boundary to be fixed, in reliance upon the Executive Decision of 5th February, 1899, raised a question as to the correct interpretation of the language of that decision and as to the practical application of that decision to the existing physical features of the land. The learned trial Judge had to consider whether Mr. Anoff, in preparing the plan "B," had correctly interpreted and applied the Executive Decision and he held that "the plan conforms with the Executive Decision".

So far the case comes exactly within the terms of section 3 (3) of the Ordinance Cap. 120, and there is no doubt that the learned Judge "caused the boundary concerned to be fixed." It was contended, however, by Mr. Quass for the defendant that the boundary as so fixed is clearly at variance with the Executive Decision. He pointed out that the decision provides that the "straight line" therein mentioned is to go from the Tano River to the Wenchi Hole, and "from there to the head of the River Ayasu" and thence the boundary is the River Ayasu to its junction with the Subin River; whereas the boundary as fixed by the learned Judge goes straight from the Tano River to the source of the Ayasu River, missing out the Wenchi Hole. Thereby, he said, the Judge placed a long strip of land, some hundreds of yards wide, on the wrong side of the boundary, to the benefit of the plaintiff. Mr. Quass went on to submit that it was outside the powers of the Supreme Court to fix a boundary at variance with the Executive Decision which the Court purported to be applying, and if the Court did so fix a boundary an appeal was not shut out by section 3 (3) of the Ordinance.

If it were shown that the Court had not addressed its mind to the issues raised and covered by the sub-section, it may well be that its decision could be set aside on appeal or by other procedure. In the present case, however, their Lordships see no reason to believe that the learned Judge did not address his mind to the issues and fix the boundary "to the best of his ability."

If the point now taken had been taken before the learned Judge, and he had deliberately disregarded it for no good reason, the defendant would have been in a stronger position. But the point was not taken. The Judge had before him the evidence of Mr. Anoff already quoted, and the error which is now said to be so obvious was not put to that witness in cross-examination, nor was it mentioned by the licensed surveyor who was called by counsel for the defendant. Nor does it appear to have been mentioned by counsel for the defendant in his closing speech. Further, the alleged error was not mentioned in the original Notice of Appeal, although when additional grounds of appeal were delivered nearly two years later, additional ground 1, would no doubt cover the point.

These facts show that the error in plan "B," if indeed there was an error, was not apparent to anyone in Court, and the existence of the error (if any) affords no evidence that the learned Judge did not fix the boundary to the best of his ability, or that he did not follow, to the best of his ability, the principle mentioned in section 3 (3) of the Ordinance.

It follows that in their Lordships' opinion any appeal in the present case was precluded by section 3 (3) of the Ordinance Cap. 120. The question whether Mr. Anoff in preparing Plan "B," and the learned Judge in accepting it, did or did not fall into error does not arise for decision, but their Lordships think it right to add that they are not satisfied that the alleged error exists. It is true that the first sentence of the Executive Decision seems to lay it down that the boundary is to run to the Wenchi Hole and thence to the source of the River Ayasu; but the last sentence throws the matter into considerable doubt. If the boundary is to "leave the hill on which the above hole is situated on the Wenchi side of the boundary," it is difficult to see how the boundary can run through the hole itself. It may well be that Mr. Anoff felt he had to choose between two directions which could not be reconciled, and chose to carry out the very definite direction contained in the last sentence.

Their Lordships entirely agree with the judgment of the Court of Appeal. They will humbly advise Her Majesty that this appeal should be dismissed with costs.

KWEKU MINTA EBU APPELLANT
AND
KWAMIN ANTRADU ABABIO RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1957] 2 W.A.L.R. 55

1956 July 11

Lords Oaksey, Radcliffe,
Somervell of Harrow and Mr. L. M. D. de Silva

Practice—Point not taken in lower courts—Traditional evidence in actions for declaration—Concurrent findings of fact.

The following points were urged on appeal:

- (a) that the respondent could not succeed without a finding in his favour on the traditional evidence.
- (b) that the evidence led for the respondent established possession only of isolated portions of land and that such evidence was insufficient to establish title to the whole of the tract of land in dispute.

Held: (i) (as regards (a)): In his statement of claim the respondent set out not only, what according to him, were the historical facts relating to the original occupancy of the land but also alleged that "from time immemorial possessory rights have been exercised" by the respondent and his predecessors. The evidence led by him as to acts of possession was accepted. Traditional evidence has a part to play in actions for declaration of title but there are cases in which a party can succeed even if he fails to obtain a finding in his favour on the traditional evidence.

(ii) as to (b): The point was not raised by the appellant in the courts below and it was not discussed in the judgments of the lower courts. There was nothing in the record and their Lordships were not satisfied that the point arose at the trial as a point with regard to which there could have been any doubt on the facts established. Even if it had been shown to be such a point their Lordships would not normally permit it to be taken for the first time before them.

Held also: there is nothing in the case to justify a departure from the general rule with regard to concurrent findings of fact.

MR. L. M. D. DE SILVA. This is an appeal by the defendant against a judgment of the West African Court of Appeal of the 5th January, 1952,

which dismissed an appeal from a judgment of the Supreme Court of the Gold Coast which granted to the plaintiff, the present respondent, a declaration of title to a tract of land and £100 damages for trespass. The parties are litigating on behalf of their respective Stools, the plaintiff-respondent being the Ohene (Divisional Chief) of Assin Bisiasi and the defendant-appellant being the Ohene of Koshea. They are both substituted parties the original parties having been the Ohenes before them. The land in dispute is shown upon a plan, Exhibit D, and is approximately 7 miles from North to South and of width varying from 4 to 2 miles from East to West.

On this appeal the appellant does not seek to have the award of damages set aside. It is sufficient for the purposes of this appeal to say that the land to which it relates is not within the area depicted in Exhibit D, and is not now claimed by the appellant.

The respondent alleges that the area in dispute is part of a larger area called "Swedru" land which is attached to his Stool and extends beyond the disputed area towards the west. The appellant alleges that the area is part of a larger area of Koshea land extending towards the north-east of the disputed area.

The action was instituted as long ago as the 12th June, 1930, in the Tribunal of the Provincial Council of Chiefs and after certain abortive proceedings, which their Lordships do not find necessary to discuss, was still pending when, by virtue of the Native Courts (Colony) Ordinance, 1944, the Lands Division of the Supreme Court of the Gold Coast became seised of it.

Pursuant to an order of the Supreme Court pleadings were delivered by the parties. In them each party claimed original title by occupancy and alleged that the other party was an immigrant who had been permitted to occupy land by the party possessing title. Each party relied upon acts of possession and alleged that a named number of villages on the land belonged to it. The respondent alleged that during the nineteen years prior to the filing by him of his Statement of Claim in the Supreme Court the appellant had placed a number of tenants on portions of the land in dispute. The respondent also alleged that his Stool had granted many concessions on the land. The appellant alleged that his Stool had made extensive cocoa farms on the land thereby suggesting that the right to cultivate the land belonged to, and had been exercised, by it.

The case went to trial before a judge and an assessor. Traditional evidence was led by each side to establish original occupancy and title. Upon this evidence the assessor gave an opinion which is not clear but which on the whole appears to decide that the respondent had failed to establish original occupancy as he had failed to lead sufficient evidence that the appellant had migrated to the land.

The learned trial judge was not prepared to arrive at a finding on the conflicting traditional evidence relating to the history of the land on the limited material furnished by the evidence in the case. He disagreed with the assessor upon the degree of importance to be attached to a point regarding migration which appears to have weighed with the latter. In the result there is no finding in favour of the appellant on the traditional evidence although the learned trial judge thought that the respondent's evidence was "as reasonable as that" of the appellant.

The learned trial judge went on to consider the evidence of occupation given by each side. He was impressed by the documentary evidence furnished by the Exhibit F which established that so long ago as 1907 the respondent's predecessor had granted a concession on a part of the land in

dispute. He thought that the evidence of the respondent and his witnesses was reliable and accepted it. He was of the opinion that the evidence of the appellant and his witnesses was unsatisfactory. The learned judge held that on the evidence of occupation the respondent was entitled to a declaration of title to the disputed area.

The Court of Appeal affirmed the findings on the facts of the learned trial judge and the conclusion that the respondent was entitled to the declaration claimed by him.

There is nothing in this case to justify a departure from the general rule with regard to concurrent findings of fact and counsel for the appellant could not, and did not, press their Lordships to review them. He argued however that upon those findings the respondent's case could not succeed.

It was argued that the respondent could not succeed without a finding in his favour on the traditional evidence. In his Statement of Claim the respondent set out not only what, according to him, were the historical facts relating to the original occupancy of the land but also alleged that "from time immemorial possessory rights have been exercised" by the respondent and his predecessors. The evidence led by him as to acts of possession has been accepted. Traditional evidence has a part to play in actions for declaration of title but there are cases in which a party can succeed even if he fails to obtain a finding in his favour on the traditional evidence.

It was next argued for the appellant that the evidence led for the respondent established possession only of isolated portions of land and that such evidence was insufficient to establish title to the whole of the tract in dispute. In support of this argument their Lordships were referred to the judgment of the Board in *Omanhene Kobina Foli v. Chief Obeng Akesse* [1934] A.C. 340 at p. 346.

In the course of the judgment Lord Thankerton said:

"In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area. No such conditions exist in the present case. Alternatively, the occupation of a portion may be reasonably attributable to a right of ownership in a larger area, as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole field."

The question whether the possession of the portions of the disputed area to which the respondent's evidence related can be reasonably attributed to a right to the whole area in dispute is essentially a question, if it arises, for consideration by the Courts in Africa with knowledge of local conditions. It was not raised by the appellant in those Courts and it is not discussed in the judgments referred to above. There is nothing in the record and nothing has been urged before their Lordships, which satisfies them that the point now taken arose at the trial as a point with regard to which there could have been any doubt on the facts established. Even if it had been shown to be such a point their Lordships would not normally permit it to be taken for the first time before them.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

PATIENCE KASUMU AND OTHERS APPELLANTS
AND
GBADAMOSI BABA-EGBE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1956] 3 W.L.R. 575; [1956] A.C. 539

1956 July 17

Lords Radcliffe, Cohen
and Somervell of Harrow

*Moneylender—Non compliance with statutory requirements—Unenforceable transaction—Loan—Security by way of mortgage of property—Borrower entitled to recover possession of property without repaying outstanding balance of loan—“Not be entitled to enforce any claim in respect of any transaction”—Construction Moneylenders Ordinance (Consolidated Ordinances of Nigeria, c. 136), s. 19.
West Africa—Nigeria.*

The respondent mortgaged certain leasehold land to a licensed moneylender (of whose estate the appellants were the administrators) as security for a loan. The moneylender had admittedly kept no book recording the transaction as required by section 19 of the Moneylenders Ordinance of Nigeria and the transaction was therefore unenforceable under that section. The respondent having instituted proceedings claiming redemption of the property and recovery of possession:

Held, that the principle of *Lodge v. National Union Investment Co. Ltd.* [1907] 1 Ch. 300; 23 T.L.R. 187 that a borrower, as a condition of being granted relief in the form of delivery up of securities (where the transaction was illegal), must repay such of the money borrowed as was still outstanding, was not applicable in the case of a transaction declared to be unenforceable by section 19 of the Moneylenders Ordinance. The Ordinance, in enacting that no loan which failed to satisfy the statutory requirements was to be enforced, meant that no court of law was to recognise the lender as having a right at law to get his money back. If the court were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such a transaction which was in direct conflict with the policy of the Ordinance. Accordingly, the respondent was entitled to possession, cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the property without being obliged to repay the outstanding balance of the loan.

Cohen v. Lester (J.) Ltd. [1939] 1 K.B. 504; [1938] 4 All E.R. 188 and *Champman v. Michaelson* [1908] 2 Ch. 612; 24 T.L.R. 795; *affd.* [1909] 1 Ch. 238; 25 T.L.R. 101 (C.A.) considered.

The words of deprivation in section 19 (4), “not be entitled to enforce any claim in respect of any transaction” were very widely drawn and were not to be confined to the assertion of rights by means of or in the course of legal proceedings. The performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged or the retention or taking possession of such property in assertion of the claim to repayment, was also precluded.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 9 of 1955) from a judgment of the West African Court of Appeal (February 22, 1954) allowing an appeal from a judgment of the Supreme Court of Nigeria (February 26, 1952) in consolidated suits.

The following facts are taken from the judgment of the Judicial Committee: The respondent held a building lease of some land known as No. 55, Great Bridge Street, Lagos, and on August 22, 1945, he executed a deed of mortgage in favour of Kasumu, a licensed moneylender, by which deed he assigned the leasehold premises as security for the sum of £2,000

acknowledged to have been paid to the borrower at the time of the mortgage, with interest at the rate of 15 per cent. until repayment. Kasumu went into possession of the premises in September, 1946, and thereafter possession or receipt of rents and profits was retained by him and after his death by the appellants, the administrators of his estate.

On February 14, 1950, the respondent instituted proceedings in the Supreme Court of Nigeria, claiming redemption of the premises, or alternatively, a declaration that the mortgage was void: an account of rents and profits received; and recovery of possession. He was met by a cross-action on the part of the appellants, the purpose of which was to set up a claim that there had been an agreement made between Kasumu and the respondent within a few months of the making of the mortgage, by virtue of which the respondent had undertaken to convey his equity of redemption of Kasumu, and to ask the court for an order that this agreement should be specifically performed. The two actions were consolidated and now formed one set of proceedings.

The Supreme Court of Nigeria (Rhodes J.) ordered that the respondent was to exercise his equity of redemption and recover the premises after an account had been taken to determine what was actually owing by him on the mortgage and paid off to the estate of the moneylender. After an account had been taken Gregg J. gave judgment for the appellants for £1,541 2s. 6d. and interest.

On appeal, the West African Court of Appeal (Sutton P., Verity C.J. (Nigeria) and Coussey J.A.) in a judgment delivered by Coussey J.A., substituted for the judges' orders a declaration that the mortgage transaction, not having been recorded in a book as required by section 19 of the Moneylenders Ordinance of Nigeria, was unenforceable; an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises.

The question in this appeal was whether as a condition of the relief which he claimed the respondent should be compelled to repay to the appellants so much of the money lent as was still owing, with interest.

1956. June 25, 26. *Phineas Quass Q.C.* and *R. K. Mandoo* for the appellants.

John Pennycuick Q.C. and *Arthur Bagnall* for the respondent.

The following cases, in addition to those referred to in the judgment were cited in argument: *In re Chetwynd's Estate, Dunn's Trust Ltd. v. Brown* ([1938] Ch. 13; 53 T.L.R. 917; [1937] 3 All E.R. 530); *Bonnard v. Dott* ([1906] 1 Ch. 740 22 T.L.R. 399); *Egan v. Langham Investments Ltd.* ([1938] 1 K.B. 667; 54 T.L.R. 268 [1938] 1 All E.R. 193); *Central Advance and Discount Corporation Ltd. v. Marshall* ([1939] 2 K.B. 781; 55 T.L.R. 1015; [1939] 3 All E.R. 695); *Direct U.S. Cable Co. v. Western Union Telegraph Co.* ([1921] 1 Ch. 370, 383, 36 T.L.R. 402); *In re Mason* ([1928] 1 Ch. 385, 393, 44 T.L.R. 225); *Sinclair v. Brougham* ([1914] A.C. 398, 456; 30 T.L.R. 315); and *Victoria Daylesford Syndicate Ltd. v. Dott* ([1905] 2 Ch. 264, 21 T.L.R. 742).

July 17. The judgment of their Lordships was delivered by LORD RADCLIFFE.

This appeal from a judgment and order of the West African Court of Appeal dated February 22, 1954, arises out of a suit relating to a moneylending transaction between one C.O. Kasumu, deceased, of whose estate the appellants are the administrators, and the respondent, who was the borrower in the transaction and the plaintiff in the resulting suit. The

only question which is at issue in the appeal is whether the order of the Court of Appeal which granted the respondent relief against the transaction in the form of an order for re-possession of mortgaged premises and delivery up of the mortgage deed and its accompanying title deeds ought to have been made subject to a condition of relief that he should undertake to pay back so much of the money lent as was still owing, with or without some interest.

There is no material point of fact which is now in dispute. [His Lordship stated the facts as set out above and continued:] The alleged agreement to assign the equity to Kasumu has dropped out of the picture. The trial judge held that it was unenforceable and that there was "no effective sale." The respondent's claim that the mortgage was void does not seem to have been supported by any facts deposed to by himself or any other witness called by him, nor is it possible to say to what contention of law it was intended to be directed. The case would have remained simply a redemption action against mortgagees in possession had it not appeared on the face of the pleadings of both parties that Kasumu had committed a breach of section 19 of the Moneylenders Ordinance (Consolidated Ordinances of Nigeria, c. 136) at the time of making his loan or instalments of loan to the respondent.

The introduction of this point came about somewhat accidentally. The respondent in his statement of claim made the statement that Kasumu had kept no book in which the principal amount advanced had been recorded (a duty which section 19 imposes upon a moneylender) and that because of this the appellants were assuming, wrongly as he claimed, that the full £2,000 had been advanced. He did not otherwise make any complaint of the absence of record. The appellants, on the other hand, explicitly admitted that no book recorded the amount of the principal advanced, but denied that their assumption that £2,000 had actually been advanced was a mistaken one. It is sufficient, however, that the breach of section 19 was brought to the attention of the judge. It became his duty to give it such effect upon the rights of the parties as the law required. Indeed, it is plain from the terms of his judgment that the respondent's counsel had raised the point in the course of the hearing and had argued "that Kasumu was a moneylender and kept no books as required by our local Ordinance, therefore he cannot enforce his mortgage."

The judge did not give effect to this submission in any way, though it is not possible to find in his judgment the process of reasoning which led him to treat it as having no bearing on the form of his order. The order that he made was one for redemption and recovery of the property after an account had been taken of what was due on the mortgage. The account was taken and a subsequent order entered judgment for the appellants for £1,541 2s. 6d. and interest. These orders were reversed by the Court of Appeal who substituted for them a declaration that the mortgage transaction was unenforceable: an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises.

Thus, on one view of the rights of the parties, the respondent gets the mortgaged property back on paying up the balance of moneys outstanding on the loan together with interest; on the other view, he gets it back without being obliged to pay up any money at all, even on the basis that there is as much as the £1,541 outstanding.

At this stage it is convenient to set out the material portions of section 19 of the Moneylenders Ordinance. They are as follows:

“ (2) Every moneylender shall keep a book (which shall be securely bound and paged so that leaves cannot be removed or inserted without apparent damage) in which he shall enter in connexion with every loan made by him (a) the date on which the loan was made; (b) the amount of the principal; (c) the rate of interest; (d) all sums received in respect of the loan or the interest thereon, with the date of payment thereof, and shall produce such book when required to do so by any court.

(3) The entries in the said book shall be made forthwith on the making of the loan or the receipt of sums paid in respect thereof as the case may be.

(4) Any moneylender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable on conviction to a fine of ten pounds or in the case of a continuing offence to a fine of five pounds for each day or part of a day during which such offence continues.”

One or two preliminary observations may be made with regard to this section. It was not in dispute that the effect of it was that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money. Secondly, their Lordships are satisfied that the words of deprivation “ not be entitled to enforce any claim in respect of any transaction ” are very widely drawn and that they should not be confined to the assertion of rights by means of or in the course of legal proceedings. Thus the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged or the retention or taking possession of such property in assertion of the claim to repayment is also precluded. Finally, section 19 is only one of a comprehensive set of provisions contained in the Ordinance which regulate the conditions under which moneylending can be carried on in Nigeria and the permitted effects of moneylending transactions. These provisions reproduce many of the sections of the current Moneylenders Act of the United Kingdom, the Moneylenders Act, 1927, though section 19 itself has no counterpart in that Act, and the scheme of the Ordinance is largely modelled on the legislation of the United Kingdom. It does not appear that the Nigerian courts have laid down any principles of their own in the interpretation of the Ordinance and the decision of the Court of Appeal which is now under appeal consists essentially of a weighing of the authority of *Lodge v. National Union Investment Co. Ltd.* ([1907] 1 Ch. 300; 23 T.L.R. 187) against that of *Cohen v. Lester (J.) Ltd.* ([1939] 1 K.B. 504; [1938] 4 All E.R. 188).

The appellants' case is that, following the decision in *Lodge's* case ([1907] 1 Ch. 300) the court ought not to have made any order by way of giving relief to the respondent without putting him on terms as to repayment of such of the money borrowed as was still outstanding. And it is undoubtedly true that in that case Parker J. did require such terms from a borrower as a condition of granting him relief in the form of delivery up of securities, the moneylending transaction in question being an illegal contract by virtue of the non-registration of the lender under the Moneylenders Act, 1900. But it is also true that in *Cohen v. Lester (J.) Ltd.* ([1939] 1 K.B. 504) Tucker J. refused to impose any terms as to repayment when making an order for the return of a pledged chattel at the instance of a borrower, the contract and

security being in that case rendered unenforceable by virtue of the Moneylenders Act, 1927, section 6. The distinction exists between the respective circumstances of the two cases that one involved an illegal and the other an unenforceable contract: but although this may to some extent account for the course of reasoning that led to the respective decisions, it is not inherently satisfactory that the law should accord to the moneylender who has committed an offence and made an illegal contract more favourable treatment than one who has done no more than enter into an unenforceable bargain. It is necessary for their Lordships, therefore, to ascertain clearly what principle is involved in the decision of *Lodge's case* ([1907] 1 Ch. 300) and then to decide whether that principle is capable of being applied consistently with the policy of the legislature shown by such an enactment as section 19 of the Ordinance.

There are two main lines of reasoning to be found in Parker J's decision. Starting from the principle that the loan constituted an illegal transaction to which the plaintiff had made himself a party, he concluded that he ought to treat him as one who could only take advantage of the illegality by submitting to do whatever the court considered fair to the defendant. His approach to the matter was governed by his view that the former statutes against usury with their prohibition of usurious contracts produced the same sort of situation as that produced by the Moneylenders Act, 1900, when an unregistered moneylender lends money, and he followed therefore the line of certain old decisions in the courts of equity and common law in which plaintiffs had not been permitted to take advantage of contracts being "utterly void" under the Usury Acts and recover their securities without repaying money due. Even so, it is apparent from Parker J's careful citation of the earlier cases that the practice in the courts of common law was by no means uniform in this matter and that there had been differences of view between the Court of Common Pleas on the one hand and the Court of King's Bench on the other. Indeed, their Lordships find it very difficult to base any principle upon the conception that the borrower under a contract tainted with usury was himself tainted with the illegality that avoided the transaction and so stood to some extent "in mercy" when resorting to the courts to claim the relief which would seem to have been his right if the contract itself was rendered void. There is nothing in any of the main Acts, 37 Hen. 8, c. 9, 12 Car. 2, c. 13, and 12 Ann. c. 16, which suggests that the victim of usury was in any sense an offending party. Indeed, so little was this so that the courts did not even preclude him from recovering, as informer, his share of the triple penalty imposed. However that may be, it does become virtually impossible to transfer that principle to such cases as arise under the current legislation which regulates moneylending when the illegality that avoids the contract or the breach of duty that renders it unenforceable is produced by the act or negligence of the moneylender himself, and has nothing whatever to do with the inherent nature of the contract into which the borrower has entered. And section 19 deals with one of those cases. It was not the fault of the respondent that Kasumu did not keep his books properly.

But it is evident that there was another line of argument that weighed with Parker J., and it is perhaps an easier one to support. The plaintiff before him was asking for equitable relief, and it is a basic principle of equity that he who seeks it must do it. Was it proper, then, for a court of equity to place its power of making orders at the disposal of the plaintiff without requiring him to submit to the condition of doing the honest thing and repaying the money he owed? This principle at least had an established position in the

practice of the courts of equity when relieving against usurious contracts: and it is noticeable that, when the subject is treated by Comyn in his book on *Usury* (see pp. 207-212) and by Story in his *Equity Jurisprudence* (see sections 300, 301), the court's imposition of terms is based squarely on this rule and not upon the more artificial conception that the borrower is an accessory to the lenders's offence. "While, however, the courts, protect the borrower they will be careful to observe that when he seeks relief he does not himself become the oppressor," says Comyn. This is a persuasive way of putting the matter: but it is exposed to the criticism that it was not so much the courts who were protecting the borrower as the Act of Parliament which made the contract "utterly void." If the courts impose upon themselves the obligation of protecting the lender while the Act protects the borrower they may find themselves in the difficulty that they are in effect reversing the Act of Parliament in their endeavour to achieve a truly equitable solution.

Lodge's case ([1907] 1 Ch. 300) was a decision of a great equity lawyer and it has stood as a decision since the year 1906. Nevertheless, it cannot be treated as having established any wide general principle that governs the action of courts in granting relief in moneylending cases. In *Champan v. Michaelson* ([1908] 2 Ch. 612; 24 T.L.R. 795) Eve J. refused to put the representative of a borrower upon any terms as to repayment when granting a declaration that a loan was illegal and void by virtue of section 2 of the Moneylenders Act, 1900. His decision was unanimously upheld by the Court of Appeal ([1909] 1 Ch. 238; 25 T.L.R. 101). Thus, in a court of equity a borrower relying on the contract being illegal obtained the relief against the lender that he chose to ask for without being required to make any offer to pay the outstanding moneys. The plaintiff was in fact the borrower's trustee in bankruptcy, but this circumstance was not treated as having any special bearing on the result. Both courts distinguished *Lodge's case* ([1907] 1 Ch. 300) Eve J. on the ground that the declaration which he was making was not "in the nature of equitable relief," the Court of Appeal on the ground that it was not "equitable relief" or "true equitable relief." It must be admitted that, now that all courts endeavour to give effect to the rules of both systems with predominance for equity in the case of conflict, a distinction which is based entirely on the nature of history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions of lender and borrower. No doubt a court of equity, operating in personam, could produce remedies for the return or cancellation of instruments of value where the common law remedies of trover and detinue did not lie: but the purpose of all such proceedings is the same, to restore the borrower to the position he occupied before the void or unenforceable transaction.

The effect of *Cohen v. Lester (J.) Ltd.* ([1939] 1 K.B. 504) has already been stated. It is evident from what is said in the judgment in that case that it would be in accordance with prevailing practice for a court dealing with loans rendered unenforceable by the Moneylenders Act to make an order for the lender to surrender securities without imposing terms as to repayment.

It remains for their Lordships to consider whether the principle of *Lodge's case* ([1907] 1 Ch. 300) ought to be applied in the case of a transaction declared to be unenforceable by section 19 of the Nigerian Ordinance. In their opinion it should not. If it were, the result would be that a lender who, while offending against the Ordinance, had fortified himself by taking any sort of security would be put by the courts in a position

altogether more favourable than a similar lender who had taken no security for his loan. For any lender who by taking security had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the Ordinance clearly intended. Not only would it seem anomalous for the court to bring about a distinction of this sort between loans each of which equally offends the statute, but it would also be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of term of repayment, for by so doing he would be enforcing directly or indirectly, "a claim in respect of the transaction."

In their Lordships' opinion it is not possible to transfer the principle which guided the courts in dealing with claims based on the Usury Acts to claims for relief arising out of transactions rendered void or unenforceable under the system of regulation which is contained in the Moneylenders Act. For in most respects the purpose of the two sets of Acts is essentially different. According to medieval ideas the taking of usury involved the sin of avarice. It was not the tendering of money or the circumstances under which it was lent that were the material matter, but the obtaining of profit from the use of money. When medieval conceptions began gradually to give way before the impulse of commercial and industrial activity, the sin of avarice turned into the offence of usury: but the usury prohibited was no longer the lending of money at profit but the lending of money at a rate of profit greater than that permitted by the statute. What the law penalised and made void was a particular kind of grasping contract: and it was evidently felt by equity judges at any rate that they were doing nothing that contravened the policy of the Acts if they insisted that the price of their remedies should be the return of the principal money and a reasonable rate of interest, so long no effect was given to those elements of the loan in which the usury itself consisted.

But the Usury Acts disappeared in 1854, and much of the Moneylenders Act, 1900, and the Moneylenders Act, 1927, is directed to enforcing measures of control that have no concern with the intrinsic nature of the contract made. Such requirements as that the moneylender must be registered or licensed, must use his authorised name, must procure a note or memorandum of the contract signed personally by the borrower, must keep a book in which is entered a contemporary record of the transaction, strike indifferently at all moneylender's loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its contents but with the vice of the conditions under which it was made. The provisions of section 19 are not purposeless: they seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised at law. If a court therefore were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships'

opinion the court should not place itself in such a position.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the West African Court of Appeal in this case was correct and that the appeal should be dismissed. The appellants must pay the respondent's costs.

Solicitors: *T. L. Wilson & Co.; Hatchett Jones & Co.*

NANA KWEI GYARKU III, ODIKRO OF AYINASU . APPELLANT

AND

JOSEPH SAM BREW AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1956 Nov. 20

Lords Oaksey, Cohen,
Keith of Avonholm and Mr. L. M. D. de Silva

Practice and Procedure—Absence of defendant or respondent at hearing—Service of copy of decision—Where no injustice occurs.

Held: Where the respondent absented himself from the second hearing in the appeal in the courts below, he is not entitled to a third hearing—and so on *ad infinitum* (Statutory directions notwithstanding).

LORD KEITH OF AVONHOLM. This appeal is not concerned with merits but only with matters of procedure. The facts must be recapitulated at a little length.

On 28th July, 1947, the Native Court B of Ayan Denchira and Breman Esiam, Cape Coast District, Western Province, Gold Coast Colony, gave judgment for £50 damages to the then plaintiff Odikro Kojo Esiam for interference by the defendants with certain land rights. The Board will hereafter refer to this plaintiff as the plaintiff or deceased plaintiff.

The Native Appeal Court of Ayan-Na-Breman Confederacy granted leave to appeal against this judgment and, after some intermediate procedure, on 27th April, 1948, commenced hearing of the appeal in the absence of the plaintiff. Their Lordships are satisfied that this was in accordance with regulation 127 of the Native Courts (Colony) Procedure Regulations, 1945, which enables the Native Appeal Court, if a respondent fails to appear, to hear the appeal *ex parte*.

On 3rd May, 1948, the Native Appeal Court reversed the judgment appealed against holding in effect that the plaintiff had failed to prove his title to the land in question and that the land belonged to defendant Joseph Sam Brew.

On 27th May, 1948, the plaintiff applied to the Native Appeal Court, by motion on notice, to discharge this decision and to fix a date for rehearing of the appeal in terms of section 51 of the Native Courts (Colony) Ordinance No. 22 of 1944. It will be convenient at this point to set out this section. It is as follows:

51. No appeal shall lie from the decision of any Native Court in any suit or matter where the defendant or respondent has not appeared, but in every such case the Native Court shall satisfy itself that a copy of the decision has been served on the defendant, or respondent, and any defendant or respondent aggrieved by any such decision may, not later

than one month after the date of the service on him of the copy of the decision, apply to the Native Court which gave or made the decision to reverse vary or discharge it, and where the Court refuses so to reverse vary or discharge the decision upon such application, an appeal shall lie in like manner as an appeal from any other decision of a Native Court.

On 28th June, 1948, the Native Appeal Court considered the application in the presence of the plaintiff and one of the defendants and after hearing them granted the application and fixed the rehearing for 27th July, 1948, "by fresh panel." The total membership of the Native Appeal Court was 20 and a fresh panel their Lordships understand to mean that some members at least of the reconstituted court were to be different from the panel that sat on the previous hearing of the appeal.

On 23rd July, 1948, the plaintiff died.

On 26th July, 1948, the defendants filed an *ex parte* motion for an Order under regulation 40 of the Native Courts Regulations to discharge the Order of 28th June, as not being in compliance with section 51 of the Ordinance, in respect that the application of the plaintiff, of 27th May, to set aside the decision of the Native Appeal Court should have been heard by the same panel that made that decision. The following day, the 27th of July, the Native Appeal Court upheld this contention, discharged the Order of 28th June, restored the plaintiff's motion of 27th May and fixed the hearing for 14th September, 1948. There is nothing to suggest that defendants knew at this date that the plaintiff had died four days earlier and the Court, it may be assumed, was ignorant of that fact.

On 23rd August, 1948, two motions on notice, supported by affidavits, were forwarded to the Native Appeal Court, on behalf of Abusuapenin Kweku Abaka (hereinafter referred to as Ebaka) who was the temporary administrator of the estate of the deceased plaintiff. These motions were (1) to substitute Abaka in place of the deceased plaintiff as respondent in the appeal; and (2) for an order discharging the Order of 27th July referring the matter of the rehearing to the original panel of judges and in effect to restore the Order of 28th June, 1948. These motions are both marked, "Court to be moved on Tuesday the 14th day of September, 1948, at 9 of the clock in the forenoon or so soon thereafter as the applicant can be heard."

On 14th September, 1948, the Court met to review "in accordance with order made on the 27th day of July, 1948." That meant to consider the deceased plaintiff's motion of 27th May to discharge the original decision of the Native Appeal Court and to rehear the appeal. Their Lordships note that the panel which sat on this date was the same panel that heard the appeal on the 27th and 28th April, 1948. The minute of proceedings notes that no one was present representing the plaintiff-respondent. Both defendants were present. The Court adjourned proceedings to 2 p.m. "to give chance to a representative of respondent to appear in Court." At 2 o'clock no appearance of a representative had been made and the Court adjourned the hearing till 18th September and ordered "hearing notice to be served on plaintiff-respondent to appear on that date."

On 18th September the Native Appeal Court (with the same panel) resumed proceedings. A bailiff, being sworn, stated that he had been given a hearing notice to serve on Abaka "regarding motion paper he filed in the Appeal Court." The sworn statement proceeds:

"When I reached Beseasi I went to one Arku's house where I was informed Abaka lives. I did not meet Abaka in the house and one Badu

late Kojo Esiam's nephew informed me that Abaka had gone to Sefwi early in the morning of that day. I returned to Esiam. On the next day I heard that Abaka had not gone to anywhere but was at Beseasi, I therefore returned to Beseasi on that day also which was the 15th September, 1948, but I did not find him, and I returned and informed the Registrar."

The minute of proceedings then sets out the two motions of Abaka dated 23rd August and the motion of the deceased plaintiff dated 27th May and refers to the respective supporting affidavits. It then records as part of the Court's judgment that the hearing on the deceased plaintiff's motion had been, by the Order of 27th July, 1948, appointed to be heard on 14th September, 1948, "of which notices were given to both defendants-appellants and the relatives of the plaintiff-respondent, Odikro Kojo Esiam (deceased) who were then present in the Court." The Record then proceeds as follows:

"Consequently, one Kweku Abaka, alleged to be a relative of late *Odikro's* Kojo Esiam applied to this Court for orders as stated in motions 1 and 2, and were fixed for hearing on the same date 14th September, 1948.

On the hearing day this party did not appear and the Court therefore adjourned the case to Saturday the 18th September, 1948, with a view to effect the service of the hearing notice on the said Kweku Abakah.

The Bailiff of this Court made two attempts to effect service, but on each occasion Kweku Abaka could not be found.

The Court under these circumstances finds it expedient to strike out *this* above motions without costs, and therefore the judgment delivered by this Court on the 3rd May, 1948, still holds good and firm."

Their Lordships would here observe that it is clear that the Native Appeal Court knew at latest on 14th September, and probably from 26th August when Abaka's motions of 23rd August were filed, that the original plaintiff had died. They also accept the statement which is recorded by the Court that the order of 27th July fixing the date of hearing for 14th September was notified to relatives of the deceased plaintiff who were then present in Court. It is also clear that as early as 23rd August Abaka knew of the Order of 27th July and date of hearing, for this appears from his notice of motion, dated 23rd August, with supporting affidavit, seeking to set aside the Order of 27th July, to be moved on 14th September.

By Order No. 129 of 1948, designated Native Courts (Colony) (Constitution of Native Courts) (Variation) (No. 2) Order, 1948, dated 30th August, 1948, the Native Appeal Court of Ayan-Na-Breman was abolished. No other Native Appeal Court was substituted in its place. This Order was gazetted on 2nd October, 1948, from which date it took effect.

Further procedure in this case may be briefly stated.

On 29th March, 1949, the Magistrates' Court at Cape Coast on its own motion ordered that the hearing of the case be stopped before any Native Court and reported its pendency and circumstances to the Land Judge for directions. This procedure was taken under section 54 of the Native Courts (Colony) Ordinance No. 22 of 1944 but it is not clear to their Lordships' Board what moved the Magistrates' Court to make the order. The Board assume that it was connected with the disappearance of the Native Appeal Court.

On 2nd May, 1949, the Land Judge (Lingley, J.) directed the cause to be

transferred to the Lands Division of the Supreme Court which was done.

On 10th August, 1949, Abaka moved to be substituted for the deceased plaintiff.

On 25th August, 1949, the defendants moved for discharge of the Order of 2nd May transferring the cause to the Land Court, on the ground, stated in the supporting affidavit, that there were no pending proceedings before the Native Appeal Court which could be the subject of transfer.

On 17th September, 1949, Mr. Justice Lingley held that he had no power to hear the appeal and dismissed it with costs.

On 29th September Mr. Justice Lingley granted Abaka special leave to appeal to the West African Court of Appeal.

On 21st December, 1951, the West African Court of Appeal dismissed the appeal. Their ground of judgment was that once the Native Appeal Court had dismissed the appeal it was *functus officio* and that there was nothing "pending" which was capable of being transferred to the Land Court for adjudication.

Final leave to appeal to the Privy Council was granted by the West African Court of Appeal on 26th June, 1952. After the appeal was taken the present appellant was, by Order in Council dated 21st June, 1955, substituted in place of the deceased plaintiff. Their Lordships note that down to this date all proceedings since his death have been conducted without any substitution taking place.

From the resumé of the steps of procedure in the Courts below it might seem that a number of things were done which in other systems of law and procedure would be regarded as irregularities or even nullities. But their Lordships are here concerned with a native court acting under special ordinances and regulations and in conditions which cannot be exactly paralleled in systems with a long established legal practice and tradition. The appellant's attack was centred largely on the order made ex parte of 27th July, 1948. It was said first that this was a nullity because the plaintiff was dead; second that it was contrary to regulation 37 of the Native Courts Procedure Regulations, 1945, which directs that motions shall be heard only after notice of motion has been served on the other parties likely to be affected; third that in any event there was no ground for reversing the order of 28th June, 1948. Their Lordships would observe that at no stage of the proceedings before the Native Appeal Court was any point made that the plaintiff had died. When Abaka appears on the scene he challenges the order solely on its merits. The deceased plaintiff, it would appear, sued not as an individual, but as head of a family claiming interest in the land in question.

On the second and third points, the ex parte motion was for an Order under regulation 40 of the Native Courts Procedure Regulations which provides:

A Native Court may in its discretion make any order within its powers and jurisdiction which it considers necessary for doing justice whether such order has been asked for by the party entitled to the benefit of the order or not, but in a civil cause judgment (save as to costs) shall not be given for a greater sum of money than that claimed in the particulars in the summons.

What seems clear is that rightly or wrongly the defendants thought that a mistake had been made by the Order of 28th June, 1948, in fixing the rehearing before a fresh panel. The Court presumably thought that its Order may have been wrong and accordingly discharged the Order of 28th

June and restored the Motion of 27th May, which left it open to the parties to argue the question afresh. This in fact was what Abaka proposed to do by his motion to discharge the Order of 27th July and again fix the hearing before a fresh panel. Their Lordships are not concerned to enter into the merits of this dispute. Much might be said for the view that one panel or division of an appeal court should not be asked to reverse what another panel or division of the same court had done and that a rehearing should take place, if possible, before the same panel that took the first hearing.

In their Lordships' view, however, the challenge of the regularity of the Native Appeal Court's actions on 27th July does not really affect the material question for decision, viz., whether there were proceedings pending in the Native Appeal Court after 18th September, 1948. All irregularities, if any, were ignored by the parties from 27th July onwards. Substitution of Abaka was asked for but never made and everyone proceeded as if he had been substituted. The Order of 28th June was discharged after the death of the original plaintiff which left matters to be argued afresh including the question whether the Order of 28th June should be restored, appointing the rehearing to take place before a fresh panel. When the case came before the Native Appeal Court on the 14th and 18th September all matters were open including the rehearing of the appeal. But Abaka failed to appear and the Court reaffirmed the judgment of 3rd May, 1948. In the circumstances their Lordships fail to see that any injustice was done. If there were thought to be any fundamental nullities or irregularities it was always open to Abaka or some other substituted representative of the deceased plaintiff to have appealed to the Land Court.

To come then to the material question, their Lordships' Board have come to the view that in this case there was nothing pending in the Native Appeal Court after it gave its decision of 18th September, 1948. It was submitted that Abaka having been absent was entitled under section 51 of the Native Courts (Colony) Ordinance of 1944, to apply for a further hearing. Their Lordships are unable to put such a construction on the section. One application had been made for a rehearing and that was in accordance with the section. When the case came on for the rehearing, Abaka, the chosen representative of the deceased plaintiff, failed to appear. Their Lordships are unable to take the view that by absenting himself from the second hearing a respondent is entitled to have a third hearing, and so on *ad infinitum*. Nor are their Lordships able to hold that he was entitled to a further hearing *ex debito justitiae*. Their Lordships can find no reason in the Record why Abaka failed to appear; Regulation 127 of the Native Courts Procedure Regulations authorises the Native Appeal Court to proceed to hear an appeal *ex parte* if the respondent fails to appear. Reference was made by counsel for the appellant to the case of *Renner v. Thensu and Others*, 1930, 1 W.A.C.A. 77, and to the judgment of Jessel, M.R., in *Fordham v. Clagett*, 20 Ch. D. 653, as throwing light on what is meant by "pending," but, for the reasons given, these cases, in their Lordships' opinion, do not apply to the circumstances of this case.

Their Lordships will accordingly humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

CHIEF IYEKE APPELLANT
AND
B. OSAGIE RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1957 Feb. 25

Lords Tucker, Somervell of Harrow
and Mr. L. M. D. de Silva

Appeal—Facts

The Privy Council will not entertain appeals against concurrent findings of fact unless the case can be brought within one of the exceptions laid down in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508.

LORD TUCKER. This appeal is concerned with a dispute as to the title to an area of land in Nigeria known as Ugbokoissa. The plaintiff in the action sued as paramount head of the Akumazi people and claimed against the defendant as Chief of the Igbodo a declaration of title to the land in question and an injunction restraining him from hiring out to timber contractors the forests on the said land and receiving royalties therefor.

The case was heard by Acting Judge S. P. Thomas from 25th to 28th March, 1952, when he granted the plaintiff the relief claimed. The issue depended solely on questions of fact as to the traditional history regarding the ownership of the land and as to the occupation of certain parts of the land by members of the Igbodo people relied upon by the defendant as supporting his people's title to the land.

The learned Judge after reviewing the evidence and visiting the land stated that he disbelieved the story of the defendant's witnesses and accepted that of the plaintiff's.

The defendant appealed to the West African Court of Appeal who dismissed his appeal on 26th May, 1953.

In giving judgment the learned President stated that the evidence presented a direct conflict of oral testimony on an issue of fact largely depending upon the credibility of the witnesses whom the trial Judge had seen and heard, and that he was not satisfied that the Judge had fallen into any error in dealing with this evidence. He was on the contrary disposed to the view that he would himself have come to the same conclusion.

The defendant now appeals to Her Majesty in Council.

Their Lordships do not consider that any further reference to the facts or evidence is called for since the case so clearly falls within the rule that the Board will not entertain appeals against concurrent findings of fact unless the case can be brought within one of the exceptions laid down in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508, none of which have any application to the present appeal.

Their Lordships will, accordingly, humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

ADEYINKA OKEKAN AND OTHERS APPELLANTS
AND
MUSENDIKU ADELE RESPONDENT

[LAGOS JUDICIAL DIVISION]

[1957] 1 W.L.R. 876

1957 June 26

Earl Jowitt, Lords Cohen and Denning

West Africa (Nigeria)—Land—Treaty of cession—Lagos—Grant of Iga Idunganran (royal palace) to Oba Docemo, his heirs, etc., for ever—Nature of estate granted—English conception of absolute title inapplicable—Iga the official residence of reigning Oba—Grant subject to right of succeeding Oba under Native law and custom to occupy the Iga—Crown Grants (Township of Lagos) Ordinance No. 18 of 1947 (Laws of Nigeria, 1948, c. 44), recital; s. 3.

By a treaty of cession in 1861 Docemo, the then Oba or " King " of Lagos, a descendant of Ado, the first Oba, ceded absolutely to the British Crown the port and island of Lagos. The British authorities thereafter allowed Oba Docemo to continue to occupy the Iga Idunganran, or royal palace, at Lagos, and in 1870 they made a Crown grant of the land on which the Iga stood " to the said King Docemo, his heirs, executors, administrators and assigns for ever." The last of Docemo's line to be Oba died in 1949, and on his death the chiefs selected as his successor, " in accordance with customary law and tradition," the respondent who was also descended from the first Oba Ado but by a different line from that of Docemo. Immediately thereafter the respondent and his followers forcibly entered and occupied the Iga in the face of opposition by the family of Docemo, who thereupon resting their case on the Crown grant of 1870, began the present proceedings against the respondent claiming a declaration of title to the Iga, damages for trespass, and recovery of possession. The respondent's defence was that he had been duly " capped " as Oba and occupied the Iga as his official residence in accordance with ancient native custom:

Held, (1) that the evidence established that before the treaty of cession the Oba of Lagos by native custom had by virtue of his office a right to live in the Iga, and that on his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each of them lived.

(2) That the right to occupy the Iga was a right which the Oba possessed as Oba and, accordingly, the property in the Iga had, as provided by the Crown Grants (Township of Lagos) Ordinance, 1947, passed to the British Crown under the treaty of cession of 1861.

(3) That, approaching the case on that basis—that the Iga had passed to the Crown under the treaty—the Crown grant of 1870 did not transfer the property to the family of Docemo absolutely. Government grants did not convey English titles or English rights of ownership, and the words " his heirs, executors, administrators and assigns for ever " in the grant of 1870 were to be rejected as meaningless and inapplicable in their African setting. The effect of a Government grant was only to ascertain and denote the chief or headman who had charge of the land for the time being—it being family land; it left the interest of the family or occupiers intact, to be determined as theretofore by the local law. While the cases which established this (*Sunmonu v. Disu Raphael* [1927] A.C. 881; *Idewu Inasa v. Oshodi* [1934] A.C. 99; 50 T.L.R. 168) were concerned only with the rights of the family or occupiers, whereas the present case concerned the rights of the Oba, those cases were confirmed and made of general application by section 3 of the Ordinance of 1947, which provided that " All grants of land . . . within . . . Lagos . . . shall be deemed to have vested in the grantee an estate free from competing interests and restrictions, save only such interests and restrictions, recognized by native law and custom, as at the date of the grant affected such estate."

(4) That, applying section 3 of the Ordinance of 1947, the grant of 1870 vested in Docemo an estate which was subject to " such interests and

restrictions, recognized by native law and custom " as affected it at that date. Accordingly, whatever estate passed to Docemo, it was subject to the right of his successor to occupy the Iga—this right being an interest and restriction recognised by native law and custom. The grant took effect only subject to that right.

(5) That the respondent, the present Oba, was accordingly entitled to occupy the Iga, was entitled to enter it as he did, and the Docemo family were wrong to resist him. No cause for action in damages lay: section 292 of the Criminal Code (Laws of Nigeria, c. 42).

Hemmings v. Stoke Poges Golf Club [1920] 1 K.B. 720; 36 T.L.R. 77 applied.

Judgment and order of the West African Court of Appeal affirmed.

APPEAL (No. 39 of 1953) from a judgment and order of the West African Court of Appeal (November 17, 1952) affirming a judgment of the Supreme Court of Nigeria (January 18, 1951).

The following facts are taken from the judgment of the Judicial Committee: The principal question on this appeal was to whom did the royal palace at Lagos belong? Its modern description was No. 26 Upper King Street, Lagos, but it had been known for over 200 years as the Iga Idunganran. It was claimed by the present Oba of Lagos as his official residence, but it was claimed by the descendants of a previous Oba as their own property. The Oba had sometimes been described as the King of Lagos, but this was hardly a correct rendering. His position had no exact parallel in English institutions. He was a very influential person whose standing was shown by the fact that he was *ex officio* President of the Lagos Town Council.

The dispute was a family one. The first Oba or King from whom all others had descended was named Ado. He ruled from A.D. 1630 to 1689. One important branch of his descendants was the family of Docemo who was Oba or King from 1853 to 1885: From Docemo's accession in 1853 down to 1949 every Oba (save one for three years) was a member of Docemo's family. The last of Docemo's line to be Oba was Falolu who was Oba from 1932 to 1949 and died on September 2, 1949.

On the death of Falolu the chiefs met together to select his successor. Various names were submitted to them. The family of Docemo presented one of their men as a worthy successor but the chiefs did not select him. They selected Adeniji Adele who was not a member of the family of Docemo. He was descended from the first Oba Ado but by a different line from that of Docemo. The announcement of his succession was made public in these words: " It is officially announced that Adeniji Adele, having been properly selected in accordance with customary law and tradition, is recognized by the Government as Head of the House of Ado."

The new Oba Adele claimed to occupy the Iga Idunganran: but the members of the family of Docemo resisted the claim. The supporters of Adele put up notices on the verandah of the Iga saying that he was coming. They also put them outside on the walls. At about 6 o'clock in the afternoon of October 1, 1949, Adele came in a car followed by the chiefs and many others and sought to enter the Iga. The family of Docemo opposed them. They pushed them back and locked the gates. Adele's brother got a crowbar and a hammer and forced a way in. Adele's car was then driven into the compound followed by the chiefs and many people. They went to the shrine in the Iga. The family of Docemo slipped out and got away in cars.

Twelve days later, on October 13, 1949, the family of Docemo brought this action against Adele in the Supreme Court of Nigeria in which they claimed a declaration of title to the Iga, £2,000 damages for trespass, and recovery of possession. The defence was that Adele was duly " capped " on

October 1, 1949, as the Oba of Lagos by the chiefs entitled to do so and occupied the Iga in accordance with ancient custom. The action was tried by Reece J., who dismissed the claim. The family of Docemo appealed to the West African Court of Appeal (Foster Sutton P., Verity C.J. and Coussey J.A.), who dismissed the appeal. The family of Docemo now appealed to Her Majesty in Council. The family of Docemo rested their claim on a Crown grant. They said that in 1861 Docemo made a treaty of cession with Britain whereby the territory of Lagos, including the Iga, passed to the British Crown, and that in 1870 the Crown granted the Iga to the Docemo and his family for ever. They said that since the treaty of cession, 1861, there had been no Oba of Lagos except as a courtesy title, and that no rights had attached to it.

1957. May 6, 7, 8. *Dingle Foot Q.C.*, *Ralph Millner* and *T. O. S. Benson* for the appellants.

B. J. M. MacKenna Q.C. and *Arthur Bagnall* for the respondent.

The following cases, not referred to in the judgment, were cited in argument: *Oduntan Onisiwo v. Attorney-General* ([1912] 2 Nig.L.R. 77); *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* ([1915] A.C. 599); *Sakariyawo Oshodi v. Balogun* ([1936] 2 All E.R. 1632); *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)* ([1928] A.C. 459; 44 T.L.R. 632).

June 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: The contest is therefore between the family of Docemo who claim by grant from the Crown of England, and the defendant Adele who claims by native custom as Oba of Lagos.

Their Lordships find it fully established by the evidence by the concurrent findings of the courts below that, before the treaty of cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of his office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each one of them lived. But the chiefs were also entitled to make proper use of it. For instance, the weekly meeting of chiefs was held there and other ceremonies.

What, then, was the effect of the treaty of cession in 1861? Did it pass the property in the Iga to the British Crown? The treaty was made

“ in order that the Queen of England may be the better enabled to assist defend and protect the inhabitants of Lagos and to put an end to the slave trade ”: by article 1 Docemo King of Lagos on the part of himself and chiefs made this cession: “ I do with the consent and advice of my Council give, transfer and by these presents grant and confirm unto the Queen of Great Britain her heirs and successors for ever the port and island of Lagos with all the rights profits territories and appurtenances whatsoever thereunto belonging and as well the profits and revenue as the direct full and absolute dominion and sovereignty of the said port island and premises with all the royalties thereof freely fully entirely and absolutely.”

By article 2 Docemo was allowed the use of the title of King in its usual African signification. By article 3 Docemo was during his lifetime to receive a pension of 1,200 bags of cowries a year.

Their Lordships desire to point out that the treaty of cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances the courts of law will not take it upon

themselves to construe the treaty. The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and therefore the power to recognise existing rights or extinguish them or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of his predecessors avail him nothing." See *Vajesingji Joravarsingi v. Secretary of State for India* ([1924] L.R. 51 I.A. 357, 360) by Lord Dunedin. *Hoani Te Heuheu Tukino v. Aotea District Moari Land Board* ([1941] A.C. 308, 324-325; 57 T.L.R. 419; [1941] 2 All E.R. 93). In inquiring however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law, see *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399); *Sakariyawo Oshodi v. Moriamo Dakolo* ([1930] A.C. 667; 46 T.L.R. 599). Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law, see *Sunmonu v. Disu Raphael* ([1927] A.C. 881), *Idewu Inasa v. Oshodi* ([1934] A.C. 99; 50 T.L.R. 168), except, of course, in those cases now growing in number, where English conceptions of individual ownership have superseded previous conceptions.

The present case sets their Lordships a new problem. It concerns, not the rights of the inhabitants, but the rights of the previous ruler himself. It concerns his official resident. Did this pass to the British Crown or not? Mr. Dingle Foot says that it did. This is an essential preliminary to his contention that the British Crown afterwards granted it to the family of Docemo. In order to get the title in the British Crown, he relies particularly on a recital in the Crown Grants (Township of Lagos) Ordinance, No. 18 of 1947, which says "the effect of the treaty was that, while the private rights of property of the inhabitants were to be fully respected, there passed to the Crown whatever rights the Oba possessed, including whatever proprietary rights the Oba possessed beneficially and free from the usufructuary qualification of his title in favour of his subject."

Their Lordships regard that recital as an authoritative statement by the British Crown of the effect of the treaty. It is, however, not easy to interpret. Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity. Suppose, for instance, he had personal property of his own, such as silks, or bags of cowries which are used as money. Their Lordships do not think that these would pass to the Crown, and this view is supported by the fact that the British Consul on February 11, 1801, received King Docemo and his chiefs and explained to them that far from depriving them of their private property, the "cession will render it more valuable" to them.

Accepting, however, that the only rights which passed to the Crown were the rights which the Oba possessed as Oba, the question is what were those rights? They would clearly comprehend any right which he had to exact tribute and revenue, to issue land certificates, and so forth. But was the right to occupy the Iga a right which he possessed as Oba? Their Lordships are inclined to think that it was. It was his official residence. It was, so to speak, public property occupied by him by virtue of his office. Their Lordships see no valid distinction in law between the official residence of the Oba and any other public property which he possessed in his capacity of Oba. It all passed to the British Crown. It is true that he did not possess the Iga "beneficially and free" from the rights of others. The chiefs had the right to use it for meetings and ceremonies. But that does not mean it did not pass to the Crown. The words "beneficially, etc.," in the Ordinance are taken from the judgment of Viscount Haldane in *Amodu Tijani* ([1921] 2 A.C. 299, 407) and appear to be inserted so as to protect the rights of the subject, not to limit the nature of the property which passed to the Crown. Their Lordships are therefore disposed to approach the case on the basis that the Iga passed to the British Crown under the treaty of cession.

Even so, it is quite plain that the British authorities did not take possession of the Iga. They allowed the Oba Docemo to occupy it after the cession just as he did before. And in due course in 1870 they made a Crown grant of it to him. This brings their Lordships to the root question in the case. What was the effect of this Crown grant? Did the British Crown transfer the property to the family of Docemo absolutely? Their Lordships draw attention to the very English form of the Crown grant. The administrator grants or assigns "to the said King Docemo his heirs, executors, administrators and assigns for ever the above specified piece of land." Those words are familiar in English law. They would fit well into a society which had the same legal structure as England: but they do not fit at all well into the structure of Lagos. The grant is drawn up according to the English conception whereby one man is able to have the entire ownership of land himself, with power to sell it to another absolutely, power to transfer it by his will to anyone he likes on his death, or, if he leaves it undisposed of on his death, it passed by law to his heir and now to his personal representatives. The inhabitants of Lagos in 1870 approached land in a very different fashion. No one man was entitled to own a piece of land absolutely. It belonged to the family for their use. The chief had charge of it on behalf of the family but he could not sell it. The idea of sale did not come into the scheme of things at all. The chief had control of the land and any member of the family who wanted to make use of it had to go to him for it, but even the chief could not make any important disposition of it without consulting the elders of the family. On his death the new chief took over the rights and duties of control on behalf of the family. It was family land and always recognised as such. This all appears from the Report on Land Tenure in West Africa made in 1898 by Rayner C.J., and on Land Tenure in Lagos by Mr. Healy, the Land Commissioner.

Many of those Crown grants were made in the English form; and much misunderstanding has arisen on that account. People have claimed rights under the grants in English fashion as though thereby they gained a title superior to the rights of the rest of the family under the local law. Several of these cases have reached their Lordships and it has been uniformly held that these Government grants do not convey English titles or English rights of ownership. The words "his heirs, executors, administrators and assigns for ever" are to be rejected as meaningless and inapplicable in their African

setting. The effect of a Government grant is only to ascertain and denote the chief or headman who has charge of the land for the time being. It leaves the interests of the family or occupiers intact, to be determined, as theretofore, by the local law. The cases already cited make this quite clear, for in all of them Crown grants had been issued. Their Lordships realise that those cases were concerned only with the rights of the family or occupiers: whereas the present case concerns the rights of the Oba. But there is an Ordinance which confirms those decisions and makes them of general application. It is section 3 of the Crown Grants (Township of Lagos) Ordinance, which says that "All grants of land situate within the township of Lagos . . . shall be deemed to have been validly made; and each of such grants shall be deemed to have vested in the grantee an estate free from competing interests and restrictions, save only such interests and restrictions, recognized by native law and custom, as at the date of the grant affected such estate."

Applying the Ordinance, it appears to their Lordships that the Crown grant to King Docemo in 1870 of 26 Upper King Street (on which the Iga stands), vested in him an estate which was subject to "such interests and restrictions, recognized by native law and custom" as affected it at that date. Their Lordships are clearly of opinion that, whatsoever estate passed to King Dosemo, it was subject to the right of his successor to occupy the Iga. This right was an interest and restriction recognised by native law and custom. It was recognised at that time and has been recognised ever since. The grant to King Docemo took effect only subject to that right. Neither he nor his successors took a title to the fee simple or to the freehold (to use English conceptions). He took an estate which was more like the estate of a corporation sole than anything else. It vested in the holder of the office for the time being. It was not an estate like that of a trustee in trust for the holder of an office.

This means that the present Oba is entitled to occupy the Iga; that he was entitled to enter it as he did on October 1, 1949; and that the family of Docemo were wrong to resist him.

It was argued, however, that even if the Oba was entitled to occupy the Iga, nevertheless the legal title was still in the family of Docemo and they were entitled to a declaration to that effect: that the Oba was not entitled to take possession by force; that he had only an equitable interest and ought to have sought his remedy in the courts; and that his action in turning out the legal owner was a trespass. The fallacy in this argument is that it seeks to apply the English concepts of legal owner and equitable beneficiary to cases where they are quite inapplicable. The simple fact is that by native law and custom the duly appointed Oba was entitled to occupy the Iga and did so. It is clear that no cause for action in damages lies on that account, see section 292 of the Criminal Code and *Hemmings v. Stoke Poges Golf Club* ([1920] 1 K.B. 720, 36 T.L.R. 77).

Their Lordships are aware that in several parts of Lagos the native law has been superseded by English conceptions of individual ownership. Nothing their Lordships have said here affects those parts. Suffice it to say that the Iga Idunganran is still subject to the native law and custom which gives the Oba of Lagos the right to occupy it during his life.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors: *A.L. Bryden & Williams; Hatchett Jones & Co.*

ANKRAH AND ANOTHER v. ARYEH AND OTHERS

ANKRAH v. ANKRAH

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1958] 3 W.A.L.R. 104

1957 Oct. 2

Lords Tucker, Somervell of Harrow
and Mr. L. M. D. de Silva

Practice—Appeals to the Privy Council—Concurrent findings of native law or custom proved by expert witnesses as fact in the courts below. Succession—Intestacy—Devolution of self-acquired property on failure of matrilineal line.

Land—Trespass—Purported alienation of land by a person having no title to convey—Liability of alienator in damages for trespass.

M.A. died intestate leaving self-acquired property. He was one of three brothers and had no sisters, so there was thus no link in the matrilineal line, traced downwards from the mother, below the brothers. In accordance with the usual rule M.A.'s self-acquired property on his death intestate became family property, the family for this purpose comprising the surviving brothers. On the death of the last surviving brother and the resultant extinction of the matrilineal line the question arose as to the devolution of the property. It was argued for the plaintiffs in the first of these consolidated suits, that the family, for the purpose of succession to what had been M.A.'s self-acquired property, now comprised the descendants of the three brothers. This argument prevailed at first instance and in the West African Court of Appeal. The defendants (the appellants before the Judicial Committee) claimed that the property reverted to the descendants of M.A. only and that these alone comprised the family for this particular purpose.

In the second suit the plaintiff, who was the appointed head of the family of the plaintiff in the first suit (*i.e.*, the family group comprising the descendants of all three brothers) sought a declaration of title to land, being part of the property concerned in the first suit, that the defendant, who claimed to be the appointed head of the family of the defendants in the first suit, had purported to convey away to one C. As, on the findings of the courts below, the defendant had no title to convey, the courts below found in favour of the plaintiff. But the plaintiff had also claimed damages for trespass against the defendant and, at first instance, had been awarded £50 in respect thereof. It was argued on the appeal that the defendant's purported alienation of the land, although it might be wrongful, did not constitute a trespass in native law and custom and therefore that the award of damages could not stand.

Held, (i) the rules of intestate succession, although rules of law in native law and custom, had been proved as matters of fact by expert witnesses in the court of first instance and had not been disturbed on appeal. The Judicial Committee's rule as to concurrent findings of fact therefore applied and, as nothing had been shown to place the case outside the rule, the findings of the courts below could not be disturbed.

Srimati Bibhabati Devi v. Kumar Narayan Roy [1946] A.C. 508 applied.

(ii) By these findings of the courts below self-acquired property which becomes family property on the death intestate of its owner will pass, in Ga areas at least, from the matrilineal to the patrilineal lines on the failure of the former line. The patrilineal family, for this purpose will comprise all the descendants of the failed line.

[EDITORIAL NOTE: This case raises several interesting points. The first is that although the facts that founded the action involved the disposition of self-acquired property on an intestate death, the actual nature of the property involved appears to be immaterial to the decision. Thus the principle of inheritance by the patrilineal line on the failure of the matrilineal would appear from the case to apply to any property, whether it was originally communal (*i.e.*, family) or self-acquired. This is of particular importance when seen in

relation to the problem of when a matrilineal line may be said to become extinct. In *Arthur v. Ayensu* (1957) 2 W.A.L.R. 357, where the general question of intestate succession was discussed, it was laid down that on the failure of the matrilineal line traced downwards from the mother, recourse would be had to the next ancestor in line above the mother, *i.e.*, the grandmother, and so on. This aspect was not canvassed in the present case.

A further point is as to who would have inherited if both M.A.'s brothers had predeceased him. It might seem at first sight that as the matrilineal line would fail on the death of the intestate in these circumstances, the patrilineal family to succeed would be the descendants only of the intestate (*i.e.*, the defendants in the first suit). But it appears from their Lordships' judgment that the fact that one of the brothers might have predeceased the intestate was irrelevant to the issue—his descendants participated together with those of the intestate and the surviving brother. It thus appears that the doctrine of representation may apply.

This case is concerned specifically with succession among the Gas but the principles involved may well be equally applicable to the other matrilineal areas of Ghana, particularly as Sarbah's *Fanti Customary Laws* is quoted by their Lordships.]

(iii) As no principle of native law or custom dealing with the existence or absence of a liability in damages for trespass had been demonstrated, the findings of the courts below on the issue of trespass could not be disturbed.

Cases referred to:

- (1) *Angu v. Attah* (1916) Judgments of Privy Council on Appeal from Gold Coast, 1874-1928, 43.
- (2) *Sackey v. Okantah* (1916) Divisional and Full Court Judgments, 1919, 88.
- (3) *Ribiero v. Mingle*, unreported.
- (4) *Srimati Bibhabati Devi v. Kumar Narayan Roy* [1946] A.C. 508.

APPEAL from a decision of the West African Court of Appeal on February 22, 1951, affirming a decision of Jackson J. on October 15, 1948, in the Land Court Eastern Judicial Division.

The judgment of their Lordships was delivered by Mr. L. M. D. DE SILVA.

This is an appeal from a judgment of the West African Court of Appeal (Lewey J.A. and Coussey J., Korsah J. dissenting) dated February 22, 1951, whereby that court dismissed the defendants' appeal from a judgment of the Supreme Court of the Gold Coast (Land Court) given on October 15, 1948, in the consolidated suits.

These suits concerned the ownership of a tract of land known as Awudome which was the self-acquired property of one Manche Ankrah. He was one of the three sons of a woman named Amanua, the other two being Ayi and Okanta. Amanua had no daughter. What has to be determined is the succession to this land after the death of Manche Ankrah who had not disposed of it during his lifetime.

It is common ground that the Ga customary law is applicable and that as stated in Sarbah's *Fanti Customary Laws*, 2nd ed., p. 100, "the right of inheritance is only through the female," the pedigree being traced through the female line and that only while there are persons in that line. Sarbah illustrates this principle (pp. 101 and 102) when he says "The owner of self-acquired real property dying intestate is not succeeded by his sons, they being outside the line of inheritance, but by his mother and her issue according to seniority. Persons in the line of succession are: Mother; Brothers, according to seniority, Nephews; by seniority."

By "brothers" is meant brothers by the same mother, by "nephews" children of sisters but not children of brothers. He goes on to indicate the persons situated further in the line of matrilineal succession.

Following what has been said above, on the death of Manche Ankrah the brothers who survived him succeeded him in order of seniority. It is not clearly established that Ayi survived Manche. If Ayi had not survived Manche, Okanta succeeded immediately. But this question of survival is not of importance. The important fact is that on the death of Okanta the inheritance could not follow through a daughter of Amanua as Amanua had no daughter and, on the facts as presented by both parties, there were no persons in the matrilineal line who could succeed. The question arose as to what was to happen to the property when the matrilineal line failed to furnish a successor. This is the main question in the case.

According to the plaintiffs, who are the respondents to this appeal, the descendants male and female (tracing descent through both males and females) of all three brothers, Manche, Ayi and Okanta, would be entitled to the property and entitled to assert rights of ownership through a duly appointed head. He would also be their representative in litigation. M.D.A. Ankrah, a plaintiff in both suits, claims that he is the duly appointed head of such descendants.

According to the defendants, who are the appellants on this appeal, the descendants of Manche Ankrah alone are entitled to the property. Charles Amoo Ankrah, a defendant in both of the suits, claims he is the duly appointed head and representative of the descendants of Manche Ankrah.

The position of the other parties is subordinate to the position of the parties named above and has no direct bearing upon the main question.

It is necessary to ascertain what the Ga customary law is upon the question which has arisen. In the case of *Angu v. Attah* (1), dealing with an appeal from the Gold Coast, the Board observed that customary law "had to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them." Their Lordships will now examine the decisions cited to them in order to ascertain whether any principles relevant to the determination of the question before them have been proved and recognised so frequently that judicial notice can be taken of them.

There are two decisions which have to be considered. The first is the case of *Sackey v. Okantah* (2). In that case Smyly C.J. observed:

"I have given a good deal of consideration from time to time to this question of succession among the Gas and am of opinion, though there are certainly witnesses to the contrary, that the whole weight of the evidence goes to show that the Ga law of succession, whether the property is self-acquired or not, is that the brothers succeed first to the property, then it descends to the nephew, failing which, to the children, the brothers to succeed must be of the same mother with the deceased and the nephew must be the sister's child."

There is much force in the appellants' argument that the word "children" in the passage means the children of the deceased whose property is being considered. But if the passage means that the children of the deceased are to get property when the matrilineal line fails, it is clearly *obiter* as the contest in the case was between a child of the deceased and the issue of a sister of the deceased. The latter being in the matrilineal line were held entitled to succeed. The matrilineal line had not failed to furnish a successor and it was not necessary to decide what was to happen if it had.

The second case which needs consideration is *Sarah L. Ribiero and Others v. Elizabeth Mingle and Others* (3). It is an unreported case and the

judgments in the case were not available to their Lordships. It was a decision of the Tribunal of the Paramount Chief of the Ga State given in 1944 and subsequently affirmed on appeal. Of this case the trial judge said: ". . . it appears at first sight directly to decide the point of law at issue." He summarised the case thus:

" . . . in that case Charles and Henry Mingle built a house in Horse Road, Accra, and by his will Henry devised to his brother Charles his whole interest in that house. Upon Charles's death intestate in 1933 an elder brother named Joseph succeeded to his estate in Horse Road. Joseph died in 1943. The children of Charles then claimed the estate in the house from the children of Joseph and obtained judgment for recovery of the premises against the children of Joseph.

It was held that the direct descendants of Charles L. Mingle were entitled by Ga customary law to exclusive possession of the land in question, the descendants of Charles L. Mingle's uterine brother, Joseph, having no rights in the land."

After some discussion he went on to say:

" But that case heard in the Ga Native Court cannot, I think, be held to go any further than to say that the possessory rights of the children of Henry Mingle in that house were ones which excluded these rights from the children of Joseph Mingle. But would the decision have necessarily been the same if the children of Henry wished to sell, and so dispose of, the property in the estate?

Would the children of Joseph Mingle have no say in the sale of property to which they might enjoy an interest in the event of Henry's line becoming extinct?"

The majority of the judges in the Court of Appeal did not think the decision was applicable. One of the judges remarked that it was not of " any real assistance having regard to the facts of that case and to the issues which the Tribunal had to decide." Nothing has been said which persuades their Lordships to take a different view.

The cases cited other than those mentioned in the two preceding paragraphs do not, in their Lordships' opinion, have a sufficient bearing upon the question to be answered as to merit discussion in this judgment. There is not before their Lordships a series of decisions from which any relevant principles have crystallised out in the manner indicated in the case of *Angu v. Attah* (1) and the law which has to be applied has therefore to be ascertained from the evidence of witnesses who speak to what, as a fact known to them from its application in the past, the law is.

The evidence was conflicting but after due consideration the learned trial judge came to the conclusion that:

" The preponderance of evidence before me given by witnesses who could properly be described as being expert in native customary law was that not only would the consent of all three lines of the family be necessary before a valid grant of sale of land could take effect, but that every member of three lines had an interest in the land to the extent that if they wished to farm it they could do so or give up all tribute upon seeking and obtaining the consent of the caretaker of the land."

By " three lines of family " the learned trial judge meant the three sets of descendants of the three brothers. In arriving at a decision the learned trial judge was assisted by the evidence of an independent witness, a member of

the Ga State Council, called by the learned judge himself. His evidence was accepted. Of three brothers, A, B and C, in the position of Manche Ankrah, Ayi and Okanta he gave the following evidence:

“ Q. It is suggested that because B and C are dead that the children of A inherit the land to the exclusion of B and C. Is that the Ga custom?

“ A. The elder child will look after the land for the children of A, B and C.”

This was a specific answer to the question which has to be answered in this case.

The conclusions on the evidence of the learned trial judge were accepted by the majority of the judges of the Court of Appeal. These conclusions related to the law which was applicable but they were arrived at on a consideration of the evidence of expert witnesses on what, as a question of fact, the law was. The rules of the Board with regard to concurrent findings are applicable to these conclusions particularly, as observed by the Board in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* (4), as

“ the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.”

Nothing has been shown by the appellants which places this case outside the general rule regarding concurrent findings, and the view of the courts below as to ownership must therefore be upheld.

A question arose as to whether M. D. A. Ankrah, the second plaintiff in the first suit and sole plaintiff in the second suit, was the duly appointed head of the “ Manche Ankrah Family,” by which was meant, in the context in which it was used, not a family connected by matrilineal ties but the descendants of Manche Akrah and his two brothers Ayi and Okanta. There is a concurrent finding which there is no reason to distrust that he was the duly appointed head. Their Lordships observe that among the evidence produced by the plaintiffs is a document executed in 1942 appointing M. D. A. Ankrah attorney and representative of the “ Manche Ankrah Family.” It is signed by descendants of all three brothers Manche Ankrah, Ayi and Okanta. In it, among other things, they authorise M. D. A. Ankrah to take charge of Awudome. It is clear from this document that in 1942 some, if not all, of the descendants of Manche Ankrah did not claim to be the exclusive owners of the land, and went so far as to ask M. D. A. Ankrah to look after the land for themselves and others. The material furnished by this document strongly supports the findings of the courts in Africa.

It is not disputed by the appellants that if the views of the courts below referred to in the preceding paragraphs are upheld, the orders made in the first suit should stand. As their Lordships do not propose to disturb those views it is not necessary for them to discuss the orders.

The second suit was brought by the plaintiff M. D. A. Ankrah against one Captan (First defendant) and Charles Amoo Ankrah (referred to above, second defendant). The latter alleged that he had been appointed head of the descendants of Manche Ankrah by those descendants. The plaintiff claimed ownership and damage for trespass. The first defendant pleaded that he had bought the land from the second defendant, and the second defendant pleaded that he had sold it, and had had the right to sell

it, to the first defendant. Upon the views expressed in the preceding paragraphs the second defendant had no such right whether or not he had been duly appointed head of the descendants of Manche Ankrah. The learned trial judge held that as against the first defendant "the plaintiff is entitled to damages for trespass which, it is agreed, shall be nominal and which I assess at £1." He held further "As against the defendant Charles Amoo Ankrah who unlawfully sold the portion of Awudome land to the said Captan, I find that this act constituted an act of trespass and do assess general damages at £50 . . ." It was argued before their Lordships that the second defendant could not be held liable in damages. The point taken in the petition of appeal to the Court of Appeal was that the conduct of the second defendant, even if wrongful, did not "in native customary law constitute an act of trespass." There is no note in the record of an argument before the Court of Appeal that the second defendant was not liable in damages and there is no reference in the judgments themselves to such an argument. It must be presumed that in dismissing the appeal without variation the Court of Appeal took the view that on the facts established the second defendant was liable in damages under the relevant law. No principle of native customary law which supported or had any bearing upon the point raised by the appellant in his petition to the Court of Appeal was brought to the notice of their Lordships. They can see no reason for varying the judgments of the courts below.

In view of the above opinion which they have formed it is not necessary for their Lordships to consider a plea of estoppel relied on by the plaintiffs in the courts below.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. On this appeal only one respondent (substituted for M. D. A. Ankrah referred to above on his death) appeared. The appellants will pay him the costs of this appeal.

NANA OFORIATTA II, OMAHENE OF AKYEM

ABUAKWA AND ANOTHER APPELLANTS

AND

NANA ABU BONSRA II AS ADANSEHENE AND AS REPRESENTING

THE STOOL OF ADANSE AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1957] 3 W.L.R. 830; [1958] A.C. 95; (1958) 3 W.A.L.R. 171

1957 Nov. 6

Lords Tucker, Denning and the Rt. Hon.
Mr. L. D. de Silva

Estoppel—Conduct, by—Standing by judicial proceedings—Rival claims to stool lands—Previous suits between parties' subordinates in same interest—Knowingly standing by—Estopped by conduct from litigating same issue—West Africa (Gold Coast).

West Africa (Gold Coast).

On a claim by the appellant stool against the neighbouring respondent stool to certain lands in Ghana the respondent alleged that in proceedings 16 years

previously a subordinate stool of the appellant had failed to establish title to the lands now in dispute as against a subordinate stool of the respondent, and that the appellant, having knowingly stood by while the title was fought out by its subordinate in the same interest in the earlier suit—in which the appellant and respondent were not parties—was estopped by conduct from litigating the question of title again against the respondent:

Held, that the principle stated by Lord Penzance in *Wytherley v. Andrews* (1871) 2 P. & D. 327 at p. 328 that "if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest he should be bound by the result, and not be allowed to reopen the case," was not limited to wills and representative actions, and while it might have been found appropriate in England only in special conditions, there was no reason why in West Africa it should not be applied to conditions which were found appropriate for it there. The principle was, in the absence of technical legal reasons to the contrary, applicable in the present case, and accordingly the appellant stool, having knowingly stood by while its subordinate fought the question of title in the same interest, was estopped from litigating the matter afresh.

Akwei v. Cofie (1952) 14 W.A.C.A. 143 considered.

Judgment of the West African Court of Appeal (1952) 14 W.A.C.A. 149 affirmed.

APPEAL (No. 43 of 1953) from a judgment of the West African Court of Appeal (Gold Coast Session) (July 9, 1952) affirming a judgment of the Supreme Court of the Gold Coast (November 12, 1949) dismissing a claim by the appellants for a declaration of title to land and an injunction.

The following facts are taken from the judgment of the Judicial Committee: This case was a dispute about the title to certain lands in Ghana called the Nsuakwate or Anungya lands (hereinafter called "the lands in dispute"). The principal parties who appeared before the Board to claim title to them were, on the one hand, the plaintiff, the Stool of Akyem Abuakwa, which was represented by the Omahene or head chief Nana Ofori Atta II (hereinafter called "Akim Abuakwa") and, on the other hand, the defendant, the Stool of Adanse, which was represented by the Adansehene or head chief Nana Abu Bonsra II (hereinafter called "Adansi").

The plaintiff Akim Abuakwa was a paramount stool and said that the lands in dispute were under its paramountcy and in particular that they were part of the Muronam lands which were subject to it. The Odikro or sub-chief of Muronam was joined as a co-plaintiff with Akim Abuakwa. (He is hereinafter called "Muronam.")

The defendant Adansi was a neighbouring stool which claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka, which was represented by the Ohene or Chief Brako Ababio II (hereinafter called "Banka"). Adansi said that Banka was caretaker for the lands in dispute for Adansi. In the Courts of West Africa Banka applied to be joined as co-defendants with Adansi and were joined accordingly, but they were not represented before the Board.

The question in this appeal was whether it was open to Akim Abuakwa and Muronam to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out 16 years ago in proceedings between Muronam and Banka. In that earlier case Muronam failed to establish its title to the lands in dispute. The question was whether that finding precludes the paramount stool of Akim Abuakwa from now claiming title against Adansi. Adansi said that Akim Abuakwa were so precluded on one or other of two grounds: (1) estoppel by *res judicata* on the ground that Muronam was a party to the previous proceedings and

Akim Abuakwa was a privy to them; or, alternatively, (2) estoppel by conduct on the ground that the Akim Abuakwa knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings and it would be inequitable to allow them to bring up the question again. Jackson J. upheld the contention of Adansi on the second ground. The West African Court of Appeal (Foster Sutton P., Coussey J.A. and Manyo-Plange J.) upheld the contention of Adansi on both grounds. The result was that the claim of Akim Abuakwa and Muronam had been dismissed. They appealed to Her Majesty in Council.

1957. July 2, 3, 4, 10. *Phineas Quass Q.C.* and *Gilbert Dold* for the appellants.

Ralph Millner for the first respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Doe d. Smith and Payne v. Webber* ((1834) 1 Ad. & E. 119); *Seaford Court Estates Ltd. v. Asher* ([1949] 2 K.B. 481, 496; 65 T.L.R. 379; [1949] 2 All E.R. 155, C.A.); *Gray v. Lewis, Parker v. Lewis* ((1873) 8 Ch.App. 1035, 1059); *Borough v. Wichcote* ((1732) 3 Bro. P.C. 595); *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.* [1894] 1 Ch. 578; 10 T.L.R. 184); *In re May* ((1885) 28 Ch.D. 516; 1 T.L.R. 220); *Marginson v. Blackburn Borough Council* ([1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273); *Spencer v. Williams* ((1871) L.R. 2 P. & D. 230); *Roden v. London Small Arms Co. Ltd.* ((1876) 46 L.J.Q.B. 213); *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* ([1955] 1 W.L.R. 761; [1955] 2 All E.R. 657); *Magrath v. Reichel* ((1887) 57 L.T. 850; 4 T.L.R. 296); *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399, 402); *Ruttmern v. Ruttmern* ((1937) 3 W.A.C.A. 178); *Reichel v. Magrath* ((1889) 14 App.Cas. 665; 5 T.L.R. 552); *Ohene Sintim v. C. M. Apeatu* ((1936) 2 W.A.C.A. 201).

Nov. 6. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Everything depends on what took place in the previous proceedings which were heard in the Chief Commissioner's Court of Ashanti in the year 1940. Their Lordships have found some difficulty in ascertaining the issues in those proceedings because there were no pleadings. The Rules of Court say that suits shall ordinarily be heard and determined in a summary way without pleadings: and this suit was so heard and determined. But it is permissible to look at the opening statements by counsel and at the evidence as well as the judgment. In the case of *Kobina Angu v. Cudjoe Attah* in 1916 (Judgments of the Judicial Committee on appeal from the Gold Coast, 1874-1928, 43, 48). Sir Arthur Channell, delivering the judgment of the Board, said that "the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute."

Looking at these materials, it becomes clear that on May 6, 1940, Muronam sued Banka in the Chief Commissioner's Court claiming a declaration of title to the self-same lands as are now in dispute, £100 damages for trespass, and an injunction to restrain Banka from entering the lands. In the course of the evidence both sides claimed to be the first settlers and both claimed to have exercised acts of ownership over the lands in dispute. A good deal was said about a decision of Captain Soden in 1907, when he, at talks with some of the chiefs, laid down the boundaries of the Banka lands. That was an executive decision only, not a judicial decision; but, after it was given, Banka acknowledged that the lands in dispute belonged to Adansi and said that Banka was caretaker of them for Adansi.

On November 19, 1940, the court gave its decision. The Acting Assistant Chief Commissioner dismissed Muronam's claim to the land, but he relied much on the executive decision of Captain Soden. He said: "I find there is no evidence on the plaintiff's side to justify the grant of the declaration of title which he seeks, but, on the other hand, that the question of the ownership of the land has already been decided by validated executive decision. There will therefore be judgment for the defendants."

Muronam appealed from that decision to the West African Court of Appeal, who, on May 29, 1941, dismissed the appeal. They saw no reason to differ from the decision in the court below that "there is no evidence on the plaintiff's side to justify the grant of the title which he seeks," but they thought it necessary to add that they did not subscribe to the other finding that the matter had been decided by the executive decision. Muronam failed, therefore, on the ground that it had not made out its title to the lands in dispute.

Akin Abuakwa and Adansi were not parties to those proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before. There is ample material to show that whenever Muronam or Banka complained of a trespass, each reported it to his superior, Akim Abuakwa or Adansi, as the case might be, who then took the matter up on behalf of his subordinate. Thus, the secretary to Akim Abuakwa gave evidence on behalf of Muronam and put in a series of letters in 1935 which showed that the Adansi had purported to grant a concession over the land to a mining company, that white men had gone onto the land, whereupon Muronam reported to Akim Abuakwa, who took up the matter with the mining company saying that "all questions affecting Muronam land have got to be settled by him" and that the "Adansi has no right over this land. On the other hand, the linguist representing the Adansi gave evidence on behalf of Banka. He said that Banka was caretaker for Adansi and added that "if anyone trespass on the land the Banka is to report to Adansehene who, if he chooses, will take action."

Under the Rules of Court it would have been open to Akim Abuakwa or Adansi to apply to be joined as parties in those earlier proceedings, but neither of them did so.

Such being the facts, there is, as between Muronam and Banka, a clear estoppel by *res judicata* because they were parties; but their Lordships have to say whether there is an estoppel between Akim Abuakwa and Adansi, who were not parties.

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a "privity" as he is called, is bound equally with the parties, in which case he is estopped by *res judicata* the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

English law recognises that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his

own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *In re Lart, Wilkinson v. Blades* ([1896] 2 Ch. 788). Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v. Andrews* ((1871) 2 P. & D. 327, 328). The full passage is in these words:

“ There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done *bona fide* in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.”

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see *Farquharson v. Seton* ((1828) 5 Russ. 45). But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense. It may have been found appropriate in England only in special conditions. But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties, on other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now 25 years ago that the Chief Justice drew attention to this way of looking at litigation: see *Yode Kwao v. Kwasi Coker* ([1931] 1 W.A.C.A. 162, 167), *Appoh Ababio v. Doku Kanga* ([1932] 1 W.A.C.A. 253, 255). It has led the Court of Appeal in West Africa to look for a principle to meet the situation and they have found it in the principle stated by Lord Penzance: see *Akwei v. Cofie* ([1952] 14 W.A.C.A. 143).

In the present case the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court Jackson J. said: “ The principle is clear and well-established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been

adduced at the first trial." In the Court of Appeal Manyo-Plange J. said ([1952] 14 W.A.C.A. 152)

“ . . . what should the Omanhene of Akim Abuakwa have done in the circumstance? In my view he should have applied to be joined as complainant. He took no such course. Being cognisant of the proceedings, he was content to stand by and see his battle fought by somebody ' else in the same interest ' ; the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action, namely, Muronam's title to the land in dispute, without which Akim Abuakwa cannot establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of Muronam's title to the land in dispute which had been determined in the former action.”

Their Lordships are of opinion that the principle stated by Lord Penzance should be applied in this case unless technical legal reasons exist which prevent its application. Their Lordships are unable to find any such reasons and are therefore of opinion that the principle was correctly applied.

Their Lordships ought to notice one further argument. It was said that both Muronam and Banka were subordinate stools under the one paramount stool of Akim Abuakwa and that therefore there was no call on Akim Abuakwa to intervene because its title would not be affected. The answer is, however, that whilst originally they may both have been subject to Akim Abuakwa, since 1907 Banka has never admitted that it was subordinate to Akim Abuakwa. In the proceedings of 1940 Banka said that the land belonged to Adansi and that Banka was only caretaker for Adansi. When Adansi's title was thus asserted, it was, as the Court of Appeal said, “ clearly the duty of Akim Abuakwa to intervene ” if it had an interest in the land. Akim Abuakwa did not do so and cannot now be allowed to fight the battle all over again.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

Solicitors: *A. L. Bryden & Co.; T. L. Wilson & Co.*

PIERRE SARR N'JIE APPELLANT
 AND
 CHARLES S. T. EDMONDSON RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1957 Nov. 18

Lords Reid, Somervell of Harrow
 and Mr. L. M. D. de Silva

Libel—Letter to Attorney-General charging forgery—Suggestion that action be taken if found necessary—Privilege—Malice—Communication by legal practitioner.

Both parties were legal practitioners. The respondent wrote a letter to the Attorney-General suggesting that certain papers which he enclosed disclosed forgery by the appellant and that appropriate action be taken. The appellant's claim was for damages for libel. The respondent pleaded privilege. In addition to disputing the plea of privilege the appellant alleged malice. The Court of

first instance and the West African Court of Appeal held the occasion was privileged, but the trial Judge found malice and entered judgment for the respondent.

Held: (i) Normally a defendant relying on privilege must honestly believe what he writes. In *Clark v. Molyneux*, 3 Q.B.D. 237, Bramwell, L.J. pointed out that there may be occasions when it may be proper to communicate a statement without believing it to be true. A barrister or solicitor if it becomes his duty to communicate facts as to which he is instructed may well be within this exception.

(ii) Although the respondent's letter summarised in one point inaccurately the statement by the client, it did not indicate personal belief. It enclosed the statement made by the client. For these reasons there was no malice disclosed.

LORD SOMERVELL OF HARROW. This is an appeal by the plaintiff from a decision of the West African Court of Appeal setting aside a judgment in favour of the plaintiff of the Supreme Court of the Gambia. The plaintiff's claim was for damages for libel. The defendant alleged that the occasion was privileged. The plaintiff disputed privilege and alternatively alleged malice. Both courts below held the occasion was privileged. The learned trial Judge found malice and awarded £1,000 damages. The Court of Appeal set aside the finding of malice and entered judgment for the defendant. The plaintiff appeals.

The plaintiff and the defendant are both barristers-at-law. The libel alleged is contained in a letter sent by the defendant to the Attorney General enclosing a statement purporting to have been made by one Sanjali Bojang. At that date the defendant was acting as solicitor for Bojang who wished to set aside a deed of conveyance of certain property executed by Bojang and conveying the property to the plaintiff. It is alleged in the statement that Bojang executed the conveyance on a representation by the plaintiff that it was an agreement for a loan of money. By section 330 of the Criminal Code a signature obtained by a fraudulent misrepresentation is a forgery.

The letter read as follows:

“ C. S. T. Edmondson,
Barrister-at-Law
Solicitor
Proctor etc.,
Phone F. 701

Lincoln Chambers,
13, Trelawney Street,
Freetown, Sierra Leone,
British West Africa,
28th April, 1953.

Sir,

On behalf of my client Mr. Sanjali Bojang of 7, Denton Street, Bathurst, Gambia, I hereby lay before you his complaint against Mr. Pierre Sarr N'Jie, a barrister-at-law, practising in the Gambia.

I enclose herewith a copy of a statement brought to me by a messenger sent by Mr. Bojang from Bathurst. The facts of his complaint are therein contained. In effect they amount to an allegation of forgery.

My instructions were to take proceedings to cancel the alleged deed of conveyance on the ground that it was not signed by my client and was in fact a forgery on the part of Mr. N'Jie. As however civil suits involving allegations of crime on any particular matter should as a rule be stayed until the complainant has pursued his criminal remedy I am of opinion that the proper thing for me to do is to lay the matter before you for such action to be taken as you may think proper. A copy of Mr. N'Jie's letter of explanation to me is enclosed herewith.

I shall be grateful if you will cause full investigation to be made into

the matter and such action taken, if any, as to you may seem proper. Mr. Bojang has with him a certified copy of the alleged deed of conveyance as well as other papers all of which I have instructed him to submit to you when called upon.

I remain to be,
Yours faithfully,
(Sgd.) C. S. T. EDMONDSON.

The Honourable
The Attorney General,
Bathurst,
Gambia.”

As will be seen there was also enclosed a letter from the plaintiff. On receipt of the complaint the defendant had asked the plaintiff for his account of the matter. The plaintiff in his letter denied that there was any misrepresentation; he wrote that he had later sold the property and that Bojang was a tenant of the new owner paying £15 a month. It was not disputed that the statement was defamatory and the only defence was privilege. Civil proceedings were taken in 1953 by Bojang for the cancellation of the deed on the ground that it was not executed by him or was executed on a misrepresentation by the plaintiff. These proceedings failed.

The learned Judge found the occasion privileged.

“ The defendant is in my opinion correct in stating, as he did in his letter, that it was necessary for a criminal remedy to be pursued before civil proceedings are commenced where the civil suit is based upon an alleged crime *i.e.* a felony by the other party: see *Smith v. Selwyn* 1914 K.B. 98. The crime imputed to the plaintiff was a felony *viz.*, forgery contrary to section 329 of the Criminal Code. The Attorney General was in my opinion the correct authority to whom to refer the matter since he performs in this territory the duties of Director of Public Prosecutions. The defendant had a duty as solicitor for Sanjali Bojang to take whatever steps were necessary to prosecute Sanjali Bojang's claim against the plaintiff. I hold therefore that the letter and statement were published to the Attorney General on an occasion of qualified privilege. And if the matter rested there the case for the plaintiff would fall to the ground.”

The Court of Appeal agreed with the learned trial Judge on this point. The only points taken in the appellant's case are directed to the issue of malice.

Evidence was given by the plaintiff of an interview with the defendant on the 21st May, 1954. The writ of summons had then been issued and the civil proceedings started. The plaintiff's evidence appears in the note as follows:

“ After the issue of the writ in this action the defendant came to Bathurst. On 21st May, 1953, I received a message in consequence of which defendant and I met in the library. The defendant asked why I had summoned him. I said ‘ well this is the second time you have done this thing and you know as a lawyer that the correct thing for you to have done if you believe your client was to take out civil proceedings to have the conveyance between myself and Sanjali Bojang cancelled.’ He was sitting in a chair and I on the table. He moved his chair closer to me and said ‘ how can I do that when I don't believe the man?’ Look. The statement is not signed but I am going to get it signed today.”

The defendant did not give evidence. The plaintiff relied on the defendant's statement that he did not believe Bojang as evidence of malice. He also relied on (a) the fact that the defendant had not seen his client or that Bojang's statement was unsigned; (b) an inaccuracy in the defendant's letter. That letter says that Bojang was saying he had not signed the conveyance, whereas in the attached statement he is admitting that he signed a paper but on a representation that it was a loan agreement; (c) the failure to forward a copy of the tenancy agreement between Bojang and the then owner. It is admitted that the defendant had a copy of this agreement; (d) his failure to mark the envelope addressed to the Attorney General as confidential; (e) an incident in 1950 when it was said the defendant had also libelled the plaintiff in a letter to the Attorney General and later apologised.

In finding malice the learned Judge put in the forefront of his reasons the statement by the defendant that he did not believe Bojang's story. The learned Judge cited various statements as to the necessity of honest belief. One example will suffice. "If the defendant honestly believed the statement to be true omission to make any inquiry is not in itself evidence of malice." The learned Judge states his conclusion in these words, "The fact that the defendant did not honestly believe the information upon which he acted is of itself strong evidence of malice."

Normally a defendant relying on privilege must honestly believe what he writes. In *Clark v. Molyneux*, 3 Q.B.D. 237, Bramwell, L.J., pointed out that there may be occasions when it may be proper to communicate a statement without believing it to be true. A barrister or solicitor if it becomes his duty to communicate facts as to which he is instructed may well be within this exception. Although the defendant's letter summarises, in one point inaccurately, the statement by the client it does not indicate personal belief. It encloses a statement from the person accused. Their Lordships for these reasons do not find evidence of malice in the statement made by the defendant to the plaintiff.

The points set out above under (a) and (b) are said to indicate recklessness which was evidence of malice. The Court of Appeal said the defendant might have acted with more caution: it is true he had only the statement, but his client was a long way away. To have himself made further investigation would have meant delay and expense. The matter was put forward not as something established but as a matter for investigation. There is nothing in these points nor in the failure to mark the envelope and the slip in the letter which would justify a finding of malice. The Board agree with the Court of Appeal that the incident of 1950 in no way assists the plaintiff's case.

The learned Judge was of course right to take into account the fact that the defendant did not give evidence and in particular did not support by evidence the account of the interview put by his Counsel in cross-examination. In surveying all the evidence it is important to remember that the defendant enclosed the plaintiff's own account of the transaction and his answer to the charges. There is also no evidence which suggests any personal ill will or any conceivable reason why the defendant should wish to harm the plaintiff. There is no question of taking a view different from that of the learned Judge on questions of credibility. Their Lordships are of opinion that the Court of Appeal were right in holding that malice had not been established. The reasons which have led their Lordships to this conclusion are substantially those given by the Court of Appeal. They will humbly advise Her Majesty that this appeal be dismissed. The appellants must pay the costs of the appeal.

KWAMINA ACQUAH (SUBSTITUTED FOR KWEKU
APAWU DECEASED), AND OTHERS APPELLANTS
AND
NANA AMOU AFERI II, OMANHENE OF ANOMABU
(SUBSTITUTED FOR NANA BAFFOE,
REGENT AND CARETAKER OF THE STOOL
OF ANOMABU) RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]
(1958) 3 W.A.L.R. 265

1957 Dec. 2

Lords Reid, Somervell of Harrow
and Mr. L. M. D. de Silva

Land—Stool land—Allegiance of those occupying land—Ownership or attachment to land—Political or constitutional relationship—Ouster of jurisdiction of Court.

In a land dispute it was submitted that the suit between two paramount chiefs as to ownership arising from suzerainty and allegiance is a question or matter relating to political or constitutional relations under native customary law in terms of s. 2 (1) (c) of the Native Authority (Colony) Ordinance 1944 (No. 21 of 1944) (now s. 88 (3) of the Courts Ordinance, c. 4, 1951 Revision) and accordingly the suit fell within the jurisdiction of a Committee of Inquiry in terms of s. 25 of the said Ordinance and that therefore the trial court had no jurisdiction to entertain the suit. S. 88 of the Courts Ordinance provides:

“ The Supreme Court and Magistrates’ Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for . . . (3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more chiefs, or between a Paramount Chief and a Chief, or between a Head Chief and a Chief.”

Held: 1. The Ordinance has to be read with the provision that the Lands Division of the Supreme Court had exclusive original jurisdiction to hear and determine any cause or matter relating to ownership, possession or occupation of land.

2. For the submission to succeed it would be necessary to establish that the issues between the parties was a question or matter relating to political or constitutional relations under native customary law, and further that the jurisdiction conferred by s. 25 excluded the jurisdiction of the Courts if the question or matter was one that could apart from s. 25 be litigated.

3. In considering whether a question or matter relates to political or constitutional relations one applies the test laid down in *Vanderpuye v. Botchway* (1956) A.C. 501, [1956] W.A.L.R. 16. What is the real issue? The real issue is quite plainly the ownership of land.

4. Political and constitutional relations may involve questions of allegiance, but questions of allegiance may arise when no political or constitutional questions are involved.

5. S. 25 of the Native Authority (Colony) Ordinance 1944 confers a discretionary power on a Provincial Commissioner to appoint a Committee of Inquiry to report on any matter of a constitutional nature if it is expedient to refer it to a State Council. It clearly does not purport to limit what would otherwise be the jurisdiction of the Supreme Court.

6. *Held also:* It is plain that allegiance of those occupying land is relevant to and may in the absence of other evidence be sufficient to establish the ownership or attachment of the land.

LORD SOMERVELL OF HARROW. This is an appeal by the defendants against a judgment of the West African Court of Appeal affirming a

judgment of the Lands Division of the Supreme Court of the Gold Coast dated 12th July, 1948. The proceedings started by a writ issued out of the Provincial Council by the then Omanhene of Anomabu. The plaintiff claimed a declaration that certain lands "are attached to the Stool of which the plaintiff sits as Omanhene of Anomabu," and an injunction restraining the defendants from dealing in any way with the said land or any portion thereof and from carrying on any cultivation or other work thereon. The principal village in the disputed area is Abonu. The defendants were natives of that village and the Omanhene of Asebu.

Both courts below granted the relief claimed. Before the Board the defendants argued four points. It was submitted on two separate grounds that the courts below had no jurisdiction. Alternatively it was submitted that the decisions were wrong in law. Alternatively if the plaintiff was entitled to a declaration he was it was submitted not entitled to a injunction. As one of the jurisdiction points depends on the nature of the issues raised it will be convenient to deal first with the appeal on merits.

The plaintiff's case was that this land—there is no dispute as to its boundaries—was conquered from the Asebu many years ago; that the village of Abonu was founded by a man named Apotu Dekyem, a stool being created under the protection of the plaintiff's predecessors. The defendants' case was that the land from time immemorial had been and remained attached to the Paramount Stool of Asebu through the Stool of Botoasi, Kweku Apawu, the first defendant.

The judge found that the descendants of Apotu Dekyem had been installed as Odikros in Abona. The evidence of the present Odikro was that he and his predecessors in title had at all times rendered allegiance to the plaintiff's Stool. This was not disputed. In 1923 a claim was brought against Kweku Apawu, the original first defendant, by one Elizabeth Smith. In that litigation Apawu swore that the land in question was the Stool property of the Omanhene of Anomabu and that he and the other defendants in those proceedings were subjects of the Omanhene. Apawu who gave evidence in the present case, having changed sides, was cross examined in these earlier statements. His explanation seeking to discredit his earlier evidence did not commend itself to the learned judge. The present dispute arose when Apawu sought to annex Anomabu Stool lands to the Stool Asebu in about 1929. The learned judge had the evidence which he accepted that the persons in possession of the land have through the Odikro in charge of the land, discharged their duties by attendance at the annual Stool Festival of the plaintiff's stool. The defendants sought to establish Apawu's pedigree but this broke down. The learned trial judge after considering all the evidence held that the plaintiff had discharged the onus placed upon him and granted the declaration and injunction as prayed for in the writ. The defendants appealed and the appeal was dismissed.

If the question whether land is attached to Stool A or Stool B is a question of fact there are concurrent findings. The argument on law may be summarised as follows: Allegiance is personal; the land on which a person owing allegiance to Stool A lives, is not necessarily land owned by or attached to Stool A; the courts below it is said based their decision on allegiance; this, it is submitted, was insufficient to discharge the onus. The courts below were of course well aware of the first two propositions. It is also plain that allegiance of those occupying land is relevant to and may in the absence of other evidence be sufficient to establish the ownership and attachment of the land. One need not go beyond paragraph 9 of the Defendants' case in which it is alleged that before the year 1700 the people in the dispu

land owed allegiance to the paramount Stool of Asebu. It is plain that before the learned trial judge both sides regarded the question of allegiance as relevant and important. There are no grounds for the submission that the learned judge went wrong in law on the weight he gave to it on the facts as he found them.

The first point as to jurisdiction was taken below and rejected by the trial judge and the Court of Appeal. Under the then Regulations a deposit of £100 was required to be made by a plaintiff before a writ was issued. The Provincial Council had power to remit the payment in whole or in part. It is quite clear, as the learned trial judge found, that the Provincial Council waived the deposit when the writ was issued and that was a matter entirely within their discretion. It would appear that the waiver was not unconditional as in May, 1938, the Registrar of the Provincial Council wrote to the plaintiff saying that the case would be struck out unless the deposit was paid. The case was not struck out and the learned judge was unable to say whether the full deposit had or had not been paid. Assuming it had not, he exercised his own powers and ordered that there should be full remission. Their Lordships agree that in these circumstances the argument fails.

The second jurisdiction point is more complicated but has equally little substance. It was not taken below. It was formulated in paragraph 15 of the appellants' case:

“ 15. It is respectfully submitted further that a suit between two Paramount Chiefs as to overlordship arising from suzerainty and allegiance is a question or matter relating to political or constitutional relations under native customary law in terms of Section 2 (1) (c) of the Native Authority (Colony) Ordinance, 1944 (No. 21 of 1944), and, accordingly, the Suit No. J.1/1934 fell within the jurisdiction of a Committee of Enquiry in terms of Section 25 of the said Ordinance and that, therefore, the Trial Court had no jurisdiction to entertain the said suit.

This submission was not raised nor considered in the Courts below ”. This Ordinance has to be read with the provision that the Lands Division of the Supreme Court had exclusive original jurisdiction to hear and determine any cause or matter relating to the ownership, possession or occupation of land.

For the submission to succeed it would be necessary to establish that the issues between the parties was a question or matter relating to political or constitutional relations under native customary law, and further that the jurisdiction conferred by section 25 excluded the jurisdiction of the Courts if the question or matter was one that could apart from section 25 be litigated. In considering whether a question or matter relates to political or constitutional relations one applies the test laid down in *Vanderpuye v. Botchway* [1956] A.C. 501. What is the real issue? The real issue is quite plainly the ownership of land. It may be wondered how it could be suggested that the issue was one within section 25. The suggestion was based on the fact that each side sought as has been said to rely on “ allegiance ” as relevant to the ownership issue. It is plain that this does not alter the nature of the real issue. Nor is there any ground for suggesting that evidence as to allegiance *per se* is within the words of section 25 as defined by section 2 (1) (c). Political and constitutional relations may involve questions of allegiance, but questions of allegiance may arise when no political or constitutional questions are involved. The argument as based on section 25

of the Ordinance of 1944 fails also on the other point. That section confers a discretionary power on a Provincial Commissioner to appoint a Committee of Inquiry to report on any matter of a constitutional nature if it is inexpedient to refer it to a State Council. It clearly is not purporting to limit what would otherwise be the jurisdiction of the High Court.

Later in his argument Mr. Khambatta referred to the provision which is now to be found in section 88 (3) of the Courts Ordinance cap. 4 in the 1957 Revision. It reads as follows:

“ 88. The Supreme Court and Magistrates' Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for—

(3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more Paramount Chiefs or Head Chiefs, or between two or more Paramount Chiefs, or between a Paramount Chief and a Chief, or between a Head Chief and a Chief.”

This does affect the jurisdiction but is irrelevant to this case as the cause or matter was not instituted for the trial of a question touching the political or constitutional relations within the section. It was a land dispute of familiar lines.

Finally it was submitted that an injunction was inappropriate as there was no claim for ejection. It is clear that before the learned judge there was no argument that the injunction should not be granted if the plaintiff had established his right to the declaration. The ground of appeal No. 10 reads: “ Because the order granting an injunction against the defendants and co-defendant was harsh, oppressive and unconscionable.” In the note of argument under this head appears— “ Injunction harsh as land in question is an ‘ island ’ in a foreign state.” It was submitted by the plaintiff that he was entitled to an injunction against all persons who challenge his title. The Court of Appeal said “ as to the injunction it must stand and it will be for Apawu and his followers to make their peace with the overlord whose suzerainty they once recognised.”

It is clear that the matters argued or sought to be argued on this point before the Board were not argued below. The circumstances of a land dispute such as this differ greatly from the land disputes that arise or may arise in this country. An injunction is a discretionary remedy and although the principles of law and equity are to be applied, it would in the Lordships' opinion be wrong to allow points to be taken here which are not taken below.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs, if any, of the appeal.

TWIMAHENE ADJEIBI KOJO II APPELLANTS

AND

OPANIN KWADWO BONSIÉ AND ANOTHER RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1957] 1 W.L.R. 1223; (1958) W.A.L.R. 257

*West Africa—Land—Evidence—Conflicting traditional evidence—Demeanour of witnesses little guide to truth—Traditional history to be tested by recent facts established by evidence—Duty of appellate court.
Court of Appeal—Fact, question of.*

In a suit concerning title to certain land in the Kumasi district of Ashanti traditional evidence was given by each side in support of its claim that the land in dispute had been awarded to his ancestor as a reward for the part played by him in a war. The Supreme Court of the Gold Coast (Land Court), affirmed by the West African Court of Appeal, reversed the decision of the Asantehene's A Court and upheld the decision of the lower Asantehene's B Court in favour of the defendant on the ground, *inter alia*, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account:

Held, that that was not a correct approach. Where there is a conflict of traditional history, which has been handed down by word of mouth, one side or the other must be mistaken, yet both may be honest in their belief. In such a case the demeanour of witnesses is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable.

When, as here, the native courts differ, the Supreme Court must review the evidence and draw its own inferences; it should not start with the presumption that the lower native court (the B court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the native appeal court (the A Court). In the end, however, it must reach its own conclusion on inferences of fact.

Judgment of the West African Court of Appeal affirmed in the result.

APPEAL (No. 4 of 1954) from a judgment of the West African Court of Appeal (January 9, 1953) affirming a judgment of the Supreme Court of the Gold Coast (Land Court), Ashanti (November 15, 1951), which had reversed a majority judgment of the Asantehene's A Court (December 9, 1950), reversing a judgment of the Asantehene's B Court (August 4, 1950) which had dismissed the present appellant's claim for a declaration of title to certain stool land.

The following facts are taken from the judgment of the Judicial Committee: This appeal concerned the title to a piece of land at Bonkwaso in the Kumasi district of Ashanti. It appeared to be a tract of forest land a few square miles in area. The present caretaker was one Kwadwo Bonsie, but he did not live on the land. He lived about 10 miles away at Nerebehi, but he had a cottage at Bonkwaso and visited it from time to time. He took all the profits from the land and handed them to his superior, the Odikro (Chief) of Nerebehi. Those profits consisted of tribute in the shape of rubber, gold dust, snails, big game and cocoa. The Odikro of Nerebehi in turn paid over a share of that tribute to his overlord, the Bantamahene (Head Chief of Bantama) whom he served. Such was the present position and, indeed, for some time past Bonsie and his ancestors had been caretakers who had paid tribute to the Odikro of Nerebehi who in turn had paid a proportion to the Bantamahene.

Despite that long enjoyment by the present occupants, the Atwimahene (Head Chief of Atwima) now laid claim to the land. He lived many miles away at Kumasi: but he said that that piece of land at Bonkwaso was given to his ancestor as a reward for his services in the war against Abrimoro some 200 years ago. The Atwimahene gave evidence by way of traditional history about the war, identifying himself with his ancestors, and speaking as though he himself was present in person. He told how the Bantamahene appointed him with other chiefs to chase Abrimoro and he got as far as Bonkwaso when he was stricken with smallpox and got no further. He was given that land at Bonkwaso as a reward for his services in that campaign.

Three other chiefs, the Hiahene, the Akwaboahene, and the Besiasihene supported his evidence, describing the campaign as if they themselves were there and it only happened yesterday. The Atwimahene said that, after the war, he gave a portion of the land away, but that he kept the rest (the part he claimed in this action) and his hunters brought him venison, snails and fish from it. About 80 years ago, however, he became in need of money and borrowed £6 in gold dust from one Kwabena Tenteng of Nerebehi—who was not his subject but was staying on the land—and he said that he pledged this piece of land with Kwabena Tenteng to secure repayment, giving to Kwabena Tenteng the right to enjoy the profits of the land until the loan was repaid. When Kwabena Tenteng died, however, nothing was said to his relatives about the pledge. The successors of Kwabena Tenteng have continued to be caretakers on this land until in due course it came to the hands of the present caretaker Kwadwo Bonsie. In 1948 the Atwimahene sent bearers with £6 in money to be paid to Kwadwo Bonsie in redemption of the pledge; but Bonsie denied there was any such pledge. Thereupon the Atwimahene brought this action against Bonsie claiming a declaration of title to the land and an injunction. The Odikro of Nerebehi applied to become a party because he claimed to have an interest in the land and he was made a defendant.

The defendants said that the land never belonged to the plaintiff but was given to the Odikro of Nerebehi at the end of the Abrimoro war. The Odikro of Nerebehi gave evidence, by way of traditional history, saying that he did not go with the first contingent (Hiahene, Akwaboahene and the other warrior chiefs) to chase Abrimoro, but that he was sent later to search for the first contingent. He met them on the Supong stream as they were returning victorious. Afterwards he was given the land up to the Supong stream, which included the land at Bonkwaso now in dispute. The Bantamahene (the head clan chief of both the contestants) supported the traditional history of the Odikro of Nerebehi. He said that at the end of the war "I called Nerebehi Dikro and told him to take and possess the land up to the Supong stream where he reached . . . and to bring me any valuables on the land to be given a share thereof." Kwadwo Bonsie said that he and his ancestors had been caretakers of the land from time immemorial for the Odikro of Nerebehi.

The case was tried at first instance in the Asantehene's B Court, consisting of three chiefs. They heard evidence on several days from February 27, 1950, to July 28, 1950, and eventually on August 4, 1950, found in favour of the defendants in a unanimous judgment delivered by the President, Nana Mensah Yidom, Amakomhene. The plaintiff appealed to the Native Appeal Court (the Asantehene's A Court), consisting of three head chiefs, who heard the case on several days and examined the parties in person. In the result, on December 9, 1950, the appeal was allowed by a majority of two to one, the Ankobiahene and the Akyempimhene being in favour of the plaintiff; and the Nkwantahene (The President of the Court) in favour of the defendants. The defendants appealed to the Supreme Court (Land Court) at Kumasi (Windsor-Aubrey J.), who, on November 15, 1951, allowed the appeal and restored the decision of the Asantehene's B Court in favour of the defendants. The plaintiff then appealed to the West African Court of Appeal (Foster Sutton P. Coussey J.A. and Korsah J.), who, on January 9, 1953, dismissed the appeal. The plaintiff now appealed to Her Majesty in Council.

1957. Oct 10, 14. *Joseph Dean* for the appellant.

The respondents did not appear and were not represented.

The following cases were cited in argument: *Abakah Ntaha v. Anguah Bennieh* ([1931] A.C. 72); *Gariba v. Ibrahimah* ([1951] 13 W.A.C.A. 171, 179); *Agbo Kofi v. Addo Kofi* ([1933] 1 W.A.C.A. 284); *Chief Ebiassah v. Ababio* ([1946] 12 W.A.C.A. 106); *Stool of Abinabina v. Chief Kojo Enyimadu* ([1953] A.C. 207; [1953] 2 W.L.R. 261).

December 2. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above, and continued: It is plain that each side claimed the land to have been awarded to his ancestor by virtue of the part played by him in the Abrimoro war: and the main issue in the case was, who was right about the history of the matter? If the land was originally given to Atwinahene for his part in the war, nothing since would have deprived him of it. He would not lose it by pledging it and doing nothing about the pledge for 80 years. But he had, of course, to account for the fact that he had not received any of the profits for many years, and he did this by saying that he had parted with it by way of pledge only. He sought to refute the case of the defendants by saying that the Odikro of Nerebehi admittedly did not take part in the active campaign but only followed up afterwards, and that would not be a sufficient reason for rewarding him with a grant of land.

Their Lordships notice that the judges in the appeal court who were in favour of upholding the decision of the Asantehene's B Court, did so on two grounds: first, that it was a decision of fact depending on the demeanour of the witness and almost inviolable on that account: second, that on a review of the evidence it was the correct decision.

So far as the first ground is concerned, their Lordships do not think it was the correct approach to this case. Their Lordships notice that there was no dispute as to the primary facts, that is, the facts which the witnesses actually observed with their own eyes or knew of their own knowledge in their own lifetime. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable. That is how both the native courts approached the matter and their Lordships think they were right in so doing. If both the native courts had come to the same conclusion, the Supreme Court is necessarily called upon to review the evidence and draw its own inferences. It should not start with the presumption that the lowest native court (here the B Court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the native appeal court (here the A Court). In the end, however, it must reach its own conclusion just as a court of appeal in England must do, on inferences of fact: see *Benmax v. Austin Motor Co. Ltd.* ([1955] A.C. 370; (1955) 2 W.L.R. 418; (1955) 1 All E.R. 326).

So far as the second ground is concerned, their Lordships have themselves reviewed the evidence. Two facts stand out as established: The first is that the defendants have enjoyed the profits of the land without interruption for 80 years. Three or four generations have passed and no suggestion has been made that it was the subject of a pledge. The evidence

shows that, if there had been a pledge, it is customary on the death of the pledger for a reminder to be given to his successors, whereas none such was given. Even if the custom were the other way round (as was suggested), still no reminder was given: and surely, if no reminder was given, the plaintiff ought to have taken steps long since to draw the defendants' attention to his claim. The failure of the plaintiff and his predecessors to do this goes far to negative his claim.

The second is that in 1919, in the Chief Commissioner's Court for Ashanti, the Odikro of Nerebehi succeeded in an action for trespass to his land next to the Supong stream. This is not the land in dispute, but it is in fact several miles forward beyond Bonkwaso. This is strong support for the defendants' traditional history, for it shows that he did get land as far forward as the Supong. The plaintiff says that the defendant did not take part in the Abrimoro campaign at all, but if that were so, how did he get this piece of land up by the Supong?

Those two facts are so cogent that, in the opinion of their Lordships, they turn the scale in favour of the defendants. Their Lordships appreciate the force of the arguments of the majority of the Asantehene's A Court, but on balance they think the decision of the Asantehene's B Court was correct. In so doing they find themselves, on this second ground, in agreement with the President of the A Court, and the judges of the Supreme Court and the West African Court of Appeal. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: *A. L. Bryden & Williams.*

ANOMABU STOOL v. ACQUAH AND OTHERS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1958) 3 W.A.L.R. 265

1957 Dec. 2

Lords Reid, Somervell of Harrow and
 Mr. L. M. D. de Silva

Evidence—Claim for declaration of title to land—Relevance of allegiance to issue—Evidentiary value of allegiance.

State Councils—Jurisdiction—Test for determining whether or not an issue is a "constitutional matter"—Whether allegiance is a "constitutional matter"—State Councils (Colony and Southern Togoland) Ordinance, c. 8 of 1952, s. 5.

The plaintiff stool, the respondents in this appeal, had succeeded before the Land Court and the West African Court of Appeal in an action in which they claimed a declaration of title to an area of land occupied by the defendants and sought an injunction. The trial judge had accepted evidence to the effect that the defendants owed allegiance to the plaintiff stool. Claiming that the courts below had based their decision on this evidence the defendants argued that it was insufficient to discharge the onus of proof on the plaintiff stool, allegiance being a personal matter and thus not one that necessarily affected the ownership of the land occupied by the persons owing allegiance. It was further argued, *inter alia*, that issues between paramount chiefs involving allegiance were constitutional matters which, by the operation of the Native Authority (Colony) Ordinance (now, for this purpose, the State Councils (Southern Ghana), Ordinance, c. 8 of 1952) and the Courts Ordinance, c. 4 of 1951, s. 88, were excluded from the jurisdiction of the Supreme Court.

Held, (i) in determining whether a question or matter is of a constitutional matter (within the meaning of the State Councils (Southern Ghana) Ordinance)

the test to be applied is: what is the real issue between the parties. In this case the real issue was as to the ownership of land and was thus not a matter within the jurisdiction of a State Council and excluded from the jurisdiction of the Supreme Court.

Vanderpuye v. Botchway [1956] A.C. 501; (1956) 2 W.A.L.R. 16 applied.

(ii) Although allegiance was not itself the main issue between the parties, it was relevant to that issue. Where the ownership of land is in issue, evidence as to allegiance may therefore, in the absence of other evidence, be sufficient to establish the ownership or attachment of the land.

(iii) Allegiance is not *per se* a constitutional matter: constitutional matters may involve questions of allegiance, but these may equally arise where no constitutional issues are involved.

[EDITORIAL NOTE. Jurisdiction in constitutional matters is now regulated by the State Councils (Southern Ghana) Ordinance, c. 8 of 1952, where by section 5, this jurisdiction (which is an exclusive one by the effect of the Courts Ordinance, c. 4 of 1951, s. 88) is conferred upon State Councils. The Native Authority (Colony) Ordinance, c. 21, of 1944, was omitted from the 1951 Edition of the Laws of Ghana by the authority of the Revised Edition of the Laws Ordinance, c. 36 of 1951, and has been substantially repealed by the State Councils (Southern Ghana) Ordinance. The principle applied by their Lordships appears to apply equally to the current as to the old jurisdictional provisions in constitutional matters and this headnote has been prepared on this basis.]

Case referred to:

Vanderpuye v. Botchway [1956] A.C. 501; (1956) 2 W.A.L.R. 16.

APPEAL from a decision of the West African Court of Appeal affirming the decision of Jackson J. given on July 12, 1948, in the Land Court, Eastern Judicial Division, granting a declaration of title to the plaintiff stool and an injunction.

S. P. Khambatta Q.C. and *S. N. Bernstein* for the appellants.

The respondents were not represented and did not appear.

The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW:

This is an appeal by the defendants against a judgment of the West African Court of Appeal affirming a judgment of the Lands Division of the Supreme Court of the Gold Coast dated July 12, 1948. The proceedings started by a writ issued out of the Provincial Council by the then Omanhene of Anomabu. The plaintiff claimed a declaration that certain lands "are attached to the stool on which the plaintiff sits as Omanhene of Anomabu," and an injunction restraining the defendants from dealing in any way with the said land or any portion thereof and from carrying on any cultivation or other work thereon. The principal village in the disputed area is Abonu. The defendants were natives of that village and the Omanhene of Asebu.

Both courts below granted the relief claimed. Before the Board the defendants argued four points. It was submitted on two separate grounds that the courts below had no jurisdiction. Alternatively it was submitted that the decisions were wrong in law. Alternatively, if the plaintiff was entitled to a declaration, he was, it was submitted, not entitled to an injunction. As one of the jurisdiction points depends on the nature of the issues raised it will be convenient to deal first with the appeal on merits.

The plaintiff's case was that this land—there is no dispute as to its boundaries—was conquered from the Asebu many years ago; that the village of Abonu was founded by a man named Apotu Deyem, a stool being created under the protection of the plaintiff's predecessors. The defendants' case was that the land from time immemorial had been and remained attached to the Paramount Stool of Asebu through the Stool of

Botoasi, Kweku Apawu, the original first defendant.

The judge found that the descendants of Apotu Dekyem had been installed as Odikros in Abonu. The evidence of the present Odikro was that he and his predecessors in title had at all times rendered allegiance to the plaintiff's stool. This was not disputed. In 1923 a claim was brought against Kweku Apawu, the original first defendant, by one Elizabeth Smith. In that litigation Apawu swore that the land in question was the stool property of the Omanhene of Anomabu and that he and the other defendants in those proceedings were subjects of the Omanhene. Apawu, who gave evidence in the present case, having changed sides, was cross-examined on these earlier statements. His explanation seeking to discredit his earlier evidence did not commend itself to the learned judge. The present dispute arose when Apawu sought to annex Anomabu Stool lands to the Asebu Stool in or about 1929. The learned judge had the evidence, which he accepted, that the persons in possession of the land have, through the Odikro in charge of that land, discharged their duties by attendance at the annual Stool Festival of the plaintiff's Stool. The defendants sought to establish Apawu's pedigree but this broke down. The learned trial judge after considering all the evidence held that the plaintiff had discharged the onus placed upon him and granted the declaration and injunction as prayed for in the writ. The defendants appealed and the appeal was dismissed.

If the question whether land is attached to stool A or stool B is a question of fact there are concurrent findings. The argument on law may be summarised as follows: Allegiance is personal; the land on which a person owing allegiance to stool A lives is not necessarily land owned by or attached to stool A; the courts below, it is said, based their decision on allegiance; this, it is submitted, was insufficient to discharge the onus. The courts below were, of course, well aware of the first two propositions. It is also plain that allegiance of those occupying land is relevant to and may in the absence of other evidence be sufficient to establish the ownership or attachment of the land. One need not go beyond paragraph 9 of the Defence in which it is alleged that before the year 1700 the people in the disputed land owed allegiance to the Paramount Stool of Asebu. It is plain that before the learned trial judge both sides regarded the question of allegiance as relevant and important. There are no grounds for the submission that the learned judge went wrong in law on the weight he gave to it on the facts as he found them.

The first point as to jurisdiction was taken below and rejected by the trial judge and the Court of Appeal. Under the then Regulations a deposit of £100 was required to be made by a plaintiff before a writ was issued. The Provincial Council had power to remit the payment in whole or in part. It is quite clear, as the learned trial judge found, that the Provincial Council waived the deposit when the writ was issued and that was a matter entirely within their discretion. It would appear that the waiver was not unconditional as in May 1938 the Registrar of the Provincial Council wrote to the plaintiff saying that the case would be struck out unless the deposit was paid. The case was not struck out and the learned judge was unable to say whether the full deposit had or had not been paid. Assuming it had not, he exercised his own powers and ordered that there should be full remission. Their Lordships agree that in these circumstances the argument fails.

The second jurisdiction point is more complicated but has equally little substance. It was not taken below. It was formulated in paragraph 15 of the appellants' case:

“ 15. It is respectfully submitted further that a suit between two Paramount Chiefs as to overlordship arising from suzerainty and allegiance is a question or matter relating to political or constitutional relations under native customary law in terms of section 2 (1) (c) of the Native Authority (Colony) Ordinance, 1944 (No. 21 of 1944), and, accordingly, the Suit No. J. 1/1934 fell within the jurisdiction of a Committee of Enquiry in terms of section 25 of the said Ordinance and that, therefore, the Trial Court had no jurisdiction to entertain the said suit.”

This submission was not raised nor considered in the courts below. This Ordinance has to be read with the provision that the Lands Division of the Supreme Court had exclusive original jurisdiction to hear and determine any cause or matter relating to the ownership, possession or occupation of land.

For the submission to succeed it would be necessary to establish that the issue between the parties was a question or matter relating to political or constitutional relations under native customary law, and further that the jurisdiction conferred by section 25 excluded the jurisdiction of the courts if the question or matter was one that could, apart from section 25, be litigated. In considering whether a question or matter relates to political or constitutional relations one applies the test laid down in *Vanderpuye v. Botchway* (1). What is the real issue? The real issue is quite plainly the ownership of land. It may be wondered how it could be suggested that the issue was one within section 25. The suggestion was based on the fact that each side sought, as has been said, to rely on “allegiance” as relevant to the ownership issue. It is plain that this does not alter the nature of the real issue. Nor is there any ground for suggesting that evidence as to allegiance *per se* is within the words of section 25 as defined by section 2 (1) (c). Political and constitutional relations may involve questions of allegiance, but questions of allegiance may arise when no political or constitutional questions are involved. The argument as based on section 25 of the Ordinance of 1944 fails also on the other point. That section confers a discretionary power on a Provincial Commissioner to appoint a committee of inquiry to report on any matter of a constitutional nature if it is inexpedient to refer it to a State Council. It is clearly not purporting to limit what would otherwise be the jurisdiction of the High Court.

Later in his argument Mr. Khambatta referred to the provision which is now to be found in section 88 (3) of the Courts Ordinance, c. 4, in the 1951 Revision. It reads as follows:

“ 88. The Supreme Court and Magistrate's Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for . . .

(3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more Paramount Chiefs or Head Chiefs, or between two or more Chiefs, or between a Paramount Chief and a Chief, or between a Head Chief and a Chief.”

This does affect the jurisdiction, but is irrelevant to this case as the cause or matter was not instituted for the trial of a question touching the political or constitutional relations within the section. It was a land dispute on familiar lines.

Finally, it was submitted that an injunction was inappropriate as there

was no claim for ejectment. It is clear that before the learned judge there was no argument that the injunction should not be granted if the plaintiff established his right to the declaration. The ground of appeal No. 10 reads: "Because the order granting an injunction against the defendants and co-defendant was harsh, oppressive and unconscionable." In the note of argument under this head appears: "Injunction harsh as land in question is an 'island' in a foreign state." It was submitted by the plaintiff that he was entitled to an injunction against all persons who challenge his title. The Court of Appeal said: "As to the injunction it must stand and it will be for Apawu and his followers to make their peace with the overlord whose suzerainty they once recognised."

It is clear that the matters argued or sought to be argued on this point before the Board were not argued below. The circumstances of a land dispute such as this differ greatly from the land disputes that arise or may arise in this country. An injunction is a discretionary remedy and although the principles of law and equity are to be applied, it would in their Lordships' opinion be wrong to allow points to be taken here which were not taken below.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs, if any, of this appeal.

Appeal dismissed.

KOFI FORFIE, ODIKRO OF MARBAN . . . APPELLANT
AND
BARIMA KWABENA SEIFAH, KENYASEHENE . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1958] 2 W.L.R. 52; [1958] A.C. 59;
[1958] 1 All E.R. 1289; (1958) 3 W.A.L.R. 274

1957 Dec. 9

Lords Reid, Somervell of Harrow and
the Rt. Hon. Mr. L. M. D. de Silva

West Africa (Gold Coast)—Jurisdiction—Chief Commissioner's Court—Commissioner's appointment rescinded—Judgment delivered without jurisdiction—Nullity—Subsequent appointment—Review—Second judgment in identical terms—Not a nullity—"Judgment"—Inherent power to set aside judgment delivered without jurisdiction—Courts Ordinance (Laws of the Gold Coast, 1936 c. 4), s. 63; Sched. III, Ord. 41, rr. 1, 2.

Practice—Order—Recall—Order without jurisdiction—Inherent power of court which made order to set it aside.

By Ord. 41, r. 1 of the "Rules and Orders of Court" contained in the Third Schedule to the Courts Ordinance of the Gold Coast:

"Any Judge, Magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal . . . to reverse, vary, or confirm his previous judgment . . ."); and by r. 2: "Any application for review of judgment must be made not later than 14 days after such judgment . . .":

Held, that "judgment" in Ord. 41 means nothing more than an adjudication "by a judge upon rights of parties. If made without jurisdiction

it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under Ord. 41 review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction then that second judgment is not a nullity.

Accordingly, where a commissioner validly appointed to preside over the Chief Commissioner's Court reviewed under Ord. 41, r. 1, a judgment of his which was a nullity, having been delivered by him on a date when admittedly he had no jurisdiction to act, and on the review delivered a judgment identical in terms with his original judgment, the second judgment was not a nullity.

A further ground for holding that such second judgment was not a nullity is that the court has inherent power to set aside a judgment which it has delivered without jurisdiction. Assuming that the commissioner had no power to review his earlier judgment, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment.

Dictum of Lord Greene M.R. in *Craig v. Kanssen* [1943] K.B. 256 at 263; [1943] 1 All E.R. 108 applied.

A judge can act of his own motion under Ord. 41, r. 1, without the necessity of an application by a party under rule 2. The latter rule places parties under a limitation as to time without imposing a similar limitation on a judge.

The words "shall have obtained leave to appeal" in Ord. 41, r. 1, relate to the point of time at which final—not conditional—leave is formally granted by the court.

Under section 63 of the Courts Ordinance, which provides that "The Governor may at any time . . . appoint a fit and proper person to preside over the Chief Commissioner's Court . . ." more than one commissioner can be appointed to function, at the same time. Under the relevant law the singular includes the plural and the word "preside" does not stand in the way of that interpretation—two persons appointed will not sit in the same court at the same time.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 32 of 1952) from a judgment of the West African Court of Appeal (June 28, 1951), which set aside as nullities two judgments given by Mr. A. C. Spooner in the Chief Commissioner's Court of Ashanti on May 10, 1949, and June 29, 1949, respectively.

The following facts are taken from the judgment of the Judicial Committee. The original parties to this action were the predecessors in title of the present appellant and the present respondent. No question arose from the substitution of parties. The terms "appellant" and "respondent" in this report refer to the original parties as well as to the parties who appeared on this appeal.

The respondent instituted this action against the appellant on October 6, 1936, in Divisional Native Court B of Kumasi to recover a tract of land. That court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehene's Court A2 the judgment was reversed and the respondent succeeded. The appellant thereupon lodged an appeal to the Chief Commissioner's Court. Mr. A. C. Spooner, the president of the court at the time, heard the case and delivered judgment in favour of the appellant on May 10, 1949.

There was an appeal from that judgment to the West African Court of Appeal. Two dates relating to that appeal were relevant. The respondent on May 27, 1949, obtained conditional leave to appeal, and final leave to appeal was granted on July 15. His appeal was based on the contention that Mr. Spooner [supplied from (1958) A.C. 59/61] had had on May 10, 1949, no power to exercise judicial functions as on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. It appeared from the record that he had also been of that opinion that, as a result, certain steps were taken which it is convenient to examine at this stage.

It was common ground that appointments to preside over the Chief Commissioner's Court could be and were made by order signed by the Colonial Secretary and published in the Gazette. When Mr. Spooner heard the case he held office under Order No. 84 of 1948. By Order 32 of 1949 signed on May 10, 1949, by the Acting Colonial Secretary, one Mr. Allen was appointed to preside over the Chief Commissioner's Court and Order No. 84 of 1948 was rescinded. By a further Order, No. 42 of 1949, of June 21, 1949, Mr. Spooner was appointed commissioner for the period June 23, 1949, to June 30, 1949. On June 29, 1949, acting under a power to review judgment conferred by Ord. 41, r. 1, contained in Schedule III of Chapter 1 of the Laws of the Gold Coast, 1936, Mr. Spooner reviewed his judgment of May 10, 1949. He said that he had had no jurisdiction on May 10, 1949, to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment. There was an appeal from that judgment also to the West African Court of Appeal.

The Court of Appeal (Verity Ag. P., Lewey J.A. and Morgan J.) held that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment of May 10, 1949, was a nullity.

By Ord. 41, in the Third Schedule to the Courts Ordinance:

" ORDER 41
REVIEW

1. Any judge, magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision, or to order a non-suit.

2. Any application for review of judgment must be made not later than fourteen days after such judgment. After the expiration of fourteen days an application for review shall not be admitted, except by special leave of the court, on such terms as seem just."

October 29, 30. *Hector Hughes Q.C.* and *J. T. Woodhouse* for the appellant.

J. G. Le Quesne for the respondent.

The following cases were cited in argument: *Bhugwandeem Doobey v. Myna Bace* ([1868] 11 Moo.I.A. 487, 499); *Craig v. Kanssen* ([1943] K.B. 256; [1943] 1 All E.R. 108); *Hatton v. Harris* ([1892] A.C. 547, 560); and *Chief Kwame Asante v. Chief Kwame Tawia* ([1949] W.N. 40).

December 9. The judgment of their Lordships was delivered by THE RIGHT HON. MR. L. M. D. DE SILVA, who stated the facts set out above and continued: It appears from the judgment of the Court of Appeal that the appellant at the hearing of the appeal conceded that the judgment of May 10, 1949, was a nullity. An endeavour was made by counsel for the appellant to argue that upon this point the Court of Appeal had misunderstood counsel. No indication of such an argument is to be found in the "Case for the appellant." Six years have now passed since the Court of Appeal gave judgment, and their Lordships did not think that this was a case in which such an argument should be permitted. Nor did they find it possible, in the exercise of their discretion, to allow counsel, despite the concession, to argue that the judgment of May 10, 1949, was not a nullity.

Their Lordships are unable to agree with the Court of Appeal that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment on May 10, 1949, was a nullity. They have reached the conclusion that the judgment of June 29, 1949, was not a nullity upon two separate and independent grounds.

The power to review a judgment is to be found in Order 41, contained in the Third Schedule to the Courts Ordinance, which is to the following effect [His Lordship stated the terms of Order 41, rr. 1 and 2, and continued]: This is an extremely wide power and its object is to enable a court, which is of opinion that a judgment or decision given by it is erroneous, to correct the error. If, as argued by the respondent, the term " judgment " must be limited to judgments made with jurisdiction, it follows that the Order enables a court to correct all errors made by it except the error that it has given a judgment which it had no jurisdiction to give. Such a result would be curious. Their Lordships cannot accept the argument. To say that a judgment is a nullity is not to say that the judgment is not a judgment for any purpose, and, in particular, that it is not a judgment within the meaning of the term in Ord. 41. Their Lordships are of opinion that the term in Ord. 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual, but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under the Order review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction then that second judgment is not a nullity. That is the position in the present case.

Certain other submissions were made with regard to Ord. 41. It was said that a judge cannot act under rule 1 unless a party applies under rule 2. Their Lordships cannot accept this argument. There is no reason why a judge, acting under Ord. 41, should be precluded, after hearing parties, from correcting an error which he has noticed. What the legislature has done is by rule 2 to place parties under limitation as to time without imposing a similar limitation on a judge. It was argued before the Court of Appeal that where it was intended that a judge should have the right to act of his motion the legislature has expressly said so. Thus, in Ord. 26 the words " either of his own motion or on the application of either party " occur. Their Lordships are of opinion that, though this argument cannot be said to be without some force, it is not strong enough to defeat the view expressed above.

It was also argued that the words " except where either party shall have obtained leave to appeal " in rule 1 were applicable because the respondent had at the time of the review obtained conditional leave to appeal and fulfilled the conditions although the court had not granted final leave to appeal. Their Lordships cannot agree. They think " shall have obtained leave to appeal " relates to the point of time at which final leave is formally granted by the court.

It was further argued that the power to review was not exercisable by an appellate tribunal. If this were correct the term " judicial officer " in Ord. 41 would not include judicial officers exercising appellate jurisdiction. Their Lordships can see no reason for taking this view.

It was said that Ord. No. 42 of 1949, of June 21, 1949, which appointed Mr. Spooner for the period June 23, 1949, to June 30, 1949, was ineffective as Mr. Allen's appointment had not been rescinded. Their Lordships are of the opinion that more than one person can be appointed to function at the

same time. Section 63 of the Courts Ordinance is to the following effect: "The Governor may at any time by order under his hand appoint a fit and proper person to preside over the Chief Commissioner's Court and such person shall have and may exercise during the period of such appointment and subject to the terms thereof all the judicial powers and jurisdiction for the time being vested in the Chief Commissioner." It is conceded that under the relevant law the singular includes the plural, and consequently "a fit and proper person" includes "fit and proper persons." Their Lordships do not think that the word "preside" stands in the way of this interpretation. Two persons can be appointed, but as they will not both sit in the same court at the same time no difficulty can arise. Moreover, if only one person can be appointed, the later appointment of Mr. Spooner will prevail over the earlier appointment of Mr. Allen.

Their Lordships will now proceed to the second ground upon which they have come to the conclusion that the judgment of June 29, 1949, was not a nullity. A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene M.R. in *Craig v. Kansse* ([1943] K.B. 256, 262), after referring to several decisions, said: "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it."

Their Lordships are of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This in fact he did, and the only criticism of the proceedings of June 29 that could be made is that on a question of procedure he attributed the authority to do the thing he did to a source from which it did not flow. But although the source named was, on the assumption made, incorrect, he undoubtedly had power to do the thing he did. No other error can be said to have been committed. Such an error does not, in their Lordships' opinion, vitiate the act done. It follows that the judgment of June 29, 1949, was not a nullity.

Morgan J., who delivered the judgment of the West African Court of Appeal with which the others concurred, said: "The appeal against the reviewed judgment of June 29, 1949, has not yet come before this court" but he had pronounced upon the question whether or not the judgment of June 29, 1949, is a nullity. He said "the reviewed judgment must also in my view be declared a nullity." And under the heading "Court notes of Judgment" the formal order made is: "Appeal allowed. Judgment of C.C.A. set aside as a nullity. Reviewed judgment also declared a nullity. No order as to costs." That view and that order stand in the way of the appeal from the judgment of June 29, 1949, being proceeded with. Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arise on the appeal from the judgment of June 29, 1949, on the basis that that judgment is not a nullity although the judgment of May 10, 1949, is a nullity. The respondent must pay the appellant's costs of this appeal and of the hearing before the West African Court of Appeal.

Solicitors: *A. L. Bryden & Williams; Waterhouse & Co.*

CHIEF EKE OJA AND OTHERS APPELLANTS

AND

CHIEF KANU UKPAI AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1958] 1 W.L.R. 151

1958 Jan. 20

Lords Morton of Henryton, Reid and
the Rt. Hon. Mr. L. M. D. de Silva

West Africa (Nigeria)—Jurisdiction—Claim to ownership of land—Not a claim to fix boundaries—Jurisdiction of Supreme Court—Not ousted by Inter-Tribal Boundaries Settlement Ordinance (No. 49 of 1933) (Laws of Nigeria, 1948, c. 95), ss. 3, 4 and 5.

Where the respondents, as plaintiffs representing the people of Biakpan, claimed a declaration of title to a piece of land known as " Ekuot Ijoho " at Biakpan in the Calabar Province of Nigeria and defined by a plan, and the appellants as defendants representing the neighbouring people of Asaga contested the claim, it was simply a claim to ownership of the land and not a claim to have a boundary fixed between two tribes, and the decision of the claim was clearly within the jurisdiction of the Supreme Court of Nigeria, on transfer from the Native Court, by the joint effect of the Native Courts Ordinance and the Supreme Court Ordinance. Further, the Inter Tribal Boundaries Settlement Ordinance, 1933, of Nigeria, did not deprive the Supreme Court of jurisdiction to hear and decide such a claim. That Ordinance contained no express exclusion of the Supreme Court's jurisdiction, did not in section 3 give any tribe a right to have a dispute decided, and by sections 4 and 5 made it clear that the decision under the Ordinance need not be based on any principle of law. A jurisdiction of the kind conferred by the Ordinance could not have been intended to take away the right of any tribe to have its claim to ownership of a defined piece of land decided by the Supreme Court on legal principles after hearing argument.

Judgment of the West African Court of Appeal affirmed in the result.

APPEAL (No. 28 of 1956) from a judgment and order of the West African Court of Appeal (May 28, 1954), affirming a judgment of the Supreme Court of Nigeria (July 14, 1953) in favour of the present respondents.

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of a suit commenced by plaint in the Native Court of Ubaghara and transferred to the Supreme Court by an order made under section 28 (1) (c) of the Native Courts Ordinance.

It is convenient to refer hereafter to the respondents (who were plaintiffs in the suit) as " the plaintiffs " and to the appellants (defendants in the suit) as " the defendants."

The plaintiffs claimed, for themselves and as representing the people of Biakpan,

" (1) Declaration of title to all that piece or parcel of land known as ' Ekuot Ijoho ' situate and being at Biakpan in the Calabar Province, property of the plaintiffs, the said land to be particularly delineated on the plan to be produced at the hearing.

(2) £300 damages for trespass in that in or during the year 1947, the defendants and their people and/or agents broke and entered into the plaintiffs' said land and therefrom collected palm fruits and made farms therein, and thereby disturbed the plaintiffs' quiet possession of the said land, without the leave or licence of the plaintiffs.

(3) An injunction to restrain the defendants, their people, agents, servants, and each and every one of them from any further acts of interference with the plaintiffs' right, title, interest in, and possession of the said land. Dispute started since 1947."

By their statement of claim filed on September 15, 1952, the plaintiffs pleaded that the land in dispute was situate at Biakpan in the District of Arochuku, Calabar, was known as "Ekuot Ijoho," and was and had been from time immemorial the property of the plaintiffs by virtue of first occupation and the exercise of maximum acts of ownership by the plaintiffs and their ancestors. They further alleged that while certain lands lying between the plaintiffs' village of Biakpan and the defendants' village of Asaga had been treated as the common property of both villages, the effective occupation and user and exclusive possession of the land in dispute by the plaintiffs and their ancestors were always recognised by the defendants and their ancestors, who were strangers to the land in dispute, until 1947 when the defendants and their people started to invade the land in dispute and to make farms and collect palm fruits thereon thereby trespassing on the plaintiffs' property and causing them damage.

By their defence dated November 5, 1953, the defendants, for themselves and as representing the people of Asaga, admitted the representative nature of the action and said that the true name of the land in dispute was "Ali Ukwu." They averred that the defendants were the real and true owners of the land in dispute by virtue of inheritance from their ancestors and the exercise of maximum acts of ownership thereover. They pleaded that the plaintiffs enjoyed the land whereon they now lived by virtue of a grant from the defendants and that until recently the plaintiffs had always acknowledged the defendants as their landlords. The defendants denied the trespass and damage alleged in the statement of claim, and pleaded (1) estoppel; (2) *res judicata*. The defendants did not plead any matters relied on in support of the pleas of estoppel or *res judicata* nor did they plead either common ownership or common user of the land in dispute.

At the hearing of the suit in the Supreme Court of Nigeria before Dove-Edwin J. it appeared that the parties were in substantial agreement concerning the location and precise boundaries of the land in dispute, the said land being more particularly delineated on two plans (Exhibits A and B) put in evidence by the plaintiffs and defendants respectively. Those plans were substantially identical save that Exhibit A referred to all physical features by Biakpan names and included more frequent reference to physical features associated with the Biakpan people than those associated with the Asaga people. In the same way Exhibit B referred to all physical features by Asaga names and included more frequent reference to physical features alleged by the defendants to be associated with the Asaga people.

The plaintiffs and the defendants both called a number of witnesses to testify as to the prior occupation and continuous user of the land in dispute, by the party by whom the said witnesses were called. The trial judge considered the plaintiffs and their witnesses to be reliable and accepted their evidence, and in terms said that he considered the defendants and their evidence as unreliable. He gave judgment for the plaintiffs for the declaration sought and for the injunction sought, but gave no damages for trespass.

The defendants appealed to the West African Court of Appeal, and de Comarmond Ag. C.J. (Nigeria) delivered a judgment dismissing the appeal, with which Foster Sutton P. and Henley Coussey J.A. concurred. The

Acting Chief Justice said: "I do not consider that the appellants can succeed in this appeal to have the judgment set aside on the ground that it cannot be supported having regard to the weight of evidence or that it is unreasonable. The important question that falls to be decided is whether the learned judge was right in rejecting the plea of estoppel or *res judicata* raised in paragraph 8 of the Asagas' statement of defence."

He then dealt with, and rejected, the defendants' plea of estoppel or *res judicata* and continued: "The last ground of appeal, which is that the decision is unwarranted, unreasonable and not supported by the weight of evidence, must also fail because it cannot be said that there was not sufficient evidence to support the trial judge's decision. I am satisfied that the learned judge spared no effort in analysing and weighing the evidence, and I see no reason for disagreeing with him."

1957. December 2, 3, 4, 5. *Sir Andrew Clark Q.C.* and *D. M. Ogwo* for the appellants.

L. G. Scarman Q.C. and *A. S. Trapnell* for the first respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Assaf v. Fuwa* ([1955] A.C. 215; [1954] 3 W.L.R. 552); *Chief Kwame Asante v. Chief Kwame Tawra* ([1949] W.N. 40, 65 T.L.R. 105); *Rex v. The Steward, etc., of Havering Atte Bower* ([1822] 5 B. & Ald. 691); *Vanderpuye v. Botchway* ([1956] A.C. 501, 508; [1956] 2 W.L.R. 1080); *Healey v. Minister of Health* ([1955] 1 Q.B. 221, 225; [1954] 3 W.L.R. 815; [1954] 3 All E.R. 449); *Amata v. Modekwe* ([1954] 14 W.A.C.A. 580); *Oberg Akesse v. Omanhene Kobina Foli* ([1934] A.C. 340); *Chester v. Bateson* ([1920] 1 K.B. 829; 36 T.L.R. 225); *Hedley v. Bates* ([1880] 13 Ch.D. 498); *Trevivan v. Lawrence* ([1704] 1 Salk. 276); *Magrath v. Hardy* ([1838] 4 Bing.N.C. 782); *Reg. v. Hutchings* ([1881] 6 Q.B.D. 300); *Pasmore v. Oswaldtwistle Urban District Council* ([1898] A.C. 387; 14 T.L.R. 368).

1958. January 20. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above and continued: Faced with the concurrent findings of Dove-Edwin J. and the Court of Appeal, Sir Andrew Clark, for the defendants, naturally felt unable to contend that their Lordships should take a different view of the evidence which had been held to establish the title of the plaintiffs to the land in dispute. He contended, however, that neither the judge nor the Court of Appeal had jurisdiction to decide the plaintiffs' claim. In support of this contention he put forward three submissions:

(1) The present action is, in substance, a claim to have the boundary between two tribes fixed by the Supreme Court, and that court has never had any jurisdiction to fix such a boundary.

(2) If the Supreme Court ever had jurisdiction to decide such a claim as is now put forward by the plaintiffs, that jurisdiction was ousted by the Inter-Tribal Boundaries Settlement Ordinance (No. 49 of 1933) and has not existed since November 30, 1933, when that Ordinance came into force.

(3) Alternatively, the Ordinance just mentioned excludes the jurisdiction of the Supreme Court to give a judgment the effect of which is to alter an inter-tribal boundary, once such a boundary has been fixed by a decision under the Ordinance; and the boundary between the people of Biakpan and the people of Asaga has been fixed by a joint decision of two Assistant District Officers, Mr. T. G. Connell of the Afikpo Division of the Province of Ogoja, and Mr. C. T. C. Ennals of the Bende Division of the Province of Owerri, dated October 22, 1937.

It is to be observed that Sir Andrew did not rely upon any estoppel, and

the alleged decision upon which he relies is not the same as the alleged decision upon which the defendants relied in the Supreme Court and the Court of Appeal. In these courts they relied upon an alleged decision of the Resident of the Province of Ogoja, Captain D. O'Conner, dated April 23 and 24, 1938, but the Court of Appeal held that this document was a nullity, and Sir Andrew did not seek to challenge that decision.

The result is that counsel for the defendants rely upon three submissions which were not put forward in either of the West African courts; but as these submissions challenged the jurisdiction of the Supreme Court and the Court of Appeal their Lordships feel bound to express their opinion on them.

In support of his first submission, already stated, Sir Andrew cited a number of decisions in England as to the fixing of boundaries by the court, including *Parish of St. Luke v. Parish of St. Leonard* ((1779) 1 Bro.C.C. 40), *Wake v. Conyers* ((1759) 1 Edden 331), and *A. G. to Prince of Wales v. St. Aubyn* ((1811) Wight. 167, 229-230, 231, 235); and one case in Nigeria, *Ovat Ebenyam v. Ayigo* ((1941) 16 Nig.L.R. 30).

Their Lordships would have thought it regrettable if they had to decide whether or not the Supreme Court has jurisdiction to fix a boundary between two tribes, without the assistance of any discussion of the matter by that court or by the Court of Appeal. In their opinion, however, the plaintiffs in the present suit did not claim to have a boundary fixed between two tribes. The claim and defence in the suit have already been set out with some particularity. They show that the plaintiffs simply claimed ownership of a piece of land, defined by the plan Exhibit A, and the defendants contested this claim. In their Lordships' view the decision of such a claim is clearly within the jurisdiction of the Supreme Court, on transfer from the Native Court, by the joint effect of the Native Courts Ordinance and the Supreme Court Ordinance. They would observe that the jurisdiction of the Supreme Court to decide upon such a claim does not appear to have been questioned in any case in the Supreme Court of Nigeria or in the West African Court of Appeal, and these courts have frequently decided cases of this nature. See, for instance, *Okon Owon v. Eto Ndon* ([1946] 1 W.A.C.A. 71) and *Mosalewa Thomas v. Preston Holder* ([1946] 12 W.A.C.A. 78).

Sir Andrew Clark's second submission depends upon the true construction of the Inter-Tribal Boundaries Settlement Ordinance already mentioned. This Ordinance came into force on November 30, 1933, and was amended by No. 6 of 1935 and No. 38 of 1938. Section 2 of the Ordinance defines the expressions "District Officer" and "Tribe," and section 3 provides "Any district officer may, with the approval of the Resident in charge of the province, inquire into and decide any dispute between two or more tribes as to the boundaries between the lands of such tribes." Section 4 provides that "In any inquiry under the last preceding section the district officer may, if he thinks fit, be assisted . . . assessors," and section 5 provides that "No legal practitioner shall appear for or act for or assist any party in any inquiry held under this Ordinance unless he is a member of one of the tribes which are parties to the dispute, is personally interested in its settlement and receives no remuneration for his services in the inquiry." Sections 6, 7 and 8 deal with the review of decisions of the District Officer by the Resident in charge of the Province or the Governor, and section 9 provides that "For the purposes of any inquiry under the Ordinance the District Officer or Resident in charge of the Province, as the case may be, shall have all the powers of a magistrate in connexion with any civil cause in

respect of enforcing the attendance of witnesses and compelling the production of documents." Section 10 provides that "Any decision or order given upon an inquiry or a review under this Ordinance shall be recorded in writing and shall be signed by the Officer giving the same and shall be registered and preserved by the Resident in charge of the province." Section 11, upon which Sir Andrew particularly relied, is as follows:

"Any person who acts in disregard or defiance of any decision which may be in force under this Ordinance, or without due authority, removes, damages or defaces any boundary or other mark erected during the course and for the purposes of any inquiry under this Ordinance or erected in connexion with any decision or order given under this Ordinance, shall be guilty of an offence and shall be liable to a fine of £50 or to imprisonment for six months or to both such fine and imprisonment."

Their Lordships are quite unable to hold that this Ordinance deprived the Supreme Court of jurisdiction to hear and decide claims such as the claim of the plaintiffs in the present action. In the first place, they think that if the Ordinance had been intended to have any such striking effect, the intention would have been made plain by an express provision in the Ordinance to this effect. There is no such provision. Secondly, it is to be observed that section 3 of the Ordinance does not give any tribe a right to have a dispute decided. The section might have been construed as conferring such a right but for the words "with the approval of the Resident in charge of the Province," but these words, in their Lordships' view, make it clear that the Resident has a discretion to give or withhold his approval to a suggestion by the district officer that he should inquire into and decide any particular dispute. Moreover, sections 4 and 5 of the Ordinance make it clear that the decision under the Ordinance need not be based on any principles of law.

Their Lordships cannot think that a jurisdiction of this kind was intended to take away the right of any tribe to have its claim to ownership of a defined piece of land decided by the Supreme Court on legal principles, after hearing legal argument by persons skilled in the law.

As to the third submission on behalf of the defendants, already stated, their Lordships are of opinion that the alleged joint decision of the two Assistant District Officers did not decide anything, and was not intended to be a decision under the Ordinance. The document in question is headed "A Joint Report by T. G. Connell, Esqr., and C. T. C. Ennals, Esqr., Assistant District Officers, on the Inter-Tribal Boundary Settlement between the Village of Biakpan, Afikpo Division, Ogoja Province, and the Esiafor and Asaga Villages of the Bende Division of Owerri Province." The events leading up to this Report are as follows: On November 3, 1936, Mr. Connell was appointed to hold an inquiry under the Boundaries Settlement Ordinance to determine the boundary between Eziafor and Biakpan. The Asagas and the Eziafors belong to the same clan. On the 16th of the same month Mr. Connell gave his decision. The Biakpans were satisfied but the Eziafors were not, and they brought in on their side the present defendants. Objections were raised against the boundary fixed by Mr. Connell, and, as a result, Mr. Ennals was appointed to hold a further inquiry. He was instructed to fix the boundary between the Biakpans on the one side and the Asagas and Eziafors on the other. The boundary was so fixed, on April 24, 1937, and it differed in certain respects from the boundary fixed by Mr. Connell. This decision did not satisfy the Biakpans and they petitioned against it. It was as a result of these events that the joint Report of Messrs.

Connell and Ennals came into existence. The Report begins "In accordance with instructions received from the Resident, Owerri and Ogoja Provinces in their Memoranda"—then the numbers of the Memoranda are given—"the above-mentioned Officers proceeded to the area in dispute on October 22, 1937, accompanied by representatives selected by each of the three villages."

The instructions there mentioned were not before their Lordships, but reading the Report as a whole they think it is clear that the two Assistant District Officers did not purport to make any decision under the Boundaries Settlement Ordinance. After describing their investigations they "recommend" an amendment of the Biakpan-Eziafor boundary. Then, after stating certain matters of history, and of the allegations of the respective disputants, they go on to say, in paragraph 5 of the Report, "The amendment in paragraph 2 above is put forward because"—and then they go on to give the reasons why the amendment "recommended" in paragraph 2 above is "put forward." Paragraph 6 is as follows: "Ikama Pond: Fishing Rights Ubarar. No amendment of Mr. Connell's decision is proposed." In paragraph 7 they deal with the Biakpan-Asaga boundary and, after stating certain matters, they end the paragraph "therefore no amendments are proposed." Finally there is a portion of the Report headed "Description of Boundary. Proposed Biakpan-Eziafor-Asaga Boundary," and they then go on to state the "proposed" boundary.

Their Lordships think it is impossible to construe a Report so worded as being a decision under the Boundaries Ordinance. The words "decision" or "decide" are not used in any part of the Report. On the contrary, as the quotations already set out show, the two gentlemen use the words "recommend," "put forward" and, in three different places, "proposed." Moreover, there is a striking difference between the concluding part of this Report and the concluding part of the decision by Mr. Ennals already mentioned. The latter document is divided into two parts, each part being signed by Mr. Ennals on April 24, 1937. The first part is headed "Report" and takes the form of certain recommendations and proposals as to the Biakpan-Eziafor boundary and the Biakpan-Asaga boundary respectively. The second part is headed "Decision" and is in imperative terms. The earlier decision by Mr. Connell is not before their Lordships, but they cannot believe that if Mr. Connell and Mr. Ennals intended their joint Report to be a decision under the Boundaries Ordinance it would have taken the form already described. The document was merely a report intended to assist higher authority to review the two differing separate decisions of Mr. Connell and Mr. Ennals.

For these reasons their Lordships are of opinion that there has never been any decision under the Boundaries Ordinance as to the boundary between the lands of the plaintiffs and the lands of the defendants. Counsel on both sides agree that neither Mr. Connell alone nor Mr. Ennals alone could decide this boundary, since in so doing he would have decided also the boundary between the Province of Ogoja and the Province of Owerri, which he had no power to do; and, as has already been stated, the alleged decision of Captain O'Conner is no longer relied upon. Thus their Lordships are not called upon to decide as to the effect, if any, of a decision under the Boundaries Ordinance upon the jurisdiction of the Supreme Court to decide the present case, or to consider the decision of the West African Court of Appeal in the case of *Namene Anjoku v. Ivube Nwankwo Nnamani* ([1953] 14 W.A.C.A. 357).

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.
Solicitors: *Robert K. George; Sydney Redfern & Co.*

MAURICE GOUALIN LIMITED AND ANOTHER
AND
WAHABI ATANDA AMINU

APPELLANTS
RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1958 July 24

Lords Tucker, Birkett and
Mr. L. M. D. de Silva

Declaration of title to land—Not necessary to be able to pass a clean title to a purchaser in order to succeed—English common law and doctrines of equity—Recital in deed-mortgage—Section 129 of Evidence Act.

The respondent prayed for declaration of title to land against the appellant. The judge thought that the respondent had a good title but for an equitable interest which was outstanding and he dismissed the action on the ground that in his view it would be impossible for the respondent "to pass a clean title to a purchaser from him" and therefore was not entitled to a declaration of title. On appeal the Federal Supreme Court held that no equitable interest was outstanding, set aside the judgment of the Supreme Court and granted the declaration sought. Upon further appeal to the Judicial Committee.

Held: (i) It is not necessary in order to succeed in a claim for declaration of title to land for the respondent to establish that he could "pass a clean title to a purchaser from him."

The respondent had traced his title to a person who had mortgaged his title to the land in 1923. The deed of mortgage produced at the trial showed a recital to the effect that the mortgagor was seised in fee simple in possession of the land. The appellant and his predecessors in title were complete strangers to the deed of mortgage containing the recital.

Held: (ii) In the absence of any proof that the recital was inaccurate the court was bound to hold that the mortgagor was the true owner in 1923.

[NOTE: This case was over-ruled by the Supreme Court of Nigeria in: *John Kobina Seys Johnson & ors. v. Irene Ayinke Lawanson & Ano.* ([1971] 1 All N.L.R. 56) *Coram:* Coker, Lewis, Madarikan, Udoma and Somemimo.]

MR. L. M. D. DE SILVA. This appeal relates to two actions on two causes of action which can for the purposes of this case be regarded, and have been regarded by the parties, as identical. They were instituted by the same plaintiff who is the respondent to this appeal against separate defendants who are the appellants. These actions have been consolidated. As no question arises from the fact of consolidation no further reference will be made to it.

The respondent sought against the appellants in the Lagos Judicial Division of the Supreme Court of Nigeria, in respect of a tract of land shown in a plan prepared for the purposes of the case, a declaration of title, damages for trespass and an injunction restraining the appellants from committing further acts of trespass. The appellants denied the title of the respondent and set up a title of their own. They also denied the trespass.

The trial judge appears to have thought that the respondent's title should prevail but for an equitable interest which he thought was outstanding and

he dismissed the action on the ground that in his view it would be impossible for the respondent "to pass a clean title to a purchaser from him" and therefore was not entitled to a declaration of title.

On appeal the Federal Supreme Court of Nigeria held that no equitable interest was outstanding, set aside the judgment of the Supreme Court and granted the respondent the declaration and injunction he prayed for together with damages which were nominal as the result of an agreement between the parties.

The Law of Nigeria applicable to this case is by reason of Section 14 of the Supreme Court Ordinance (Laws of Nigeria, Vol. VI p. 202) "the common law, the doctrines of equity and the Statutes of general application which were in force in England on the 1st January 1900."

The earliest document of title relied on by the appellants is a deed of conveyance of the 25th June, 1952. This deed contains a recital that the land conveyed by it was part of a larger area "originally seised and possessed by the Oloto Chieftaincy Family" and that the land in question had been sold in 1927 to one Oni Ayaji by the late Chief Omidiji Oloto but that no deed of conveyance had been executed. By the deed of 1952 Oni Ayaji and one Fagbayi Oloto, describing himself as the "Present Titular Head of the Oloto Family" purported to convey the land in question to one Imoru. The appellants relied on a chain of deeds which conveyed to them whatever had been conveyed on the deed of 1952. It is to be observed that the recital being a recital in a deed of 1952, has no probative value. There was no oral or other evidence to support the title of the vendor on the deed. There was also no evidence called to establish acts of possession by the appellants or by anyone through whom they claimed prior to 1952.

The respondent relied on a deed of mortgage of the 29th May, 1923, by which one Desalu conveyed to the Scottish Nigerian Mortgage and Trust Company Limited (hereafter called the Company) a tract of land which included the land in question. Desalu having made default in the payment of the sums due under the mortgage, the company under a power of sale conferred on them by the mortgage deed sold the land by public auction and it was purchased by one Adewunmi on the 27th July, 1931. No conveyance was executed. Thereafter the land appears to have been sold by Adewunmi to one Oshire and after the latter's death by his "children and heirs-at-law" to the respondent. No conveyance was executed by Adewunmi to Oshire.

In the deed of mortgage of 1923 there is a recital in the following terms "Whereas the borrower is seised in fee simple in possession free from incumbrances of the several freehold hereditaments hereinafter described and expressed to be hereby conveyed" and it is necessary to consider what the effect of this recital is. Section 129 of the Evidence Ordinance (Cap. 62 Vol. III Laws of Nigeria p. 42) provides

"Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

It will be seen that the recital is evidence that Desalu was the true owner in 1923 and there is no evidence which contradicts it. This evidence must prevail and Desalu must, as between the parties to this case, be considered to have been the true owner in 1923. Upon this finding there is no room for

the assertion which appears in the appellants' deed of 1952 that the land was "originally seised and possessed by the Oloto Chieftaincy Family" or that it belonged to Chief Omidiji Oloto in 1927. The assertion must, in their Lordships' opinion, be rejected.

There is a reference in the deed of mortgage of 1923 to a deed of gift of 1896 which, it was argued, under section 129 of the Evidence Act furnished evidence of respondent's title from 1896. This argument was contested. Their Lordships do not propose to decide the points which arise as in their opinion the respondent is entitled to succeed without establishing that his title dated back to 1896.

It was argued that the sale to Adewunmi was ineffective on the ground that the notice of sale of the land by auction did not contain an adequate description of the land and that therefore there could not have been a valid contract with regard to it. This argument was not raised in the courts below. It is impossible to say that all the relevant facts bearing on it are on the record. Their Lordships do not feel they can entertain it.

The deed in favour of the respondent connecting his title with the title of Desalu is a deed of the 25th June, 1953, in which the Company, Adewunmi and persons who purported to be the heirs and successors in title of Oshire joined in conveying the land to the respondent. As Desalu has been held to have been the true owner this deed undoubtedly conveys the legal title to the respondent. As between the respondent and the appellant, the respondent as holder of the legal title is entitled to the declaration of title which he seeks. There may be equitable claims against him in persons other than the appellants and, if there are, they may or may not be pursued. But the existence of such equitable claims will not detract from his right to the declaration.

The learned trial judge was wrong when he thought that the respondent before he could succeed had to establish that he could "pass a clean title to a purchaser from him." The Court of Appeal held that no equitable rights were outstanding. This may in fact be so, but it is unnecessary so to find for the respondent to succeed and their Lordships do not propose to enter upon the questions that are relevant to that finding.

Reference was made by the trial judge to the fact that the appellants' deeds were registered before those of the respondent. This fact is of no consequence because, as already observed, the appellants' deeds are not traceable to any person with title and the registration under the Land Registration Ordinance (Cap. 108 Laws of Nigeria Vol. IV p. 40) of a deed from a person without title does not give the grantee any right.

On this appeal counsel for the appellants raised the point that the land with regard to which the dispute had arisen had not been identified with the land covered by the deeds already mentioned in this judgment. A plan was prepared and produced by a surveyor. There are explanatory remarks on it which, if accepted, show that the deeds did cover the disputed land. The statements were not challenged when the surveyor was in the witness box and they do not appear to have been challenged during the addresses of counsel or at any other point in the proceedings. Their Lordships do not think that there is any substance in the point.

The appellants admittedly entered the land, cleared it and started to build on it. The respondent had as against the appellants the right to possession and the acts of the appellants constituted a trespass. The respondent is entitled to the damages which have been awarded as well as to the injunction restraining the appellants from committing further acts of trespass.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the respondent the costs of the appeal.

THE HON. OBAFEMI AWOLowo

APPELLANT

AND

ZIK ENTERPRISES LIMITED AND ANOTHER RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1958 Oct. 2

Lords Tucker, Birkett and

Mr. L. M. D. de Silva

Libel—Innuendo—Nature and proof of innuendo.

1. It is well settled that in order to prove that the words complained of were understood in the meaning ascribed in innuendo, the plaintiff can give evidence of any facts or circumstances which would lead reasonable persons to infer that the words were understood in that meaning, provided that such facts or circumstances were known to those persons when the words were published and that such facts or circumstances existed at the time the words were published.

2. (Citing *Tolley v. J. S. Fry & Sons Ltd.* [1930] 1 K.B. 480 with approval. "The evidence required is evidence of special facts causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge.")

3. It is never enough merely to call witnesses to say that they understood the words complained of in a defamatory sense; it is essential that they should prove some fact known to them which would be enough to entitle a reasonable man in possession of such knowledge to interpret the words in a defamatory sense.

LORD BIRKETT. This is an appeal from a judgment of the West African Court of Appeal dated the 11th of March, 1955, which set aside the judgment of Jibowu, J., dated the 13th of April, 1953, in the Supreme Court of Nigeria in the Lagos Judicial Division, in the Suit No. 270/1952.

That Suit had been consolidated with Suit No. 273/1952 and the two actions were heard together by Jibowu, J. This appeal is confined to the Suit No. 270/1952 in which Jibowu, J., gave judgment for the appellant for the sum of £2,000 and fixed costs. The West African Court of Appeal reversed the judgment and entered judgment for the respondents with fixed costs.

In Suit No. 270/1952 the appellant claimed damages for libel against the first respondents Zik Enterprises Ltd., as the owners, publishers and printers of a daily newspaper called the West African Pilot, and against the respondent A. Y. S. Tinubu as the editor of the newspaper at the material time.

The words complained of were contained in two articles on the front page of the newspaper, one on 10th June, 1952, and one on 11th June, 1952. On the 10th June the respondents printed and published the words—

“ ACTION GROUP THREATENS CRISIS TO WIN OVER
THE GOVERNMENT

SECRET BEHIND PLAN DISCLOSED

Political observers believe that the motive behind the delegation to the Government concerns the Iga Idunganran Civil Case, the Ilorin boundary and other issues affecting, directly or indirectly, the Action Group. It is believed also that the party may endeavour to use power politics to enable the Government to yield to certain demands which the Action Groupers feel must be conceded in order to avert a constitutional crisis. Apart from the walk-out threat, reliable sources believe that the Action Group Ministers may resign 'en bloc' in order to affect the demands of the party over the issues at stake. Meanwhile it is understood that the Government will be represented in the proposed parley with Government by Mr. Eric Himsworth, Financial Secretary, and Mr. Harold Cooper, Public Relations Officer, and others including the Governor himself."

The words complained of were part of an article which was read in full and referred to as Exhibit B.

On the 11th of June the respondents printed and published the words—

**“ GOVERNMENT TURNS BACK ACTION GROUP WITH
NO TO ALL DEMANDS**

... The Ikenne trial also re-echoed in the parley, but the Government felt that it was an issue for the legal department and the court, and not the concern of the Governor. On this matter the Governor refused to make a statement."

The words complained of were part of an article which was read in full and referred to as Exhibit B.1.

An article of 13th June published by the first respondents, and written by one Mbonu Ojike, was the subject of Suit 273/1952 brought by the appellant and consolidated with the action which is the subject of this appeal. That article was referred to as Exhibit B.3. Jibowu, J., gave judgment for the appellant, and the West African Court of Appeal dismissed the appeal against that judgment. From that decision there has been no appeal, but the article B.3. was referred to in the present appeal. At all material times the appellant was the Minister for Local Government in the Western Region of Nigeria, and a member of the Executive Council of that Region, and Leader of the party known as ACTION GROUP.

On the 10th of June, 1952, the appellant, together with all the Ministers of the Government of the Western Region, and the four Ministers of the Central Government appointed from representatives of the Western Region, had a conference with His Excellency the Governor of Nigeria. The appellant alleged that the words published on the 10th of June referred to him, and meant and were understood to mean, that the appellant and the other Ministers who formed the deputation to the conference with the Governor, had asked the Governor and the other officials present at the conference to interfere with the course of justice in an action then pending before the West African Court of Appeal, Suit 276 of 1949, and intended and threatened to create a constitutional crisis in order to force the hands of the Governor.

The appellant alleged that the words published on 11th June, 1952, referred to him, and meant and were understood to mean that the appellant and the other Ministers present at the conference, had asked the Governor to interfere with the course of justice in the appeal of one Sadiku Salami who had been convicted of murder and had appealed to the West African Court of Appeal, and the appeal was then pending.

The respondents raised several defences before Jibowu, J., and the learned trial judge dealt with them all with great care and in much detail. In the Court of Appeal some of these defences were not pursued, and before their Lordships here the submissions made on behalf of the respondents were as follows—

1. That the words complained of in the article of 10th June were not capable in law of referring to the appellant.
2. That, if they were so capable, there was no evidence to show that in fact they did refer to the appellant.
3. That the words complained of in the article of 11th June were not capable of referring to the appellant and the witnesses were entitled to think that they did, but that they did not bear the meanings alleged in the innuendoes pleaded.
4. That the words complained of in the article of 10th June did not bear the meanings alleged in the innuendoes.
5. That the words complained of in both publications referred to a class or body of persons known as the ACTION GROUP and not to the appellant personally.
6. That the words of both publications were not defamatory on their face, and there was no evidence to support the innuendoes alleged.
7. That the evidence called to prove that the second respondent, Mr. Tinubu, was the editor of the paper at the material time was insufficient, and that Mr. Tinubu should have been dismissed from the action.

The submissions for the appellant were that the words complained of were capable of referring to the appellant and in fact were shown to do so by the evidence, that the innuendoes alleged were proved by the evidence, that the evidence was enough to prove that Mr. Tinubu was the editor of the newspaper, and that the decision of Jibowu, J., was right and should be restored.

It would be convenient to deal first with the expressed view of the West African Court of Appeal that Jibowu, J., "might well have taken a different view had consideration of the three articles been more clearly separated in his judgment," and the further observation that "the trial judge seems to have been influenced in reaching his conclusions on the first two articles by the article of 13th June written by the second defendant in Suit 273/1952, from which he drew the inference that the author had drawn the same conclusions from the articles of 10th and 11th of June as had the witnesses for the plaintiff. In this connection I would observe that the article of 13th June does not contain any reference to the two earlier articles, and so far as I am aware there is no direct evidence to support the conclusion."

In their Lordships' view these passages from the judgment of the Court of Appeal scarcely do justice to the learned trial judge and the course the proceedings took before him. It would appear from the learned judge's notes that it was agreed by the learned counsel for the respondents that the articles of the 10th and the 11th of June should be read together. This is confirmed by the passage from the judgment in which the learned judge said—

"There are two causes of action on the plaintiff's particulars of Claim in Suit 270/52, but he claimed damages in respect of the two taken as one. The case was conducted on both sides as though there

was only one cause of action. Neither the counsel for the plaintiff nor the counsel for the defendants has asked the Court to treat them separately and give a separate verdict and judgment on them, so I shall treat them as one and give one verdict on them.”

Furthermore, it would appear that the submission made by the counsel for the appellant before Jibowu, J., was that the article of 13th June was a sequel to and a comment on the articles of 10th June and 11th June. In the learned judge's notes of the trial he records the counsel for the respondents saying in argument— “ May be the article (B.3.) was a sequel to Exhibit B. and B.1. or not.” In his judgment the learned judge said—

“ I shall now consider the position of the third defendant. He wrote the article complained of commenting on the plaintiff and the other Ministers who attended the Conference with the Governor. The delegation he described as iniquitous because they tried to force the Governor to intervene in the ‘ Atrocious Ikenne Dispute ’ and in the ‘ Iga Controversy case.’

The article reflected the impressions which Exhibits B. and B.1. had given him, which more or less confirmed the impression the articles conveyed to the witnesses called by the plaintiff.”

In view of the agreement that Exhibits B. and B.1. should be read together, and the submission that Exhibit B.3. was a sequel to Exhibits B. and B.1., the learned judge was perfectly entitled to look at the three publications together. He was satisfied that Exhibit B.3. was a comment on the articles Exhibit B. and B.1, and the criticism of the Court of Appeal that in some way he fell into error by not treating the three articles in isolation in their Lordships' opinion is not justified. The learned judge was quite justified in attaching importance to Exhibit B.3. if he was of the opinion that it was in truth a sequel to Exhibits B. and B.1., and expressed the views of what the reasonable reader of Exhibits B. and B.1. understood by the words complained of.

The West African Court of Appeal considered the publications of 10th June and 11th June separately despite the agreement in the court below that they should be read together, and despite the fact that one judgment had been given in respect of both publications without objection, and one sum of damages awarded.

They based their judgment on the ground that the words complained of in the publication of 10th June were incapable in law of referring to the appellant, and in any event the words were incapable of bearing the alleged defamatory meaning as set out in the innuendo, and without the innuendo the words were not defamatory on their face.

With regard to the words complained of in the publication of 11th June they held the words to be capable in law of referring to the appellant and that the witnesses were entitled to think that the words did so refer to the appellant, but the words were incapable of bearing the alleged defamatory meaning as set out in the innuendo, and without the innuendo the words were not defamatory on their face.

In their Lordships' view, the principles which govern the determination of the main question in this appeal are not in doubt. The respondents alleged in this case that the words they had printed and published referred to a party, the ACTION GROUP, and not to any individual such as the appellant.

They therefore relied on the decision in *Knupffer v. London Express*

Newspaper Ltd. [1944] A.C. 116, as applying to the facts of the present case.

In that case the words complained of referred to a body of persons, some thousands in number, who belonged to a society whose members were to be found in many countries of the world.

Viscount Simon said at page 121—

“ No facts were proved in evidence which could identify the appellant as the person individually referred to. Witnesses called for the appellant were asked the carefully phrased question: ‘ To whom did your mind go when you read that article?’ and they not unnaturally replied by pointing to the appellant himself, but that is because they happened to know the appellant as the leading member of the society in this country and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual.”

The West African Court of Appeal adopted the language of Viscount Simon and applied it to the trial judge in the present case, when he said: “ . . . Where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily as a matter of law to be answered in the negative.” Viscount Simon also said at page 119— “ There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action ” and Lord Porter at page 125 said— “ Whatever the tribunal the first question is: Are the words in conjunction with the relevant circumstance reasonably capable of being understood to apply to the plaintiff?”

The respondent's principal submission on the article of 10th June was that the words could not and did not refer to the appellant and that his claim should be dismissed. For the appellant it was contended that whenever the words complained of reflect on each and every member of a determinate body or class then each and every member of the body or class can maintain a separate action. Though it might appear that defamatory words reflected on a class, yet if the words are capable of being shown to point to any one individual, an action for libel will lie at the suit of that individual. Even when the plaintiff is not mentioned by name in the words complained of, extrinsic evidence may be given to “ connect the libel with the plaintiff.” Witnesses may be called to testify that they understood from reading the alleged libel in the light of the circumstances known to them and their acquaintance with the plaintiff that he was the person referred to.

They relied on *Hough v. London Express Newspaper Ltd.* [1940] 2 K.B. 507, where it was held by the Court of Appeal that in order to support an innuendo that the words have the secondary and defamatory meaning, it is sufficient for the plaintiff to allege and to prove that there are persons who know the special facts and so might understand the words in that secondary and defamatory sense without proving that any person did in fact understand them in that sense.

Reference was also made to *Browne v. D. C. Thomson and Co.* [1915] S.C. 359; *Le Fanu v. Malcolmson* (1848) 1 H.L.C. 637; and *Abraham v. The Advocate Company Ltd.* [1946] 2 W.W.R. p. 181.

Applying these principles to the facts of the present appeal, the first question is whether the West African Court of Appeal was right in saying that the words complained of published on 10th June were incapable in law

of referring to the appellant. It is said that the whole tenour of the article shows that the Action Group party is aimed at, and not any individual: and that the learned trial judge treated the evidence led to support the identification in fact as governing the matter, and that he erred in so doing. What the learned trial judge did was to set out with great care what he called the background of the three articles and considered the question whether the appellant could sue in respect of them. Part of this background was the personality and position of the appellant, his public offices, the publicity given to the conference between the delegation of Action Group Ministers and similar matters. It is true that in the words complained of the Action Group is named, but the headlines are connecting the secret plan of the Action Group with the delegation of Ministers to the Government. The delegation was clearly a determinate body or class of persons. The motive behind the delegation is also stated as being something that "concerns the Iga Indunganran Civil Case, the Ilorin boundary and other issues affecting the Action Group."

Their Lordships are clearly of opinion that the words published on 10th June are capable in law of referring to the appellant, and the evidence that they did so in fact is quite overwhelming. If Exhibits B. and B.1. are read together, as it was agreed that they should be, the decision of the West African Court of Appeal that Exhibit B.1. was capable of referring to the appellant and that the witnesses called before the learned trial judge were justified in so thinking puts the matter beyond all doubt. The "parley" referred to in Exhibit B.1. is quite obviously the "parley" referred to in Exhibit B. and the Headline of Exhibit B.1. is only intelligible in the light of the words in Exhibit B. and is clearly making reference to it.

But the West African Court of Appeal reversed the judgment of the learned trial judge on the further ground that the words complained of in the publications of 10th June and 11th June were not defamatory on their face, and that the innuendoes alleged by the appellant had not been proved. It is of course well settled that in order to prove that the words complained of were understood in the meaning ascribed in the innuendo, the plaintiff can give evidence of any facts or circumstances which would lead reasonable persons to infer that the words were understood in that meaning, provided that such facts or circumstances were known to those persons when the words were published, and that such facts or circumstances existed at the time the words were published. In *Tolley v. J. S. Fry & Sons Ltd.* [1930] 1 K.B. at page 480, Greer, L.J., said: "The evidence required is evidence of special facts causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge."

It is never enough merely to call witnesses to say that they understood the words complained of in a defamatory sense; it is essential that they should prove some fact known to them which would be enough to entitle a reasonable man in possession of such knowledge to interpret the words in a defamatory sense. See *Tolley v. J. S. Fry & Sons Ltd.* [1931] A.C. at pages 333 and 338 in the speech of Viscount Hailsham: and *Hough v. London Express Newspaper Ltd.* [1940] 2 K.B. 507.

In the present case the appellant called four witnesses—Ernest Ikoli, Olujide Somolu, Joseph Kosomiola Randle and Nathaniel Kotoye—to testify to facts and circumstances which led them as reasonable persons to infer that the words were understood by them in the meanings ascribed by the innuendo. The learned trial judge had the advantage of seeing these witnesses and of hearing them give evidence. He discussed the credibility of

the witnesses and said—" All the witnesses who testified about the publications complained of are in my view reasonable persons and by the evidence I find the innuendoes alleged to have been proved." The extrinsic evidence which was accepted by the learned trial judge proved that the appellant was the leader of the Action Group party; that he was a Minister that he was a member of the delegation referred to in Exhibits B., B.1. and B.3.; that the civil case known as Iga Induganran was pending before the West African Court of Appeal; that Oba Adeniji Adele in whose favour judgment had been given was a prominent member and supporter of the Action Group party; that Sadiku Salami was a first cousin of the appellant's wife and had been convicted of murder and that an appeal was pending in the West African Court of Appeal.

Apart from the evidence of the four witnesses and the evidence of the appellant, the learned judge was entitled to look at Exhibit B.3. published by the first respondents. Their Lordships regard it as a document of the first importance in considering the evidence of the witnesses. For the West African Court of Appeal had no doubt that the appellant had made out his case in that action and dismissed the respondent's appeal from the decision of Jibowu, J. As the submission of the appellant was that Exhibit B.3. was in sequel to and a comment on Exhibits B. and B.1., it is perhaps important to observe that the West African Court of Appeal when dealing with the interpretation to be put upon Exhibit B.3. said— "... the articles of 10th and 11th of June provide evidence of circumstances sufficient to entitle any reasonable man with knowledge of them to interpret the words in the articles now under consideration in the defamatory sense alleged." The West African Court of Appeal also said of Exhibit B.3., "... it must I think be regarded in the light of the article of the 11th of June." In their Lordships' view the learned trial judge was bound to examine the relation between Exhibit B.3. and Exhibits B. and B.1. in view of the submissions made and he could not fail to be impressed by the contents of Exhibit B.3. The article asked, " Does the party wish Government to interfere with the course of justice in relation to the atrocious Ikenne dispute?" and " Will the Ikenne controversy case already in court be cancelled by the Governor in order to placate Action Groupers?" and ends by saying, " Western Local Government Minister, behave like a statesman . . . Thanks to West African Pilot for unmasking Groupers woes. Shame to Daily Times for calling Groupers iniquitous delegation to Government House a ' Top Secret.' "

The learned counsel for the defence before Jibowu, J., stated according to the note made by the learned judge that " Ojike (the author of the article of 13th June) published Exhibit B.3. from Exhibits B. and B.1.; and this will be referred to later when dealing with damages." Their Lordships are of opinion that the learned trial judge came to a right conclusion on the matters he had to decide and that he fell into no error. It was reasonable for him to take the view that as the words complained of in Exhibit B.3. were based upon the words in Exhibits B. and B.1. that the meanings put upon the words by Mbonu Ojike " more or less confirmed the impression that the articles conveyed to the witnesses called by the plaintiff " and " There can be no doubt that the same meaning has been conveyed to many other reasonable readers of the articles . . ." It only remains for their Lordships to add that in their view the evidence of the witness Akanbi Giwa, the editor of the Nigerian Statesman, was sufficient to prove that Mr. Tinibu was the editor of the West African Pilot in June of 1952 and that the learned trial judge was justified in so holding for the reasons stated by him, and that the West African Court of Appeal was wrong in holding that the onus of proof

had not been discharged.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be allowed the Order of the West African Court of Appeal in so far as it relates to Suit No. 270/1952 set aside and the judgment of the learned trial judge restored.

The respondents will pay the costs of this appeal and of the appeal to the West African Court of Appeal.

IDOKO NWABISI AND ANOTHER ON BEHALF
OF THEMSELVES AND THE UMELERI PEOPLE

AND

APPELLANTS

R. A. IDIGO AND ANOTHER ON BEHALF OF
THEMSELVES AND THE AGULERI PEOPLE RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1959 July 28

Lords Tucker, Jenkins and
Mr. L. M. D. de Silva

Land—Acts of ownership of doubtful origin—Prescriptive title in customary law.

In the absence of traditional evidence the onus of proof is difficult to discharge, inasmuch as the native customary law does not recognise titles by prescription, and acts of ownership or occupation, relied on by a given family as referable to their ownership of a piece of land, may be shown at any distance of time to have been attributable to permission on the part of the family against whom they claim. In that case the effect of the matters relied on as evidence of ownership is destroyed, and in the absence of any law of limitation they cannot be called in aid for the purpose of founding a prescriptive title.

LORD JENKINS. This is an appeal by the plaintiffs (now appellants), suing on behalf of themselves and the Umuleri people, from a judgment of the Federal Supreme Court of Nigeria dated the 23rd February, 1957. That judgment dismissed the plaintiffs' appeal from a judgment of Hurley J. in the Supreme Court of Nigeria (Onitsha Judicial Division) dated the 7th January, 1955, which had dismissed a claim by the plaintiffs against the defendants (now respondents), sued on behalf of themselves and the Aguleri people, for a declaration of the plaintiffs's title to a piece of land known as Otu-Ocha situate at Umuleri in the Onitsha Division of Nigeria.

The disputed land lies on the left bank of the Anambra River which forms its north-western boundary. It is bounded on the north-east by the Emu Stream, a tributary flowing into the Anambra River from the south-east, and on the south-west by the Akor River, another tributary of the Anambra, which joins it from the south-east at a point further down stream. The south-eastern boundary consists of an imaginary line joining the two tributaries. The length of the disputed strip along the Anambra is about 2,500 yards, and its width from north-west to south-east about 1,000 yards, narrowing slightly towards its north-eastern end. It is shown surrounded by a pink verge line on a plan which was exhibit " P " in the present action. The land beyond the Emu Stream on the N.E. is admittedly Aguleri land, and the land beyond the Akor River on the S.W. is admittedly Umuleri land. The bone of contention is this strip of riverside land between the two tributaries.

The plaintiffs sought to make good their claims to ownership of the disputed strip under native customary law by evidence establishing traditional ownership of the land by the Umuleri family, and by evidence of facts of ownership and of occupation by members of the Umuleri family from which ownership of the disputed strip was to be inferred.

The traditional evidence admittedly broke down, and accordingly the plaintiffs were thrown back upon such evidence of acts of ownership and of occupation as they were able to adduce for the purposes of raising the inference that the Umuleri family were the exclusive owners of the disputed strip.

As was observed by Webber J. in *Ekpo v. Ita*, XI Nigeria Law Reports p. 68—"In a claim for a decree of declaration of title the onus is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact."

This statement of principle is untouched by the case of *Stool of Abinabina v. Chief Kojo Enyimadu* [1953] A.C. 207 in cases where, as in this one, traditional evidence fails.

In the absence of traditional evidence the onus of proof is difficult to discharge, inasmuch as the native customary law does not recognise titles by prescription, and acts of ownership or occupation, relied on by a given family as referable to their ownership of a piece of land, may be shown at any distance of time to have been attributable to permission on the part of the family against whom they claim. In that case the effect of the matter relied on as evidence of ownership is destroyed, and in the absence of any law of limitation they cannot be called in aid for the purpose of founding a prescriptive title.

The action in which the present appeal arises represents the plaintiffs' third attempt (not counting an unrecorded suit in the Native Court of an uncertain date) to establish in proceedings against the Aguleri their title to the disputed strip, or to a larger area of land known as Aguakor to the south-east of the disputed strip, and both previous attempts have failed. Their Lordships find it unnecessary to refer in detail to this earlier litigation, which took place in 1933 and 1935, but would observe that the 1933 proceedings seem to have been confined to the disputed strip while the 1935 proceedings claimed Aguakor, expressly excluding the disputed strip, which it might perhaps be strictly accurate to regard as part of the Aguakor area.

The complete records of the proceedings in 1933 and 1935, including the transcripts of evidence, were put in, and apparently treated as evidence, in the present suit.

It is difficult to ignore the ill success of the plaintiffs' previous attempts to establish their title in assessing the merits of their present claim, but it is fair to add that as the law stood in 1933 and 1935 it was, as shortly to be explained, impossible for the plaintiffs to succeed as regards the disputed strip, no matter how strong their evidence of occupation or acts of ownership might be. That bar has since been removed, and accordingly the present claim to the disputed strip cannot be dismissed on a plea of *res judicata* by virtue of the failure of the 1933 proceedings; and as already observed the land claimed in the 1935 proceedings did not include the disputed strip.

The history of the disputed strip is briefly this. During the last decade of the 19th century the Royal Niger Company Chartered and Limited went

active in the purchase of riverside lands from the natives, and made several such purchases in the vicinity of the disputed strip. In particular by an Agreement dated the 25th June 1898, and made between the Niger Company of the one part and the Head Chief and Chiefs of the Umutshezi (who are a branch of the Umuleri) of the other part the Umutshezi "for good consideration" purported to sell to the Niger Company "all the private rights of every kind not already possessed by the Company in the land therein described," which can be taken as comprising the whole of the disputed strip as delineated on the plan exhibit "P." This Agreement contained a provision, the precise effect of which has not been explained, that the Company agreed not to disturb present tenants or their heirs who might wish to continue in personal occupation of their lands or houses from that date except at a price to be fixed by mutual agreement at the time.

It is common ground, however, that if at the date of this Agreement the Umuleri were the owners of the disputed strip it operated to transfer such ownership from the Umuleri to the Niger Company.

The plaintiffs contend that the Umuleri did own the disputed strip at the date of the Agreement, in reliance on the facts that by this date they were in physical occupation of two beaches or canoe stations within the disputed strip, whereas there was no physical occupation of any part of the disputed strip by the Aguleri before 1910; and that the Agreement itself constituted an assertion of Umuleri ownership of the whole of the disputed strip, which (as they claimed) was known to and acquiesced in by the Aguleri.

The defendants on the other hand contend that the Umuleri occupied the beaches by permission of the Aguleri as owners of the disputed strip. They disclaim knowledge of the Agreement of 25th June, 1898, and rely on a grant made by them in 1894 to the Roman Catholic Mission of a beach on the bank of the Anambra within the disputed strip, which grant was renewed in 1898.

The plaintiffs no doubt made their claim in the present action coextensive with the disputed strip as shown on plan P because they could point to an act of ownership in the shape of the Agreement of the 25th June, 1898, extending to the whole of that area.

Mr. Dingle Foot for the plaintiffs did however inform their Lordships in the course of the hearing that the plaintiffs also maintained their claim to Aguakor, although they were not pursuing that claim in the present proceedings.

Their Lordships would next refer to the Niger Lands Transfer Ordinance 1916 (ch. 149 of the Laws of Nigeria). By section 2 of that Ordinance all the lands and rights within the Southern Provinces belonging to the Niger Company on the 1st January, 1900, and specified or referred to in the agreements and instruments mentioned in the First Schedule (which included as No. 110 the Agreement between the Umutshezi and the Niger Company) were vested as from the 1st January, 1900, in the Governor in Trust for His Majesty his heirs and successors. In 1945 the Ordinance was amended by inserting a new section 10, by sub-section (1) of which it was provided that where in relation to any vested trust lands (*i.e.* any of the lands and interests vested in the Governor in Trust as aforesaid) the Governor considered it desirable so to do, he might by order published in the Gazette declare that with effect from a date to be specified in such order he abandoned all the right title or interest vested in him by virtue of the Ordinance in the whole or any part of such vested trust lands as might be mentioned therein. By a further amendment of the same date a new section 14 was inserted in the Ordinance, stating in these terms the effect of any

abandonment by the Governor under section 10 (1):

“ Where the Governor abandons all the right, title or interest vested in him by virtue of this Ordinance in any vested trust lands or parts thereof in accordance with the provisions of this Ordinance then such abandonment shall have effect as if such vested trust lands or parts thereof had never been included in the instrument, agreement or document, as the case may be, by which the same were originally transferred to the company.”

By an Order made under this Ordinance (No. 38 of 1950), and published in the Nigeria Gazette of the 2nd November, 1950, the Crown abandoned all right title and interest in the land in dispute except for a small area edged yellow on the plan exhibit “ P.”

On the strength of this abandonment by the Crown, which reinstated the plaintiffs as owners of the disputed strip if they had in truth been owners of it before the execution of the Agreement of 25th June, 1898, the plaintiff on the 6th November, 1950, commenced the present suit in the Nigerian Court, from which it was later transferred to the Supreme Court.

In these circumstances the plaintiff's put their case in this way: (1) At the date of the Agreement with the Niger Company on the 25th June, 1898, the Umuleri were the owners of the disputed strip; (2) The Agreement operated to transfer such ownership to the Niger Company; (3) By virtue of Section 10 of the Ordinance of 1916 the Niger Company's ownership of the disputed strip became in that year vested in the Governor in Trust for His Majesty from the 1st January, 1900; (4) The abandonment of the disputed strip by the Crown under the Order of the 2nd November, 1950, made pursuant to sections 10 (1) and 14 of the Ordinance of 1916 as amended in 1945, had the effect as if the disputed strip had never been included in the Agreement of the 25th June, 1898; and accordingly on the date of the Order the ownership of the disputed strip reverted to the persons (*i.e.* the Umuleri) to whom it would have belonged if the Agreement of the 25th June, 1898, had never been made.

It is common ground that the provisions of the Ordinance could only apply to the disputed strip on the footing that the Umuleri were themselves the owners of the disputed strip at the date of the Agreement, and were capable of transferring such ownership to the Niger Company. If the Umuleri were not the owners of the disputed strip at the date of the Agreement no interest passed under it to the Niger Company, and accordingly the disputed strip was not land belonging to the Niger Company, and was therefore outside the scope of the Ordinance.

It therefore appears to their Lordships that the whole case turns on the question whether the Umuleri were or were not owners of the disputed strip on the 25th June, 1898.

If the Umuleri were not the owners of the disputed strip on the 25th June, 1898, nothing that has happened since can have made them the owners of it and their claim must necessarily fail.

Their Lordships have already referred to the facts and circumstances leading down to and including the execution of the Agreement of the 25th June, 1898, relied on by the plaintiffs as raising the inference of Umuleri ownership at that date, and by the defendants as repelling that inference.

Evidence was given on both sides of numerous later acts as raising retrospectively the inference of ownership of the disputed strip by one side or the other on the 25th June, 1898.

The main acts of ownership attributable to either side since 1898

according to the findings of the learned trial Judge, were these:

Between 1910 and 1920 the Umuleri allowed the Church Missionary Society to build a church near the Akor apparently without objection by the Aguleri.

About 1925 or 1926 the Umuleri allowed the Church Missionary Society to build a church and a school on a new site, again without objection from the Aguleri.

In 1924 the Aguleri leased a plot to the Niger Company and the Umuleri made no objection.

From 1926 onwards the Aguleri made numerous open dispositions of parts of the disputed strip without opposition from the Umuleri. These included leases of riverside plots to John Holt & Co. Ltd. in 1926 and 1932 and to a French Company called C.F.A.O. in 1931. There were also on the part of the Aguleri a grant to the Roman Catholic Mission of a site for a school, various settlements of strangers along the water side, and a settlement of Umuoba Anam people, the Aguleri version of which appears to have been accepted by the learned Judge.

The Umuleri relied on the presence on the land of an allegedly old Ju Ju which they claimed to be theirs, and also claimed to have granted to people Umuoba Anam in 1903 permission to fish the Emu stream near the place where the Ju Ju stood. The trial Judge appears to have accepted the plaintiff's evidence as to the grant of this permission to fish, but to have rejected their claim that the Ju Ju was old, basing his conclusion on the latter point on the view formed by the District Officer who tried the 1933 action that the Ju Ju was not old when he inspected it in 1933. There was moreover some doubt whether this Ju Ju was in truth a communal Ju Ju of the Umuleri or belonged to a private individual.

The trial Judge after reviewing the evidence concerning the various acts of ownership adduced on either side said this:

“ If Umuleri were the owners, they allowed the Aguleri to put their guests the Roman Catholic Fathers there in 1894, and suffered them to remain there for nine years; and after allowing the Aguleri themselves to settle, not before 1910, they allowed them to lease four plots to firms and give a plot for a church, and settle numerous strangers on the waterfront, all within twenty years or less, and raised no objection until they saw that there was money in it which they were not getting. If Aguleri were the owners, and allowed Umuleri to settle, then after the settlement they let them bring the Umuoba Anam in to fish, and later to settle (after taking tribute themselves, they say), and afterwards on two occasions let them give plots to the Church Missionary Society. The result seems to be that neither side can convincingly say that any of these transactions on their own part (except, on Aguleri's showing, the Umuoba Anam settlement) is inconsistent with ownership of the land by the other side. Even so, the Umuleri as owners show themselves far the more complacent when compared with the Aguleri as owners, for the Aguleri dispositions are much more numerous. But the acts of ownership which are of weight in themselves and not merely by their number are, on the Umuleri side, the 1898 grant, as being a disposition of more than a mere portion of the land, and, on the Aguleri side, the 1894 grant of Ofianwagbo beach (because of its date) and the Umuoba Anam settlement, if their evidence about the latter is believed.”

He repeated this conclusion at page 82 where he said, “ The acts of

ownership which are significant are, as I have said, the 1898 grant, the 1894 grant of the Ofianwagbo beach to the Mission (because it preceded the entry on the land of the Aguleri who were the grantors) and the Umuoba Anam settlement."

He went on at pages 82 and 83 to refer to the Aguleri evidence about the Umuoba Anam settlement in terms which appear to indicate his acceptance of it.

In the course of his judgment the learned Judge referred to an affidavit sworn by the Chiefs of the Aguleri in 1922 when the Lease of 1924 to the Niger Company was in contemplation, as a matter which told in favour of the Aguleri. The effect of this affidavit was that the Aguleri were the rightful owners of the land forming part of the disputed strip for which the Niger Company was negotiating. The deponents to this affidavit included Okoya and Onowu who were Umuleri. Objections were raised below as to the admissibility of this document and were renewed before their Lordships, who, however, see no sufficient reason for holding that it was wrongly admitted by the learned trial Judge. The original, of which it was a certified copy, was more than twenty years old at the time of the trial. No objection was taken below on the ground that the document produced was a certified copy and not the original. It appears on the face of it to have been produced from proper custody, viz., that of the District Clerk of the District Office of Onitsha by whom it is certified to be a true copy—but again no objection was taken below as to this—and it purports to have been signed by the District Officer as witness to the marks of the deponent Chiefs. Inasmuch as the document would have been admissible under section 122 of the evidence Ordinance if it had been the original, and produced from proper custody, and inasmuch as no objection was taken that it was a certified copy, or as to the custody from which it was produced, their Lordships consider themselves as justified in treating the admissibility of this document as covered by section 122.

The learned trial Judge, after a full and careful review of all the evidence, at page 84 of the Record expressed his conclusion thus:

"The evidence afforded by the dealings with the land by the parties, and by the existence on the land of a juju now tended by the plaintiffs, in my judgment falls short of establishing the fact that the plaintiffs are owners of the land, and on this evidence, and on the case as a whole, it is quite impossible for me to find in favour of the plaintiffs, whose claim must accordingly be dismissed."

In the Federal Court Hubbard, F.J., who delivered the leading judgment, came to the same conclusion, while differing from the trial Judge's reasoning in two respects.

The learned Judge took the view that the Aguleri probably did not know anything about the Agreement of the 25th June, 1898. Hubbard, F.J., thought it probable that the Aguleri did know that some bargain had been made between the Umuleri and the Niger Company, but did not know the extent of the grant to the Niger Company which that bargain involved. Hubbard, F.J.'s, view may be said to be borne out by the fact that the only action taken by the Niger Company as grantees consisted of the erection of some small zinc houses abandoned after three years. Either view would deny to the Aguleri that degree of knowledge of the nature and extent of the bargain which would be necessary to support a case of acquiescence against them.

The other point of difference was that the trial Judge thought that the

grant by the Aguleri to the Roman Catholic Mission in 1894 was more significant as an indication of Aguleri ownership when made as it was without their physical presence on the land than it would have been had they been in actual occupation at the time. Hubbard, F.J., dissented from this view, but their Lordships are not satisfied that in the context in which it was expressed by the learned Judge it was wrong. It seems to their Lordships simply to mean that a bargain with actual occupiers might be made on the facile assumption that the occupiers were owners, whereas a bargain with persons not in occupation would necessarily involve more attention to the question of ownership as distinct from mere occupation.

Hubbard, F.J., further pointed out that the Umuoba Anam settlement "took place in 1910 when the land was already Crown land"—(see Record, page 102). Their Lordships understand this as meaning "when according to the plaintiffs' contention the ownership of the land had passed from them to the Niger Company." Except in a retrospective sense, there could be no question of any transfer to the Crown before 1916, and if the ownership of the land did in fact pass from the Umuleri to the Company and through the Company to the Crown, that could only be because the Umuleri did in truth own the land on the 25th June, 1898, the date of the Agreement with the Niger Company, in which case they would have owned it to this day by virtue of the retrospective abandonment effected under the Ordinance of 1916 as amended, and would be entitled accordingly to succeed in the present appeal, which would be contrary to Hubbard, F.J.'s, own view.

Their Lordships do, however, agree with the view to be collected from Hubbard, F.J.'s judgment as a whole that little, if any, assistance is to be found in the various acts of ownership on either side which took place between the 25th June, 1898, and the abandonment of the land by the Crown.

The essence of the plaintiffs' case is that the Umuleri, being then owners of the land, made over the ownership of it to the Company on the 25th June, 1898. They must therefore be taken as having believed from the 25th June, 1898, onwards that they had no interest in the land, and cannot rely on any acts of ownership on their part after the 25th June, 1898, as assertions of their title against that of the Aguleri. According to their own case, such acts of ownership, at the time when they took place, could only constitute assertions of their title in the first instance against that of the Company, and latterly against that of the Crown. Similarly, the acts of ownership from the 25th June, 1898, onwards relied on by the Aguleri as assertions of their title against that of the Umuleri could, according to the Umuleris' case, only amount to assertion of the Aguleris' title against that of the Company in the first instance and latterly against that of the Crown, which the Umuleri, having parted with the whole of their interest, were neither concerned nor able to contest.

The reasoning of Hubbard, F.J. is not altogether easy to follow at all points, but it appears to their Lordships that he balanced the rival claims with great care, giving full weight to all that could be said on either and if anything putting the case of the Umuleri somewhat too high. Having done so, he expressed his conclusion thus at page 103 of the Record:

"Upon a careful consideration of the whole appeal and of the arguments advanced by Counsel on both sides, it appears clear to me that the appellants completely failed to prove the extent and length of occupation which is necessary to ground a claim for declaration of

title, and that the learned Judge was fully justified in dismissing their action."

Sir Stafford Foster Sutton, F.C.J., in a concurring judgment, thought the learned trial Judge right in placing some weight on the affidavit to which their Lordships have already referred, which he described as a declaration by Chief Okoye against the interest of his own people.

The learned Federal Chief Justice went on (at page 104) to express this conclusion: "The onus of proving that they were entitled to the declaration of title to the land in dispute was upon the plaintiffs. The learned trial Judge reached the conclusion that they had not discharged that onus, and nothing that was said at the hearing of this appeal has persuaded me that he ought to have held otherwise."

The third member of the Court concurred without adding further reasons.

Mr. Quass for the defendants invited us to hold that notwithstanding differences in the reasoning of Hubbard, F.J. and the learned Federal Chief Justice there were here concurrent findings of fact which their Lordships, according to the well-settled rule, should not disturb save in exceptional circumstances which do not exist in the present case.

Mr. Dingle Foot for the plaintiffs on the other hand submitted that there was here no substantial dispute on any question of fact, and that this was not a case of concurrent findings of fact, but a case in which the two Courts below had concurrently erred in declining to draw from virtually admitted facts the inference that the Umuleri were owners of the disputed strip.

Their Lordships are content to accept as the more favourable to the plaintiffs Mr. Dingle Foot's submission that this was a case of concurrent inferences from facts rather than concurrent findings of fact. Even so, they find it impossible to hold that the Courts below were wrong in concluding as they did that the plaintiffs, on whom the onus lay, had failed to make out their claim to the declaration sought.

On the contrary, it appears to their Lordships that such evidence of ownership as existed immediately after the execution of the Agreement of 25th June, 1898, was wholly inconclusive either way, and that if and so far as subsequent acts and events are to be regarded as having any evidential value at all they do not, on balance, afford any further support for the plaintiffs' claim. As to the reliance placed by the plaintiffs on the physical occupation by the Umuleri of parts of the disputed strip before 1898, their Lordships would refer to *Omanhene Foli v. Chief Obeng Akesse* [1934] A.C. 340, which, in circumstances such as those of the present case, to say the least casts doubt on the evidential value of such partial occupation for the purpose of raising the inference of ownership of the whole of the area claimed.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed.

The plaintiffs must pay the costs of the appeal.

TEJUMADE ONITIRI APPELLANT
AND
SAMUEL A. OYADIRAN AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1959 Nov. 16

The Lord Chancellor (Viscount Kilmuir),
Lord Jenkins and Mr. L. M. D. de Silva.

Administration of Estates—Setting aside sale on ground of fraud—Sale at undervalue not alleged.

1. A claim to set aside a sale of land on the ground of fraud particularised, which particulars do not include an allegation that the land was sold at gross undervalue in comparison to market value cannot be sustained on the ground of sale at gross undervalue if the allegation of fraud is not proved.

2. Where fraud is alleged, the grounds on which it is alleged must be stated with particularity and it must be strictly proved in accordance with those grounds and no others.

LORD JENKINS. In this case the appellant, one of the children of the late Lawani Idowu Onitiri (who died intestate and is hereinafter called the deceased) brought an action in the Supreme Court of Nigeria, Lagos Judicial Division, on behalf of herself and the other children of the deceased, against the three respondents, claiming that a sale to the first respondent by the second and third respondents, as Administrators of the estate of the deceased, of a piece of land known as Onitiri (sometimes called "Ajegunle Onitiri") Brickfield, at Yaba on the mainland of Lagos and forming part of such estate, should be set aside on the ground of fraud.

The action was heard in the Supreme Court by Jibowu, J., who dismissed it by a judgment dated the 30th December, 1955. The appellant appealed to the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton, F.C.J. and Lestang and Abbott, F.JJ.). By a judgment of that court dated the 30th December, 1957, her appeal was dismissed, and from that judgment she now appeals to this Board.

The dispute concerning the sale of Onitiri Brickfield arose in this way: At the date of his death the deceased was owner in fee simple of land on the mainland of Lagos which included the brickfield and also included the villages of Onitiri, Onike, and Araromi. On the 27th January, 1948, pursuant to an Order of the Supreme Court made in the year 1947, the Administrators offered all the undevised properties of the deceased for sale by public auction, through the agency of one Sammy Crowther, in accordance with an auction notice dated the 19th January, 1948, wherein the properties offered for sale were described as "freehold landed property in a very good locality situated at Onitiri Village popularly known as Onitiri Brickfield and Village, Yaba, including Onike and Araromi Villages." The conditions of sale set out in the auction notice provided (by Condition 3) that the highest bidder should be the purchaser subject to the approval of the Vendors and (by Condition 6) that if the reserve price should not be obtained "hammer should not be down but the highest bidder should sign and bid submitted for seller's consent."

At the auction the first respondent was the highest bidder with a bid of £3,800, but a sale at that price was not approved by the Administrators, on the ground that the reserve price (namely £10,000) had not been reached.

On the 21st March, 1948, the first respondent agreed with the Administrators by private treaty to purchase the brickfield at the price of £650, this being the agreement which the appellant claimed to have set aside as fraudulent. Inasmuch as that claim was founded substantially on the contention that the sale for £650 comprised the whole of the land which had been offered for sale at the auction and for which the first respondent had then bid £3,800, reference should next be made to the description applied to the land sold for £650, as compared with the description given in the auction notice above referred to of the land then offered for sale. Three receipts appear to have been given during March, 1948, to the first respondent by the Administrators or their agent Crowther in respect of the sale for £650. The first, dated the 3rd March, 1948, acknowledged the receipt of the sum of £450 "as part of the purchase price of piece of a landed property situate and being at Ajegunle Onitiri Brickfield Sabo via Yaba." The second, dated the 16th March, 1948, acknowledged the receipt of £50 "in settlement of an account re Ajegunle Brickfield Sabo." The third, dated the 24th March, 1948, acknowledging the receipt of £500 (in fact represented by the two sums of £50 and £450 already paid), described the property sold in the same way as the first, but added "Dimension to be stated after separation of the said portion part from the whole plan." The balance of £150 appears to have been paid by the first respondent to the Administrators on or about the 23rd July, 1949.

Before proceeding to examine further the basis of the charge of fraud made by the appellant in respect of the sale for £650, their Lordships would briefly refer to an earlier action (No. 55 of 1950) brought in the Supreme Court by the first respondent as plaintiff against the Administrators and one Taiwo as defendants. The Administrators brought this earlier action upon themselves by executing a conveyance dated the 6th January, 1949, whereby they purported to convey to Taiwo for a sum of £1,000 land described as "All that piece or parcel of land situate . . . at Onitiri Brickfield near Onike Village Yaba . . ." and further defined by reference to a plan. On the 23rd July, 1949, the first respondent tendered to the Administrators for execution a conveyance to the first respondent of the brickfield described as "All that piece or parcel of land situate . . . at Ajegunle—Onitiri Brickfield Sabo via Yaba Lagos . . ." and further defined by reference to a plan, which showed the Brickfield as having an area of 23.95 acres. The Administrators refused to execute the conveyance so tendered, on the ground that the plan drawn thereon did not represent the land agreed to be sold to the first respondent. On the 4th February, 1952, judgment was given in favour of the first respondent, and it was ordered that the conveyance to Taiwo be set aside, and declared that the first respondent was the true owner of the land depicted in the survey plan attached to the conveyance tendered by him. The judge expressed the opinion that the conveyance so tendered should be more carefully drafted before execution. An appeal by the Administrators from this judgment to the West African Court of Appeal was dismissed, but the conveyance to the first respondent has never been executed.

The appellant was not a party to this earlier litigation, which did however determine conclusively as between the first respondent and the Administrators that the land sold by the Administrators to the first respondent for £650 was the land described in the conveyance tendered by him, that is to say (to put it shortly), Onitiri Brickfield comprising an area of 23.95 acres.

The Civil Summons in the present suit was issued on the 11th June, 1954,

and the appellant thereby claimed to set aside the sale of the brickfield to the first respondent by the Administrators on the ground of fraud.

By her statement of claim as amended pursuant to an Order of the Supreme Court dated the 22nd November, 1954, the appellant, after pleading her representative capacity, the capacity of the Administrators and the deceased's ownership of the brickfield alleged in para. 4 as follows:

“ 4. On the 21st day of March 1948, the first Defendant fraudulently bargained with the second and third Defendants and purchased the land known as Onitiri Brickfield for £650.

Particulars of Fraud

(a) The first Defendant on 27th January 1948 was the highest bidder at a sale by Auction of the aforesaid property for £3,800.

(b) That the sale was eventually rescinded because the reserved price of £10,000 was not reached.

(c) On the 21st day of March 1948 the first Defendant purported to purchase the same piece of land for £650.

(d) That the aforesaid Onitiri Brickfield was divided into plots on or about the same period and sold at £800 a plot, *i.e.* an acre.

(e) The first Defendant now claims to have bought about 23 plots (acres) for £650. Rent on this land being about £1,000 p.a.

(f) That there was no notice of the sale to the Plaintiff.

(g) That the alleged sale was by private treaty surreptitiously concluded by the Defendants without any cause whatsoever in that the estate being solvent the sale in itself was unnecessary.

(h) The Plaintiff says that the second and third Defendants have no power to sell aforesaid property.”

By his defence the first respondent admitted the Administrators' capacity and that he bought the brickfield from them for £650 but denied all other allegations in the Statement of Claim and particularly the allegations of fraud. He also pleaded *res judicata* by virtue of the action brought by him in 1950, and estoppel.

By their joint defence the Administrators made no admissions as to the appellant's representative capacity, admitted their own capacity and also admitted sub-paras. (a), (b) and (d) of para. 4 of the Statement of Claim, but denied every other allegation contained therein. They also pleaded that they sold the brickfield as Administrators and that they were not bound to consult the appellant before such sale.

The pleas of *res judicata* and estoppel raised by the first respondent were heard by the Supreme Court as preliminary points and Jibowu, J., in a judgment dated the 3rd January, 1955, found against the first respondent on both of them.

On the pleadings it was clear enough that the cardinal issue of fact in the case was whether, as alleged in para. 4 (c) of the Statement of Claim, the land bought by the first respondent from the Administrators for £650 on the 21st March, 1948, was the same as the land for which he had bid £3,800 at the auction sale on the 27th January, 1948. With a view to proving this allegation three witnesses were called on the appellant's behalf, namely, the agent Crowther, the plaintiff herself, and a son of the deceased named Emanuel Idowu Onitiri. After considering the evidence of these witnesses and the relevant documents the learned judge found on this issue of fact that the land bought by the first respondent for £650 was not the same as the land for which he had offered £3,800 at the auction but (as is clearly implicit

in his finding) was a part only of the land so offered. On the appellant's appeal to the Federal Supreme Court the learned judge's finding on this issue of fact was upheld, and the appellant does not seek to challenge these concurrent findings. There are however two passages in the evidence of Emanuel Idowu Onitiri and the appellant to which reference should be made. The former witness, in giving evidence (which the learned judge rejected) to the effect that the land offered at the auction sale for which the first respondent bid £3,800 consisted only of the 23 acres subsequently bought by the first respondent for £650, said this: "Onitiri Village comprises of 238 acres of land. Land for which the first defendant offered £3,800 was only a portion of the land. It was 23 acres of land that was sold for £650." The appellant, in her evidence, thus described the fraud of which she complained: "The fraud is that the land was sold for £650 after we refused to accept £3,800 for it."

Also called on the appellant's behalf was an auctioneer and valuer named Emanuel Sosanya, who gave expert evidence to the effect that Onitiri Brickfield, 23.95 acres in size, was worth in 1948 between £250 and £300 per acre, and in 1954 over £400 per acre.

In his Judgment dated the 30th December, 1955, the learned Judge after finding as above adversely to the appellant on the allegation in paragraph 4 (c) of the Statement of Claim to the effect that the piece of land bought by the first respondent for £650 was the same as the land for which he had bid £3,800 at the auction sale, and holding that this allegation of fraud therefore failed, went on to consider the remaining particulars of fraud alleged in paragraph 4 of the Statement of Claim.

With regard to the allegation in sub-paragraph (d) that "Onitiri Brickfield was divided into plots on or about the same period and sold at £800 a plot *i.e.* an acre," the learned Judge observed, and it is not disputed, that there was no proof that the brickfield had been divided into plots or that a plot had been sold for £800. He pointed out that the evidence of Emanuel Onitiri was to the effect that although it was intended to divide the brickfield into plots, that intention had not been carried out up to the 14th December, 1955, when he gave evidence. It plainly follows that whatever its import, which is decidedly obscure in that it does not say by whom, or for whose benefit, or at what cost in the way of development and so forth, the division into plots and sales at £800 a plot are alleged to have been carried out, and whatever assistance (if any) it might have afforded to the appellant's case if proved, this allegation as matters actually stood, could only suffer the fate of complete rejection as an allegation which the appellant had wholly failed to substantiate. No point was made on the appellant's side of the admission of paragraph 4 (d) of the Statement of Claim in the Defence of the Administrators. This was shown by the evidence referred to by the learned Judge to have been contrary to the facts, and appears to have been disregarded as a mere mistake.

As to the allegation in sub-paragraph (e) that "the first defendant now claims to have bought about 23 plots (acres) for £650. Rent on this land being about £1,000 p.a.," the learned Judge said that the first respondent was justified by the judgment of the Court in Suit No. 55 of 1959 in claiming that he bought the 23 acres for £650 and that "the question whether rent of £1,000 p.a. might be collected on it" was "beside the point." It was, of course, common ground that the first respondent had bought the brickfield, 23 acres in extent, for £650. But there has been some discussion as to the learned Judge's meaning when he said "the question whether rent of £1,000 p.a. might be collected on it" was "beside the

point." It may be said at once that there was no evidence that the brickfield had ever in fact been let for £1,000 p.a., or expert evidence to the effect that it could be or could have been let at that rent. This in itself would seem to have been sufficient to dispose of sub-paragraph (e) so far as it alleged that the "rent on the land" was "about £1,000 p.a." which like the allegation as to sale in plots contained in sub-paragraph (d) had necessarily to fail as an allegation without evidence to support it. But it appears to their Lordships that in saying that "the question whether rent of £1,000 p.a. might be collected" was "beside the point" the learned Judge was construing this allegation as referring to the rent potentially obtainable for the brickfield as at the date of the Statement of Claim. That is borne out by the learned Judge's use of the words "might be collected" which refers to the present, as distinct from "might have been collected" which would have been apt to refer to the date of the allegedly fraudulent agreement. This construction of the allegation as to the "rent on the property" appears to their Lordships to be right, having regard to the reference to the present imported by the words "the first defendant now claims" at the beginning of sub-paragraph (e). If that is right then the allegation as to the rent obtainable even if true could not assist the appellant on her case as pleaded. The mere fact that the first respondent might be able to obtain a rent of £1,000 p.a. in 1954 for land purchased in 1948 for £650 could not in itself entitle the appellant to have the agreement set aside. Be that as it may the short answer to this allegation is that it was never proved. The remaining allegations in sub-paragraphs (f), (g) and (h) of the Statement of Claim were all rejected by the learned Judge, and as such rejection has not been challenged, their Lordships find it unnecessary to refer to them further.

So far, it would seem to their Lordships that the course taken by the learned Judge was wholly correct. He dealt with the case *secundum allegata et probata*, and, concluding that none of the allegations of fraud in the Statement of Claim was proved, dismissed the action accordingly.

It remains, however, to consider the circumstance that Mr. Sosanya was called and gave evidence to the effect that the brickfield in 1948 was worth between £250 and £300 per acre and would be worth over £400 in 1954. None of the respondents took any objection to that evidence, and Mr. Sosanya was not cross-examined. On the other hand Mr. Thompson, counsel for the appellant, did not refer to this evidence at any stage in his argument before the learned Judge or invite him to draw any conclusion from it. The learned Judge for his part made no reference at all to this evidence.

It is clear that Mr. Sosanya's evidence was not relevant to any issue expressly raised in the Statement of Claim, which contained no express allegation that the sale was at an undervalue so gross in comparison to the true market value of the brickfield as to raise an inference of fraud on the strength of which the sale should be set aside, but founded its basic charge of fraud on the special ground that the Administrators sold to the first respondent for £650 land for which he had offered £3,800.

If gross undervalue in comparison to market value had been pleaded, Mr. Sosanya's evidence would of course have been relevant, but it was wholly irrelevant to the actual complaint to the effect that fraud was to be inferred from the gross discrepancy between the £650 paid and the £3,800 offered by the first respondent, with which expert opinion as to market value had nothing to do.

If Mr. Sosanya's evidence was irrelevant, as in their Lordships' view it undoubtedly was, the mere fact that he gave it could not make it relevant.

The position might have been different if Mr. Thompson had told the Court that in his submission the Statement of Claim sufficiently raised the general issue of undervalue by reference to market value, and that he proposed to call Mr. Sosanya to give evidence as to the market value of the brickfield at the material time, and Mr. Taylor, counsel for the first respondent, had then allowed Mr. Thompson to call and examine Mr. Sosanya without objection. There might then conceivably have been something to be said for the view that Mr. Taylor had waived any objection based on the lack of a sufficient plea of undervalue in the Statement of Claim, the more so if Mr. Taylor had cross-examined the witness. But nothing of that sort happened. Again, Mr. Thompson might have applied for leave to amend the Statement of Claim so as to raise the issue to which Mr. Sosanya's evidence was directed. But he made no such application.

In fact Mr. Taylor, according to the learned Judge's note, founded his argument entirely on the particular fraud alleged. Thus the learned Judge records him as submitting "the mere fact that the first defendant knew the land was worth more than £650 as £3,800 had been rejected for it raises a presumption of fraud as the property was sold at undervalue;" and as saying near the close of his argument "the defendant has obtained land for £650 which he could not get for £3,800."

In these circumstances, it appears to their Lordships entirely proper that Mr. Sosanya's evidence should have been ignored, as in fact it was, both by counsel in argument and by the learned Judge in his Judgment.

An argument was addressed to their Lordships to the effect that although the primary allegation that the Administrators sold to the first respondent for £650 the same area of land as that for which he had offered £3,800 was not made good, and although the alleged division into plots and sale of plots at £800 each never took place, and although the alleged rental of £1,000 (whether actual or potential) was not proved, nevertheless the Statement of Claim by alleging these matters did by implication raise the general issue of undervalue, because these abortive allegations were all directed to inadequacy of price. Their Lordships cannot accept this argument. It seems to them to be wholly inconsistent with the well-established principles applicable to the pleading and proof of charges of fraud. Where fraud is alleged, the grounds on which it is alleged must be stated with particularity, and it must be strictly proved in accordance with those grounds, and no others.

To take a simple example, let it be supposed that A and B hold land on trust for sale and to pay the proceeds to C, and let it be supposed that A and B sell the land to X for £500. Being dissatisfied with this sale, C brings an action against A, B and X to have it set aside, in which he delivers a statement of claim whereby he pleads the sale and alleges it to have been fraudulent, and alleges further as particulars of the fraud complained of that X sold the property to Z on the following day for £5,000 no other particulars being given. At the trial C wholly fails to prove that the land was sold to Z as alleged or at all. Can it then be open to C, without amendment of his pleading, to set up, and call evidence directed to proving, a case to the effect that the sale was at a gross undervalue, on the ground that the particulars which he wholly failed to prove would if proved have supported that inference? It appears to their Lordships self-evident that the answer to that question must be "No." But the appellant's argument demands that it should be answered affirmatively.

By her original notice of appeal to the Federal Supreme Court the appellant complained of the learned Judge's decision that the land sold for

£650 was not the same as the land for which the first respondent offered £3,800.

By a statement of further grounds of appeal she complained that the learned Judge failed to direct himself as to (so far as now material) "the sale at undervalue." This (so far as their Lordships are aware) was the first time that reference had been made to "undervalue" as a general issue.

As their Lordships have already mentioned, the Federal Supreme Court upheld the learned Judge's finding on the issue as to the identity of the land, and the appellant has accepted these concurrent findings as conclusive.

On the question whether it was open to the appellant to raise the issue of gross undervalue Sir Stafford Foster Sutton (in the course of a Judgment with which the other members of the Court concurred) said this:

"No rule is more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts, *Thesiger L.J. in Davy v. Garrett* (1887-8) 7 Ch.D. 489. It has repeatedly been held that any charge of fraud must be pleaded with the utmost particularity. The reason for this rule is obvious; it is only fair and right that the person against whom fraud is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly.

In the present instance it is clear that the issue of fraud was that set out with particularity in paragraph 3 (a) (b) and (c) of the Statement of Claim, and which was so succinctly put by the Plaintiff in her evidence. Gross undervalue as an issue was not once referred to by Counsel for the Plaintiff during his closing address at the trial.

In these circumstances I think it would be wrong at this late stage to allow the Plaintiff to contend, for the first time, that the pleading and evidence disclosed another fraud to the one upon which the case was fought in the Court below."

With these observations their Lordships respectfully agree.

For the reason above stated their Lordships are of opinion that this appeal fails and should be dismissed, and will humbly advise Her Majesty accordingly.

The appellant must pay the costs of the appeal.

EDWARD RAMIA LTD. APPELLANT

AND

AFRICAN WOODS LTD. RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1960] 1 W.L.R. 86; (1960) 1 All E.R. 627

1960 Jan. 19

Lords Tucker, Denning and
the Rt. Hon. L. M. D. de Silva

West Africa—Gold Coast—Concessions, application for—Timber lands—Failure to comply with imperative statutory requirements for protection of grantor—Concession invalid—Laws of the Gold Coast (1951 Ed., c. 136), ss. 12 (2) (3) (4), 13 (11).

Statute—Construction—Directory or obligatory—Privilege or power conferred—Regulative provisions or acquisition or exercise—Timber concession.

Section 12 of the Concessions Ordinance of the Gold Coast provides that any person desiring to obtain a concession in respect of an area of land in Ashanti shall make application to the chief or chiefs concerned, and “ (2) . . . shall give notice in writing to the Chief Commissioner of Ashanti of such application ” who

“ (3) . . . shall instruct the chief or chiefs concerned to appear before him . . . and . . . shall ascertain from them, in the presence of the applicant or his agent, whether they are willing to grant the concession . . . and shall make such other inquiries touching the grant of the concession as he shall consider necessary. . . . (4) The terms of the agreement reached between the applicant and the chief or chiefs . . . shall be embodied by the applicant in the concession which shall contain full particulars of the boundaries and which shall be executed by the interested parties in the presence of the Chief Commissioner. . . . ”

Section 13 provides that “ No concession shall be certified as valid . . . (11) unless . . . the concession has been obtained in accordance with the provisions of section 12 ”:

Held, that sections 12 and 13 (11) were clearly imperative and their provisions were to be strictly observed; they were designed to protect the grantor in the public interest and no waiver was possible of any of the conditions of section 12.

Where, therefore, the appellant company, which had applied for and been granted a concession by the Stool of Bekwai relating to timber rights in land in Ashanti, had admittedly failed to comply with the provisions of sub-sections (2), (3) and (4) of section 12 of the Concessions Ordinance, the concession was invalid.

Principles stated by Denman J. in *Caldow v. Pixell* (1877) 36 L.T. 469 at p. 470 applied.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 33 of 1958) from a judgment and order of the West African Court of Appeal (March 19, 1956) setting aside a judgment and order of the Supreme Court of the Gold Coast, Concessions Division Land Court, Kumasi, Ashanti (January 13, 1955) whereby the Land Court dismissed the opposition in Concession Inquiry No. 447.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal concerned two Concession Inquiries numbered 447 and 450 in the Concessions Division Land Court, Kumasi, Ashanti. In Concession Inquiry No. 447 the present appellant, Edward Ramia Ltd., was the claimant, and in Concession Inquiry No. 450 the present respondent, African Woods Ltd., was claimant. On January 13, 1955, the Land Court dismissed the opposition of African Woods Ltd. as opposer in Inquiry No. 447 to the grant of a certificate of validity to Edward Ramia Ltd. in respect of a concession, notice of which was filed on July 20, 1953. The claim of African Woods Ltd. to a concession in Inquiry No. 450 in respect of land, part of which was the same as that claimed by Edward Ramia Ltd. in Inquiry No. 447, was not dealt with by the court having regard to the view it took adverse to African Woods Ltd. as to the rights of the parties under their competing concessions.

The parties will be referred to hereafter as “ Ramia ” and “ African Woods.”

The claimant Ramia in Inquiry No. 447 on July 20, 1953, filed notice of a concession dated May 26, 1953, granted to it by the Stool of Bekwai. On March 30, 1954, Ramia filed a supplementary document dated February 26, 1954, between the same parties in support of the said concession. By notice dated November 20, 1953, African Woods gave notice of a concession dated

October 3, 1953, granted to it by the same Stool of Bekwai covering a large part of the land comprised in the concession claimed by Ramia. By notice filed on June 4, 1954, African Woods entered opposition to the grant of a certificate of validity to Ramia in respect of the concession the subject-matter of Inquiry No. 447 in so far as it purported to coincide with the grant claimed by it by virtue of the concession the subject-matter of Inquiry No. 450. The principal ground of opposition was that the provisions of section 11 (now s. 12) of the Concession Ordinance (c. 136) had not been complied with.

The material sections of the Ordinance were:

“ 2. In this Ordinance—‘ Concession ’ means any instrument whereby any right, title or interest in or to land, or in or to minerals, timber, rubber, or other products of the soil in or growing on any land or the option of acquiring any such right, title or interest purports to be granted or demised by a native . . .

3.—(1) Any agreement whereby any right, interest, or property in, to or over land, in or to minerals, metals, precious stones, timber, rubber or other products of the soil in or growing on any land, or the option of acquiring any such right, interest or property, purports to be granted by a native to a person who is not a native, shall be void unless it is in writing.

4.—(1) Every concession shall be held to be under and subject to the operation of this Ordinance . . .

6.—The court shall have power, jurisdiction and authority to inquire into and certify as valid or invalid any concession, except so far as otherwise provided in this Ordinance, and shall exercise such power, jurisdiction and authority subject to and in accordance with the provisions of this Ordinance. . . .

8.—(1) Notice of every concession shall within two months of the date thereof be filed in the court having jurisdiction to inquire into the concession by the person claiming to be entitled to the benefit thereof (hereinafter called the ‘ claimant ’).

(3) The notice shall be in Form A of the Schedule and shall contain the particulars specified in the said form and together with the said notice there shall be delivered a plan of the land comprised in such concession which shall be prepared in accordance with any regulations from time to time made under section 5.

(4) The claimant shall also file within the said period of two months such other documents (including a copy of the concession) or duly certified copies thereof as he relies upon in respect of his right to the concession and together with any such documents there shall be filed a list of such documents in such form as may be provided by rule: Provided that the filing of any such copies shall not be deemed to render unnecessary the due production at the inquiry into any concession or at the trial of any questions relating thereto of the original document so relied upon.

(5) Every concession, in respect of which compliance has not been made with the provisions of this section, shall on the expiration of two months after the date of the concession, become null and void and all rights of the claimant with respect to the concession shall thereupon determine absolutely: Provided that the court may in its discretion for good cause shown, and upon such terms as it sees fit, extend the said period of two months for one or more terms not exceeding in all four months.

12.—(1) Any person desiring to obtain a concession in respect of an area of land of which either the whole or the greater part is situate in Ashanti shall make application to the chief or chiefs concerned for the grant of such concession.

(2) Any person who has made application as aforesaid (hereinafter called the 'applicant') shall give notice in writing to the Chief Regional Officer of Ashanti of such application.

(3) Upon receipt of any such notice the Chief Regional Officer of Ashanti shall instruct the chief or chiefs concerned to appear before him or before a Government Agent, and the Chief Regional Officer or Government Agent shall ascertain from them in the presence of the applicant or his agent, whether they are willing to grant the concession applied for, and shall make such other inquiries touching the grant of the concession as he shall consider necessary, and shall arrange with the applicant or his agent in the presence of the chief or chiefs concerned the sum which should be paid annually in consideration of the concession.

(4) The terms of the agreement reached between the applicant and the chief or chiefs concerned after the aforesaid appearance before the Chief Regional Officer or Government Agent shall be embodied by the applicant in a concession which shall be executed by the interested parties in the presence of the Chief Regional Officer or a Government Agent, and the Chief Regional Officer or the Government Agent before whom any such interested party executes such concession shall certify to the due execution of such concession by such party.

13. No concession shall be certified as valid . . . (11) Unless, in the case of a concession granted in respect of an area of land of which either the whole or the greater part is situate in Ashanti, the concession has been obtained in accordance with the provisions of section 12.

32.—(1) A certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto, and shall be effective in respect of the whole area of land contained by the boundaries stated in such certificates, whether or not any discrepancy exists between such area and the area indicated by the notice and plan of the concession referred to respectively in subsections (1) and (3) of section 8.

(2) A certificate of validity . . . shall be conclusive evidence that all the requirements of the Ordinance . . . and all matters precedent and incidental thereto have been complied with . . ."

The concessions in question related to timber rights in land in Ashanti. Section 12 of the Ordinance laid down the procedure to be adopted in such cases. It was common ground that Ramia failed to comply with the provisions of sub-sections (2), (3) and (4) of this section in respect of the concession dated May 26, 1953.

The supplementary document dated February 26, 1954, was executed before the Government Agent, but sub-sections (2) and (3) of section 12 had not been complied with, nor was there compliance with section 8 (4). Furthermore, the documents, although expressed to be supplementary to the lease of May 26, 1953, contained a demise from its date, viz., February 26, 1954, and related to an area of land of 64 square miles whereas the lease of May 26, 1953, related to 82 square miles.

The trial judge (Quashie-Idun J.) held that the intention of the legislature was purely to protect the grantors of concessions in Ashanti from

exploitation, and that, where the grantors raised no objection to the terms contained in a lease, as in the present case, it would be inequitable to hold that such lease was null and void. He considered that the court had a discretion in the matter and dismissed African Woods' opposition to the validity of Ramia's concession. He made no finding with regard to Inquiry No. 450.

On appeal, the West African Court of Appeal (Coussey P., Korsah J.A. and Baker Ag. J.A.) allowed African Woods' appeal and declared Ramia's concession invalid. They remitted the case of Inquiry No. 450 to the Supreme Court of the Gold Coast for adjudication, and on May 19, 1956, Benson J. declared African Woods' concession invalid on the ground that in granting it the Bekwai chiefs had not understood the nature and terms of the grant, and were under the impression that the land already leased to Ramia did not include the land leased to African Woods.

This judgment was not appealed, and the hearing before their Lordships was confined to Inquiry No. 447.

1959. December 10. *Anthony Cripps Q.C.* and *Mark Smith* for the appellant.

Dingle Foot Q.C. and *T. O. Kellock* for the respondent.

The following cases in addition to the case referred to in the judgment, were cited in argument: *Wassew Exploring Syndicate Ltd. v. African Rubber Co. Ltd.* ([1914] A.C. 626); *In re Concession Inquiry No. 939 (Accra) Came, Ofori Atta, African Selection Trust Ltd.* ([1933] 9 W.A.C.A. 305 at p. 317).

1960. January 19. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts as set out above and continued: It will be convenient first to dispose of the supplementary grant of February 26, 1954. As already stated, this lease related to a smaller area of land than that comprised in the original grant, and the requirements of sub-sections (2) and (3) of section 12 and of section 8 (4) were not complied with. It is therefore clear that if the original grant was invalid for non-compliance with section 12 the supplementary grant will not avail Ramia, whose case must stand or fall on the validity of the original concession.

As to this, the President of the West African Court of Appeal (the late Sir Henley Coussey) in his judgment allowing the appeal of African Woods, after quoting from the judgment of Denman J. in *Coldow v. Pixell* ([1877] 36 L.T. 469 at p. 470) said:

“Applying these principles, the words of sections 12 and 13 (11) are, to my mind, clearly imperative. The respondent could only take a concession under the Ordinance and in compliance with section 12. It is true that there are no negative words in the sections referred to, but the affirmative words are absolute, explicit and peremptory, and when you find in an Ordinance only one particular mode of effecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes are essential and imperative. To render the purpose of section 12 unmistakable, sub-section (4) provides that the terms of the agreement can only be embodied in a concession after they have been agreed upon before the official named. The policy of the law clearly insists upon strict observance of the steps already alluded to before there can be a concession. Sections 12 and 13 (11) are so clearly designed to protect the grantor in the public interest that in my opinion the learned judge erred in holding that a waiver is possible of any of the conditions of section 12 and that the grantors had waived them. To

accede to this proposition would be to entirely ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance.”

With these words their Lordships are in complete agreement and do not desire to add anything thereto.

Later in his judgment the President, referring to the lease of May 26, 1953, used these words: “ That deed may be good as a demise of land and the covenants therein no doubt are binding on the parties, but it never came into existence as a concession owing to non-observance by the parties of the imperative provisions of section 12.” Relying on these words counsel for Ramia invited their Lordships, if against him on the main issue, to vary the order of the West African Court of Appeal by making no order instead of declaring the concession invalid.

Their Lordships express no view with regard to the first sentence in the above quoted passage, which may raise issues which are not germane to the present proceedings and were not canvassed in the courts below. They find no ground for varying the judgment pronounced by the West African Court of Appeal and will, for the reasons indicated above, humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Knapp-Fishers & Blake and Radden; Birkbeck, Julius, Coburn & Broad.*

NANA YAO NKANSAH II APPELLANT
 AND
 NANA ASANTE YIADOM III (DECEASED) RESPONDENT
 NANA ATUOBI YIADOM IV SUBSTITUTED

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 7

1960 Mar. 21

Viscount Simonds, Lord Jenkins and
 Mr. L. M. D. de Silva

Estoppel—Judgment limited in scope—Cannot be expanded in later proceedings—Practice and Procedure—Amendment in the absence of adverse party—Not binding on him.

1. A decree expressed or intended to be binding only on some of several parties cannot subsequently sustain a plea of *res judicata* against such parties not included or contemplated within its ambit.

2. At the very end of the proceedings counsel for the plaintiff asked permission to amend “ the description of the land claimed in the Writ of Summons.” This amendment was allowed in the absence of the defendant and without any notice to him. If a formal decree had been drawn up it would not have been made binding on a party who had had no notice of this amendment.

MR. L. M. D. DE SILVA. In this case the appellant Nana Yao Nkansah II, the present Ohene of Bukuruwa, has been substituted as plaintiff in place of Nana Osei Twum II who as Ohene of Bukuruwa in 1950 instituted this action in the Grade “ A ” Native Court of Okwawu (also known as Kwahu) against the respondent Nana Asante Yiadom III, Ohene of Nkwatia, for a

declaration of title to a parcel of land situated in the Kwahu State and edged red in a plan produced in the proceedings, for possession and for damages for trespass.

The respondent denied that the Bukuruwa stool was entitled to all the land claimed by the appellant and counterclaimed a portion hatched pink within the red land. In respect of this land he claimed possession and damages for trespass.

Both the appellant and the respondent are subordinate to the Paramount Chief of Kwahu.

In December, 1950, the suit was transferred to the Land Division of the Supreme Court of the Gold Coast.

In a statement of claim filed in the Supreme Court the appellant set out a historical title to the red land and pleaded further that the respondent was estopped from denying the title of the appellant by reason of a judgment entered in a case commenced by the Bukuruwa in 1940 (hereafter called the 1940 action).

In his defence the respondent denied the historical title alleged by the appellant and set out his own historical title. He also denied the alleged estoppel.

Evidence on the question of ownership was led by each side before the Supreme Court which came to the conclusion that the respondent had established in respect of a portion of land edged green (hereafter called the green land) rights "which possessed all the features of ownership by customary law subject to the over-riding rights of allegiance to Kwahu State." It held however that the respondent was estopped from denying the appellant's title by reason of the judgment in the 1940 action.

On appeal the West African Court of Appeal held that the plea of estoppel failed and entered judgment for the respondent in respect of the green land.

The only point in dispute between the parties on this appeal and the only point for decision by their Lordships is whether or not the plea of estoppel is entitled to succeed. It is agreed by the parties that if the plea of estoppel succeeds the appeal ought to be allowed and that if it fails it should be dismissed. Their Lordships will now examine the judgment and proceedings in the 1940 action upon which the plea is based.

That action was begun in 1940 in the Tribunal of the Paramount Chief of Kwahu between Bukuruwa Stool as plaintiff and the Chief of Atipradaa and one of his subjects as defendants for a declaration of title to the land. The suit was thereafter transferred to the Supreme Court of the Gold Coast in March, 1942. There is some dispute as to whether the land which was the subject matter of that action was identical with the land claimed by the present appellant but in view of what follows it is not necessary for their Lordships to decide that point. Their Lordships will assume without deciding against the respondent (who succeeds on the appeal) that it was identical.

In July, 1942, on the application of the Bukuruwa Stool, the Chief of Wusuta was added as a defendant on the ground that the original defendants were his subjects and claimed to occupy the land under his authority.

The Bukuruwa Stool in its statement of claim (in the 1940 action) pleaded that the predecessor of Chief Atipradaa had been permitted by Bukuruwa to hunt, reside and make farms on payment of tolls but now refused to pay tribute and, in concert with the Chief of Wusuta, claimed the property as part of the Stool property of the Wusuta Stool.

In 1943 a surveyor and the parties visited the land in order to prepare a plan for the purposes of the case. In January, 1944, the respondent made an application to be joined as a defendant on the ground that when the surveyor visited the land the elders of his Stool had been invited to be present and had discovered that a large part of the land claimed in the action was the respondent's Stool land. On the 11th February, 1944, this application, though opposed, was granted. An appeal against the order for joinder was dismissed on the 22nd November, 1944, by the Court of Appeal.

On the 25th August, 1945, on an application made by the present appellant (plaintiff in the 1940 action) the Paramount Chief of Kwahu was joined as co-plaintiff on the ground that he had an interest in all Kwahu lands and that the lands in dispute were a portion of the lands held under him.

Thereafter the respondent took no further part in the 1940 action. It has been said on his behalf in this action that he did so because of an arrangement with the Paramount Chief in order not to embarrass him in the proceedings against the Wusutas. But he took no steps to have himself discharged from the action. It is argued for the appellant that the respondent was a party to the 1940 action and is consequently bound by the result of the case namely a declaration of title in favour of the plaintiffs. It is to be observed that the declaration was not in favour of Bukuruwa alone; it was in favour of the Bukuruwa and the Paramount Chief of Kwahu. Their Lordships do not find it necessary to go into the question how far this fact would affect a plea of *res judicata* by the Bukuruwa alone if the plea was otherwise valid because they find it fails on other grounds.

In holding that the plea of estoppel failed the President of the Court of Appeal with whom the other judges concurred said:

“ There are points which, in my view, strongly support the Appellant's ” (Respondent on the appeal to their Lordships) “ contention that there was an understanding that his predecessor should drop out of the action when the Omanhene ” (this is a reference to the Paramount Chief) “ had been joined as a co-plaintiff and it became clear that the battle was really between the Kwahu and the Wusuta.

Firstly, it seems odd that he should after strenuous efforts to be joined as a Defendant, for no apparent reason unless it was for the one alleged, suddenly drop out of the case. In this connection I think it relevant to refer to three pieces of evidence given by witnesses called by the Plaintiffs in the former case.” (This is a reference to the 1940 action.) “ The 6th witness, Emmanuel Otukwa, said: ‘ At one time Nkwatia claimed the middle part of the land in dispute from us. As the result of the intervention of the Omanhene the claim was settled,’ and again, ‘ For some reason or other the Nkwatias got joined as co-defendants, but on the Omanhene becoming co-plaintiff, they withdrew,’ and their 18th witness, G. V. Johnson, clerk to the Omanhene and State Secretary, said: ‘ The Nkwatias claim that they own land between Asabi and Nkami lands. They do not claim any other parts of the land in dispute. However, this is an internal dispute between Nkwatia and Bukuruwa, which has nearly been settled by the Omanhene ’; secondly, it is quite clear that in the former case the Omanhene claimed title to a portion of the land in dispute through the Nkwatia Stool, vide the three letters Exhibits ‘ M,’ ‘ N ’ and ‘ O ’

which were put in evidence through the State Secretary, G. V. Johnson; thirdly, the passage in the judgment of McCarthy, Ag. C.J., where he said: 'The Plaintiffs press for a declaration in respect of all the land claimed by them, although it is realised that such a judgment will only be binding on the Wusuta Stool and those claiming under it,' from which it would seem clear that the case had been treated by all concerned as a battle between the two opposing Stools, Kwahu and Wusuta, and fourthly, the name of the appellant's predecessor ceased to appear in the title of the case, and no judgment was asked for, or given, against him at the conclusion of the trial.

In all the circumstances I am of the opinion that the Appellant is not estopped from setting up his present claim by reason of the judgment in the former case, and I think the learned trial Judge erred in holding that he was."

The learned trial judge on the evidence before him refused to hold that there was an agreement made between the parties during the 1940-1947 trial that the Nkwatiahene should withdraw from the action. It appears from the preceding paragraph that the Court of Appeal on a strong line of reasoning took the opposite view. From what follows it will appear that it is not necessary to decide which view is correct.

Their Lordships agree with the Court of Appeal that in the 1940 action the Paramount Kwahu Chief "claimed title to a portion of the land in dispute through the Nkwatia Stool." It is also to be observed that the final view of McCarthy, J., who tried the 1940 case regarding the evidence is stated thus: "My view is that the balance is slightly in favour of the Kwahu Stools." The facts already stated and a review of the 1940 action as a whole lead their Lordships to the same conclusion as the Court of Appeal namely that it "had been treated by all concerned as a battle between the two opposing Stools, Kwahu and Wusuta." There was in fact no evidence relevant to any dispute between the Bukuruwas and Nkwatias. It is argued nevertheless that as the respondent failed to have himself discharged from the action he is bound by the declaration made in it with regard to the land.

It is relevant at this stage to note the provision with regard to decrees which is to be found in rule 4 of Order 40 of the General Procedure Rules (Second Schedule of the Courts Ordinance Cap. 4 Laws of the Gold Coast, Vol. I, p. 122), namely

4. A minute of every judgment, whether final or interlocutory, shall be made, and every such minute shall be a decree of the Court, and shall have the full force and effect of a formal decree. The Court may order a formal decree to be drawn up on the application of either party.

No formal order was asked for or drawn up in the 1940 action. The passage in the judgment, "The plaintiffs press for a declaration in respect of all the land claimed by them, although it is realised that such a judgment will only be binding on the Wusuta Stool and those claiming under it" (vide above) appears to their Lordships to possess great significance. The whole course of the 1940 action and the words just quoted indicate that the learned judge intended that the judgment should be binding on the Wusuta Stool only. It is true that the words were used in a passage of his judgment where the immediate question under consideration was whether the declaration to be granted should cover all the land claimed by the plaintiff or only that part of it claimed by the Wusutas. But the course the case has run and the judgment convinces their Lordships that a dominant idea in the

mind of the judge was that the Wusuta Stool only was to be bound by anything decided and that if he had been asked for a formal decree he would have so drawn it as to avoid its having any effect on anyone but the Wusutas.

Their Lordships have also observed that at the very end of the proceedings in the 1940 action counsel for the plaintiff asked permission to amend "the description of the land claimed in the Writ of Summons." This amendment was allowed in the absence of the Nkwatia defendant and without any notice to him. If a formal decree had been drawn up it would not have been made binding on a party who had had no notice of this amendment.

For the reasons they have given their Lordships are of opinion that the judgment in the 1940 action could have no effect upon the claim now asserted by the respondent in this case.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of this appeal.

THE CHEAPSIDE SYNDICATE LIMITED APPELLANT
AND
G. STANLEY LEWIS RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 11

1960 June 1

Lords Tucker, Jenkins and
Morris of Borth-y-Gest

Agency—Claim for share of profits not established Account Stated founded on statement of account—Accounts must be considered over the background of antecedent correspondence between the parties.

The plaintiff founded his claim on account stated based on a document which was enclosed in a letter from the defendants dated 23rd February, 1950, addressed to the plaintiff's solicitor. The document enclosed contained three statements: (a) personal account showing salary due (b) transfer from advance account to personal account (c) suspense account. The plaintiff relied on the suspense account which reads in part:

" . . . 31/3/49: One-third profits of £10,715 4s. 7d. being goods in stock reckoned at Cost Price and unrealisable at Cost Price . . . £3,571 14s. 8d.
Signed: George Francois
Managing Director."

Held: The suspense account cannot be considered apart from the letter of 23rd February in which it was enclosed and which explains its nature and why it was brought into being. Taken in the context of this letter and the preceding correspondence it is manifest that it could not be construed as an acknowledgment of a debt of £3,571 14s. 8d. and a promise to pay it which is the inference necessary to sustain an action on an account stated of the nature relied upon in this action which is to be distinguished from one where items on each side of an account have been set off against each other and a balance struck (see *per* Lord Atkin in *Siqueira v. Noronha* [1934] A.C. 332 at 337).

LORD TUCKER. This is an appeal by the defendants in an action brought against them by the respondent who was the plaintiff in the action. The parties will be referred to hereafter as defendants and plaintiff. The action

was brought in the Supreme Court of the Gold Coast Eastern Judicial Division claiming £645 11s. 0d. arrears of salary and £3,571 14s. 8d. for one-third share of profits on an account stated. Judgment was entered for the plaintiff for the arrears of salary but his claim for one-third share of profits was dismissed. On appeal to the West African Court of Appeal this judgment in so far as it rejected the claim for one-third share of profits was set aside and the case remitted to the Supreme Court to determine the market value of certain goods on 31st March, 1949, with directions to deduct the sum of £500 from the sum so ascertained and to enter judgment for the balance plus the sum of £645 11s. 0d. in respect of salary awarded by the trial Judge.

No question arises on this appeal with regard to the sum awarded for salary, the sole question at issue is whether the plaintiff is entitled to any further relief in respect of his claim to a share of profits. The defendants are a limited company trading as merchants in Accra. The plaintiff had for many years been employed by the defendants as a District Agent at a salary plus residential accommodation. The record does not show what, if any, was the agreement as to salary or how it was fixed. It seems to have varied from £400 to £500 until the last year of his employment when he was credited with £700, but his salary is irrelevant to any issue in this appeal which relates solely to his claim for a share of profits in addition to salary. In September, 1948, the plaintiff approached Mr. Francois, the defendants' Managing Director, suggesting he should have a share of profits instead of salary. Correspondence subsequently passed between the parties and on 15th October, 1948, the defendants, by their Managing Director, wrote to the plaintiff a letter containing the following:

“ The Cheapside Syndicate Ltd. offers you the following terms:

1. Quarters . . .
2. Passages . . .
3. Conveyance . . .
4. Emoluments. The company offers you 33½ per cent. of the nett profits as shown at the close of each financial year. Permission is given to draw up to £500 before the figures for the year are ascertained.
5. Net Profits. This will be ascertained on the basis of deduction of all company working expenses and reasonable provision for bad or doubtful debts from gross profits but will not include personal amount drawn by yourself or myself towards remuneration.
6. These terms specifically exclude the carving out of spheres of activity on which to base percentage of profits.

We hope you will find the terms acceptable when an agreement embodying these and other usual terms can be drawn up.”

No reply to this offer was received and on 28th March, 1949, the defendants wrote as follows:

“ Dear Sir,

The company made you an offer of revised working terms on 15/10/48. As there has been no acceptance of the offer it is hereby withdrawn.”

It is common ground that at this date there was no agreement between the parties for any alteration in the plaintiff's remuneration but he continued in the service of the company until his employment was determined on 8th February, 1950. It is therefore plain that in order to establish his claim the

plaintiff had to rely on something which occurred between 28th March, 1949, and 8th February, 1950.

It is clear from the pleadings that the plaintiff did not rely at the trial on any agreement between these dates. His claim in the writ was originally based on contract in the following words "both amounts claimed for salary and share of profits being due under the said defendants' agreement of employment of the said plaintiff." On 12th March, 1951, he gave notice of amendment by which instead of a claim in contract he substituted the following: "The plaintiff's claim is for the sum of £4,217 5s. 8d. payable by the defendants to the plaintiff being money found to be due from the defendants to the plaintiff on an account stated between them."

The particulars relating to that part of his claim to a share of profits were as follows:

" 23rd February, 1950.

The plaintiff's one-third share of profits computed up to 31st March, 1949, also acknowledged in the statement of account attached by the said defendants to their letter of 23rd February, 1950, addressed to the plaintiff's former solicitor Mr. J. Sarkodee-Adoo . . . £3,571 14s. 8d."

In his evidence the plaintiff said (at page 17 of the record): "This claim before the Court is not based on a contract. I based my claim on an account stated." At page 21 he said: "My salary on 1/4/49 on date of stocktaking was one-third of the net profits. The net profits would be the sales made after deducting expenses and costs of goods not including emoluments of myself and the Managing Director. I have no salary apart from the one-third share of net profits. My emoluments are one-third share of net profits."

This is a reversion to the offer of 15th October, 1948, which was withdrawn and never thereafter renewed. After the trial in the Supreme Court the plaintiff gave notice that he would apply at the hearing of the appeal to add an alternative claim in contract as follows: "In the alternative the plaintiff claims £3,571 14s. 8d. being plaintiff's one-third share of profits computed up to 31st March, 1949, agreed by the defendants to be paid to plaintiff by way of remuneration for the year 1st April, 1948, to 31st March, 1949. Plaintiff also claims interest at 5 per cent. per annum from 1st April, 1949, up to date of judgment."

It is not surprising that, in view of the abandonment of such a claim as originally appearing in the writ by the amendment thereof on 12th March, 1951, and the plaintiff's evidence referred to above, this application was refused by the Court of Appeal. The rejection of a claim in contract need not, however, be based solely on questions of pleadings as their Lordships are satisfied from a perusal of the evidence and the documents that no such agreement was ever reached. It is clear from the correspondence that after the withdrawal of the defendant's offer of 15th October, 1948, all their suggestions for remuneration on a one-third share were based on the value of goods in stock. In a memorandum to the Board of Directors dated 9th September, 1949, Mr. Francois stated in paragraph 6: "Whatever is decided on it is quite clear that the company is in no financial position to meet one-third of net profits in cash vide 1 (a) above and 8 below."

In a memorandum in reply thereto the plaintiff asked that a meeting of the Board be summoned immediately to discuss Mr. Francois' memorandum under review together with his (the plaintiff's) reply and to make

recommendations. He added that he had continued in the service of the company doing valuable work on the understanding that his remuneration was still a third share of net profits.

He had, however, never accepted this offer and it had been withdrawn. The minute book of the directors' meeting of 31st October, 1949, was not one of the exhibits transmitted to the Board, but it appears from the trial Judge's judgment that while not considering themselves competent to deal with the financial year 1948-1949 the Board advised that as there had been a previous offer it would be wise and make for smooth working of the company if this offer of one-third net profits were given to Mr. Lewis in a manner convenient to the company having regard to Mr. Francois' memorandum of 9th September, 1949. After his dismissal in February, 1950, by which date it is clear no agreement had been concluded, the plaintiff stated in evidence that there was a dispute between him and the Managing Director about payment of his one-third share in goods and he insisted on payment in cash. This divergence of view was never resolved, but the subsequent correspondence makes it clear that the defendants were at all times ready to accede to a settlement on the basis of a one-third share of goods in stock. The plaintiff never agreed to this and brought his action for a one-third share of net profits.

This brings their Lordships to the consideration of the document relied upon as constituting an account stated.

It is a document which was enclosed in a letter from the defendants dated 23rd February, 1950, addressed to the plaintiff's solicitor. The document enclosed contained three statements:

- (a) Personal account showing salary due.
- (b) Transfer from Advance Account to personal account.
- (c) Suspense Account.

It is the last of these three that is relied upon. It is as follows:

“ J3 ”

STATEMENT “ C. ” SUSPENSE ACCOUNT, G. S. LEWIS

STATEMENT “ C ”

GEORGE STANLEY LEWIS

SUSPENSE ACCOUNT

31/3/49	One-third profits of £10,715 4s. 7d. being goods in stock reckoned at Cost Price and unrealisable at Cost Price	£3,571 14s. 8d.
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For and on behalf of Cheapside Syndicate Ltd.,

(Sgd.) GEORGE FRANCOIS,
Managing Director.

The relevant extracts from the letter are as follows:

“ There remains your client's one-third share of profits vide statement (c). It is only necessary here to state why this amount is placed in suspense and how and when the company will settle.

This one-third profit was not a cash profit but was arrived on the ground stock value of goods at cost price on stocktaking at 31/3/49.

It was discovered in the interim between our financial stocktaking at 31/3/49 and the preparation of our balance sheet for the year 1/4/48-31/3/49 that most of the goods shown at cost price at the financial

stocktaking were not being sold at all and a large proportion of what was being sold was sold at under cost which made our statements of profits based on cost price rather inflated in the circumstances.

The suggestion was made that the ground stock really represented only a percentage of the actual value and should be so treated. Your client resisted this suggestion on the ground that it was an attempt to cheat him of his full third share. The accounts were therefore submitted to the Income Tax authorities as they stood. The suggestion that the ground stock represented only a percentage of the actual value (this must have been anathema to the Income Tax authorities) as well as your client's repudiation of such a suggestion of percentage were all submitted. Your client's third share was placed in a Suspense Account for obvious reasons. If your profits are in unsold goods that you have ordered and cannot sell and when you do sell you sell below cost, equity, in our view, does not demand that the company has to find money outside of these goods to meet in cash unreal profits on 'errors of experience.'

* * *

Your client has the option of accepting from the company a third section of the remaining goods at cost price and payment in cash of what his third of sales already made represents. This is one alternative mathematically ascertainable. The other is that at 31/3/50 when we devalue this old stock and ascertain what his third profit represents at the devalued price plus what his third share on sales represents a total can be arrived at and we will make proposals for settlement."

These proposals were rejected and counter proposals put forward in the plaintiff's solicitor's letter of 25th February, 1950.

The Suspense Account cannot be considered apart from the letter of 23rd February in which it was enclosed and which explains its nature and why it was brought into being. Taken in the context of this letter and the preceding correspondence it is manifest that it cannot be construed as an acknowledgment of a debt of £3,571 14s. 8d. and a promise to pay it which is the inference necessary to sustain an action on an account stated of the nature relied upon in this action which is to be distinguished from one where items on each side of an account have been set off against each other and a balance struck. (See *per* Lord Atkin in *Siqueira v. Noronha* [1934] A.C. 332 at p. 337.) The trial Judge rejected the claim for a share of profits principally on the ground that the plaintiff's remuneration as to one-third share of net profits for the financial year 1948-49 was never adopted by any lawful authority under the company's Articles of Association.

Their Lordships agree that any agreement would have required the directors' sanction, but as indicated above they are of opinion that no agreement was ever arrived at between the plaintiff and the Managing Director and that the original claim on this basis was abandoned. It is unnecessary therefore to consider whether the directors had power under articles 11 and 12 of the company's Articles of Association to award the plaintiff remuneration on the basis of a share of profits in the circumstances of this case.

The Court of Appeal as previously stated made an order remitting the action to the Supreme Court to determine the market value on 31st March, 1949, of the goods referred to in the account (Ex. J.3) headed George Stanley Lewis: Suspense Account and therein shown as being at cost price of £3,571 14s. 8d. Their decision was based on the following paragraphs of the Defence:

“ 4. The defendants further aver that the plaintiff’s recommended share of profits was in goods and a list of goods showing quantities and values was prepared and forwarded to his said solicitor under registered cover dated the 23rd day of February, 1950. Plaintiff was requested to collect his goods.

5. The plaintiff returned the cheque for undrawn salary. Plaintiff made no attempt to collect his goods.

7. The defendants are prepared to account for the plaintiff’s goods sold through their organisation and for the residue handed to an auctioneer.”

These paragraphs do not in any way admit the claim put forward by the plaintiff. They merely put forward that which the defendants had at all times been willing to agree. They are not relevant to any issue in the case and should not have been pleaded. The plaintiff never sought to amend his claim so as to take advantage of this admission, nor did he at the trial intimate his willingness to accept this in lieu of his claim. The defendants have been ordered to do that which they have throughout been willing to do and which the plaintiff neither before nor at the trial had ever claimed or accepted and the defendants have been ordered to pay costs. Their Lordships are of opinion that neither on the pleadings nor on the evidence was such an order justified and will humbly advise Her Majesty that the appeal be allowed and the judgment of the West African Court of Appeal be set aside and the judgment of the Supreme Court restored. The respondent must pay the costs of this appeal and in the West African Court of Appeal.

GHANA COMMERCIAL BANK APPELLANT
AND
D. T. CHANDIRAM AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE COURT OF APPEAL OF GHANA]

[1960] 3 W.L.R. 328; [1960] A.C. 732; [1960] 2 All E.R. 865

1960 June 20

Lords Tucker, Jenkins and
Morris of Borth-y-Gest

West Africa—Ghana—Executive—Ghana Supreme Court (Civil Procedure) Rules 1954, Ord. 43, rr. 7, 11.

Mortgage—Subrogation—Moneys paid off by third party—Intention to keep mortgage alive for own benefit—Subsequent invalid mortgage to third party—Effect.

Execution—Sale under fieri facias—Title transferred—Sale of land subject to equitable mortgage.

A debtor, the owner of certain real property, on July 16, 1954, created an equitable mortgage on it in favour of the B. Bank by deposit of the title deeds to secure the payment and discharge of his liabilities to that bank. On September 4, 1954, at the request of the debtor the deeds were sent to the appellant bank with the permission of the B. Bank against the appellant bank’s undertaking to hold them on the B. Bank’s behalf. On September 24, 1954, a writ of *fieri facias* for the attachment of the property was issued at the instance of a judgment creditor pursuant to Order 43 of the Ghana Supreme Court (Civil Procedure) Rules, 1954, which, by rule 7, prohibited the debtor from “ alienating the property by sale, gift, or in any other way, and all persons

from receiving the same by purchase, gift, or otherwise," and by rule 11 provided that any alienation without leave of the court after attachment should be null and void.

On October 27, 1954, the debtor executed a legal mortgage of the property in favour of, and conveyed the property to, the appellant bank to secure repayment of money owing or to become owing by him to that bank, and on the same day, the appellant bank paid to the B. Bank the sum owing to it by the debtor on the security of the equitable mortgage, retaining in their custody the deeds which had been passed to them.

On November 4, 1954, the debtor let the property to the second respondent.

On April 16, 1955, the second respondent being in possession, the property was sold to the first respondent at a court auction.

After competing claims by the appellant bank that the rent should be paid to it as the holder of the legal estate pursuant to the legal mortgage, and by first respondent as purchaser of the property at the court sale, the latter instituted the present proceedings against the tenant and the appellant bank claiming a declaration of his title of ownership and possession:

Held (1) that the legal mortgage by the debtor to the appellant bank must, by virtue of the provisions of Order 43, be taken to have been null and void.

(2) That a purchaser of property under the execution of writ of *fieri facias* stepped into the shoes of the judgment debtor, and what he purchased was no more than the right, title and interest of the judgment debtor therein, and if the property was in any way encumbered the purchaser bought subject to that charge or encumbrance.

The attachment of September 24, 1954, took effect subject to the B. Bank's interest as equitable mortgagee, and the benefit of that interest continued after the date of the attachment to be capable of assignment or devaluation whether by the application of equitable principles, just as it would have been if the attachment had never taken place. Accordingly, by paying the amount due to the B. Bank the appellant bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured over the first respondent's interest as had theretofore been enjoyed by the B. Bank.

Dicta of Lord Chelmsford in *Wickham v. New Brunswick and Canada Railway Co.* (1865) L.R. 1 P.C. 64 at pp. 75 and 76 (P.C.) and *Dadzie v. Kojie* (1940) 6 W.A.C.A. 139 applied.

Butler v. Rice (1920) 2 Ch. 277 and *Chetwynd v. Allen* (1899) 1 Ch. 353 considered.

(3) As between himself and the appellant bank the first respondent was absolutely entitled to the property, subject to the charge thereon created by the equitable mortgage, and as against the appellant bank he was entitled to possession or receipt of the rents and profits of the property unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage.

Judgment and decree of the Court of Appeal of Ghana discharged.

APPEAL (No. 30 of 1959) from a judgment and decree of the Court of Appeal, Ghana (December 2, 1958) affirming, save with a modification as to mesne profits a judgment and decree of the Ghana High Court (September 3, 1957).

The following facts are taken from the judgment of the Judicial Committee: This case concerned competing interests in certain real property at Accra, the rival claimants being Ghana Commercial Bank, formerly the Bank of the Gold Coast—defendants in the action and now appellants (hereinafter called "the Ghana Bank") who claimed to be mortgagees of the property; and D. T. Chandiram, plaintiff in the action and now respondent (hereinafter called "the purchaser") who claimed to have bought the property at an execution sale free from the alleged mortgage. Also concerned in the litigation was one J. Mensah (hereinafter called "the tenant") who, in his capacity as Manager of St. John's Grammar School at Accra, was in possession of the property as tenant at the date of the execution sale, but who thenceforth, according to the purchaser, became a trespasser, by refusing to attorn tenant to the purchaser and insisting on paying his rent (£75 per month) to the Ghana Bank, who demanded such

payment on the strength of the alleged mortgage. The purchaser accordingly joined the tenant as a defendant along with the Ghana Bank, and he had been made a respondent in the present appeal but was not represented at the hearing before the Board.

The action was brought by the purchaser as plaintiff in the Land Court at Accra claiming against both defendants jointly and severally: "(a) A declaration of his title of ownership to the said premises; (b) £500 general damages for trespass; (c) £2,025 as mesne profits at the rate of £75 a month as from April 16, 1955" (the date of the execution sale) "to September, 15, 1956" (the end of the last whole month prior to the issue of the writ on September 26, 1956) "and any further sums of money by way of mesne profits that will have accrued up to the date of judgment; (d) recovery of possession."

The case was tried in the Land Court before Ollennu J., who by a judgment and decree dated September 3, 1957, granted the purchaser the relief claimed (save that he reduced the claim for damages for trespass to £100) with costs. He assessed the mesne profits at £75 per month from April 16, 1955, to September 15, 1957, and found them to amount to £2,925; and he directed that the recovery of possession should take effect from September 15, 1957.

From that judgment and decree both defendants appealed to the Court of Appeal of Ghana (Korsah C.J., Van Lare and Granville Sharp J.J.A.) who, by a judgment and decree dated December 2, 1958, dismissed the appeal, save that the learned judge's calculation of the mesne profits was corrected from £2,529 to £2,175.

From the last mentioned judgment and decree the Ghana Bank now appealed to the Board.

On July 16, 1954, one Ebenezer Ofue Holomah (hereinafter called "the debtor") who was then the owner of the property in dispute, created an equitable mortgage upon it in favour of his banker, Barclays (D.C. & O.) Ltd. (hereinafter called "Barclays") by the usual method of depositing with Barclays the title deeds to the property, together with a memorandum of deposit signed by him and stating (to put it shortly) that the deeds had been so deposited with the intent to create an equitable mortgage on all the hereditaments and property comprised therein for assuring the payment and discharge on demand of all moneys and liabilities then or thereafter due from or incurred by the debtor to Barclays. The memorandum contained a usual form of undertaking on the part of the debtor to execute on demand a legal mortgage of the property to Barclays in such form and with such provisions and powers of sale, leasing and appointing a receiver as Barclays might require. The deeds were not in fact retained in the physical possession of Barclays, but were held on their behalf by their solicitor, Mr. H. V. A. Franklin. It was not suggested that this circumstance had any material bearing on the case.

On September 4, 1954, Mr. Franklin sent the deeds to the Ghana Bank with a letter in which he stated that the debtor had requested him to hand them to the Ghana Bank, and that he had obtained Barclays' permission to do so against the Ghana Bank's undertaking to hold them on their behalf. According to the evidence of Kwasi Amoako Atta, the credit manager of the Ghana Bank, the deeds were received by him on September 9. There was no evidence as to the reason for this change in the custody of the deeds, but it did not materially alter Barclays' position. It was simply a substitution of the Ghana Bank for Mr. Franklin as the agent by whom the deeds were to be held on Barclays' behalf.

On September 24, 1954, a writ of *fi. fa.* for the attachment of the property was issued under the hand of the Chief Justice at the instance of one M. D. Bassil who had obtained a judgment dated July 27, 1954, against the debtor in the Division Court Sekondi. The attachment was made by an attachment notice issued by the Deputy Sheriff and dated September 25, 1954. No question was raised as to its validity. It prohibited the debtor from "alienating the property by sale, gift, or in any other way and" all persons were thereby prohibited "from receiving the said property by purchase, gift or otherwise." On the same date auction notices were issued by the Deputy Sheriff advertising the property for sale on October 18, 1954.

The attachment was effected under Order 43 of the Supreme Court (Civil Procedure) Rules, 1954. Order 43 includes the following provisions:

"4. If the judgment be for money, and the amount thereof is to be levied from the property of the person against whom the same have been pronounced, the court shall cause the property to be attached in the manner following . . .

7. Where the property shall consist of lands, houses, or other immovable property or any interest therein, either at law or in equity, the attachment shall be made by a written order of the Sheriff prohibiting the judgment debtor from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise, and the Sheriff may also, by direction of the court, take and retain actual possession thereof . . . 11. After any attachment shall have been made by actual seizure or by written order as aforesaid, and in case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any alienation without leave of the court of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends, or shares to the judgment debtor during the continuance of the attachment, shall be null and void, and the person making such alienation or payment shall be deemed to have committed a contempt of court."

The debtor applied for and obtained a stay of execution pending an appeal, which was unsuccessful. Ultimately fresh notices of attachment and auction were issued on January 13, 1955, and the property was ultimately sold to the purchaser on April 16, 1955. It was held in both courts below that notwithstanding the stay of execution the attachment effected on September 25, 1954, remained in full force, and the contrary was not argued before the Board.

On October 27, 1954, the debtor executed a legal mortgage of the property in favour of the Ghana Bank. By this document (to put it shortly) the debtor covenanted with the Ghana Bank to pay on demand all such sums as then were or should from time to time become owing by him to the Ghana Bank (*inter alia*) on balance of current account and/or loan account and/or any other account sanctioned by the Ghana Bank, with interest at the rate of 7 per cent., on the balance from time to time owing, and conveyed the property to the Ghana Bank, its successors and assigns forever, subject to the proviso for redemption therein contained. It was not necessary to refer further to the terms of this legal mortgage except to mention that it ended with a provision to the effect that the legal mortgage was not to prejudice or affect the security created by any deposit which might already have been made with the Ghana Bank of the deeds relating to

the property or any other securities the Ghana Bank might then or at any time thereafter hold for the moneys thereby secured or any part thereof.

On the same day (October 27, 1954) the Ghana Bank paid to Barclays the sum owing to Barclays on the security of the equitable mortgage of July 16, 1954, retaining in their custody the deeds which had been passed to them by Mr. Franklin to hold on Barclays' behalf. There was no evidence as to the amount owing to Barclays Bank on October 27, 1954, but counsel for the purchaser in his opening speech appeared to have put the amount in respect of which the legal mortgage was given by the debtor at £4,000.

On November 25, 1955, the Ghana Bank's solicitor wrote to the tenant a letter stating that the legal estate in the property was vested in the Ghana Bank under and by virtue of the legal mortgage of October 27, 1954, and requiring the tenant to pay all rent which was then or should thereafter become payable in respect of the property to the Ghana Bank or its duly authorised agent.

On July 28, 1955, the purchaser's attorney wrote to the tenant informing him of the sale of the property to the purchaser on April 16, 1955, and requiring the tenant as from that date to pay the rent of £75 per month in respect of the property to the writer as such attorney.

On August 13, 1955, the tenant wrote to the purchaser's attorney to the effect that the tenant was paying to the Ghana Bank according to their instructions all rents accruing in respect of the property, which course was thereafter persisted in by the tenant in accordance with the Ghana Bank's demand.

In these circumstances the present proceedings were on September 26, 1956, brought by the purchaser against the tenant and the Ghana Bank claiming (so far with success) the relief above described.

1960. May 10, 11, 12. *Phineas Quass Q.C.* and *J. G. Le Quesne* for the appellants.

S. P. Khambatta Q.C. and *Joseph Dean* for the first respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Carter v. Wake* (1877) 4 Ch.D. 605; *Parker v. Housefield* (1834) 39 E.R. 1004; *Patten v. Bond* (1889) 60 L.T. 583; *Brocklesby v. Temperance Building Society* [1895] A.C. 173; 11 T.L.R. 297 H.L.; *In re McMahon* (1886) 55 L.T. 763; *Russel v. Russel* (1783) 1 Bro. 269.

June 20. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: The learned trial judge at an early stage in his judgment said: "It is agreed by counsel for the parties that the main question to be determined in the suit is 'In whom was the legal estate in the property vested on the date of attachment?'" and this statement is fully justified by reference to the notes of counsel's argument in the record.

Then, after a full statement of the facts, the learned judge went on to hold that the attachment of the property made on September 25, 1954, was never lifted (this being a reference to the stay of execution on which some reliance had apparently been placed on the part of the Ghana Bank); that Barclays never at any time transferred their equitable mortgage on the property to the Ghana Bank, but merely created them their agents for the custody of the title deeds; that consequently the Ghana Bank never acquired any proprietary interest which was subsisting or could subsist on September 25, 1954, but were on that date holding the title deeds merely as agents or bailees of Barclays. So far the learned judge was clearly right, if his intention was merely to describe the position as matters stood on September

25, 1954, but his statements to the effect that Barclays "never at any time" transferred their equitable mortgage to the Ghana Bank, and that the Ghana Bank "never acquired any proprietary interest legal or equitable in the property" require further examination if and so far as they are intended to apply to the period between the date of the attachment and the date of the execution sale. The learned judge went on to say that "the legal estate and beneficial interest was on September 25, 1954, vested in 'the debtor' and in no other person." In saying this the learned judge appears to have overlooked the important circumstance that on September 25, 1954, the debtor's interest in the property was subject to Barclays' equitable mortgage. As to the legal mortgage given by the debtor to the Ghana Bank on October 27, 1954, the learned judge held that the execution of this mortgage by the debtor while the attachment was subsisting without the leave of the court, and the acceptance of it by the Ghana Bank, were in contravention of the provisions of Order 43 rule 7, and that, accordingly, by virtue of the provision of Order 43 rule 11, this mortgage was null and void. It will be observed that the learned judge said nothing as to the effect on Barclays' equitable mortgage of the payment by the Ghana Bank to Barclays on October 27, 1954, of the balance then owing from the debtor to Barclays on that security. It is clear from the learned judge's note of the argument addressed to him by the defendants' counsel that the point was taken that, even if the legal mortgage was null and void, the Ghana Bank still had the benefit of Barclays' equitable mortgage, having "stepped into the shoes" of Barclays on paying them the amount due under it. In fairness to the learned judge it is right to say that before him the defence based on the continuance of the equitable mortgage for the benefit of the Ghana Bank (as distinct from the argument based on the contention that the Ghana Bank had acquired the legal estate by virtue of the legal mortgage of October 27, 1954), seems not to have been accorded the major importance attached to it at the hearing of the present appeal. Moreover, before the learned judge the claim to the benefit of the equitable mortgage seems to have been based primarily on the erroneous ground that there had been a transfer of the equitable mortgage on September 9, 1954, when the Ghana Bank received the title deeds from Mr. Franklin; and this may have led the learned judge to overlook the alternative claim to the effect that the Ghana Bank acquired the benefit of the equitable mortgage by paying off Barclays on October 27, 1954.

Be that as it may, the learned judge concluded that the purchaser acquired the whole of the right, title and interest which the debtor had in the property on September 25, 1954, comprising the legal estate and beneficial interest, and the consequential right to immediate possession.

He went on to hold that the tenant became a trespasser the moment he refused to acknowledge the title of the purchaser; and that the Ghana Bank were also trespassers in that they claimed to be entitled to possession and had authorised the tenant to continue to occupy the premises upon payment of the monthly rent to the bank. On this basis he made the order detailed above against the tenant and the Ghana Bank jointly and severally for damages, mesne profits and recovery of possession of the premises by the purchaser.

In the Ghana Court of Appeal Van Lare J.A. delivered a judgment with which the other two members of the court agreed. That judgment contains the following statement of the law relating to the position of a purchaser under the execution of a *fi. fa.*, which appears to their Lordships to be wholly correct:

“ The law is clear that a purchaser of a property under the execution of a *fi. fa.* steps into the shoes of the judgment debtor by purchasing no more than the ‘ estate ’ of the judgment debtor therein. In other words what is sold and what is bought at a sale in execution is the right, title and interest of the judgment debtor—*Dadzie v. Kojjo* (1940) 6 W.A.C.A. 139. It follows therefore that if a certain property which is attached under execution by way of *fi. fa.* turns out to be in any way encumbered the purchaser buys subject to that charge or encumbrance.”

The learned J.A. went on to say that the case would have taken a different turn had Barclays still remained at the date of sale the party interested in the encumbrance, thereby, as it seems to their Lordships, indicating the view that, in accordance with his statement of the law as quoted above, Barclays, had they retained the equitable mortgage, could have enforced it against the property in the hands of the purchaser.

Nevertheless, the learned J.A. went on to conclude that the appeal should be dismissed, it would seem on the grounds that Barclays ceased to have any interest in the property on being paid off by the Ghana Bank on October 27, 1954; that there was no formal assignment of Barclays' interest to the Ghana Bank; that the legal mortgage given by the debtor to the Ghana Bank on October 27, 1954, was null and void by virtue of the provisions of Order 43 above referred to; and, accordingly, that the Ghana Bank had no interest, legal or equitable, in the property at the date of the execution sale.

Their Lordships agree that the legal mortgage of October 27, 1954, must be taken to have been null and void, and are unable to accept the submission made by Mr. Quass to the effect that the legal mortgage should be related back to the date of the equitable mortgage on the ground that it was merely an implementation of the debtor's undertaking contained in the latter document to execute a legal mortgage when required to do so by Barclays. It appears to their Lordships that the legal mortgage was on the face of it intended to constitute a new and distinct security. But this by no means compels the conclusion that the Ghana Bank did not become entitled to the benefit of Barclays' equitable mortgage on paying to Barclays on October 27, 1954, the balance owing on that security.

In their Lordships' opinion, it follows from their acceptance of Van Lare J.A.'s statement of the law as quoted above (to which may be added a reference to the observations of Lord Chelmsford in *Wickham v. New Brunswick and Canada Railway Co.* (1865) L.R. 1 P.C. 64 at pp. 75, 76) that the attachment of September 25, 1954, took effect subject to Barclays' interest as equitable mortgagees.

It furthermore appears to their Lordships that, being outside the ambit of the attachment, the benefit of Barclays' equitable mortgage continued after September 25, 1954, to be capable of assignment or devolution, whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place.

The case thus turns upon the question whether the payment by the Ghana Bank to Barclays on October 27, 1954, of the amount then owing on the security of Barclays' equitable mortgage had the effect of entitling the Ghana Bank to the benefit of the equitable mortgage with the like priority over the purchaser's interest as it had possessed in the hands of Barclays at the date of such payment off.

It is not open to doubt that where a third party pays off a mortgage he is

presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see *Butler v. Rice* (1910) 2 Ch. 277, 282 at p. 283.

In the present case it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention. Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced: see *Butler v. Rice* (1910) 2 Ch. 277 at pp. 282, 283 and *Chetwynd v. Allen* (1899) 1 Ch. 353. Their Lordships would add that if it is legitimate to look at the abortive legal mortgage for this purpose, the view they have formed as to the Ghana Bank's intention finds some support from the terms of the ultimate paragraph of that document, to which reference has already been made.

Their Lordships accordingly hold that by paying the amount due to Barclays the Ghana Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured as had therefore been enjoyed by Barclays.

But this conclusion gives rise to consequential questions which were not fully argued before their Lordships, and cannot be adequately dealt with in the present appeal, in view of the form of the proceedings and the absence of evidence as to the amount which can properly be claimed to be due to the Ghana Bank on the security of the equitable charge in priority to the purchaser's interest. For example, it seems to their Lordships open to question whether the equitable charge could rank as security in the hands of the Ghana Bank for any greater sum than the amount owing upon it to Barclays at the date of the attachment or at the date of payment off of Barclays by the Ghana Bank, whichever was the less. It also seems to their Lordships that the possible bearing on the question of priority of any payments made into or out of the debtor's account between acquisition of the benefit of the equitable charge by the Ghana Bank on October 27, 1954, and the execution sale on April 16, 1955, would require consideration.

The award of damages for trespass over and above the claim for mesne profits appears to their Lordships to be ill founded, and Mr. Khambatta Q.C., for the purchaser, said that in any event he would not seek to maintain it.

As to the claim for mesne profits against the Ghana Bank, in respect of the rent received by them from the tenant, this claim was allowed in the courts below on the footing that the Ghana Bank had no interest at all in the property. Their Lordships having now decided that the Ghana Bank are in fact interested as equitable mortgagees, it is clear that the Ghana Bank must account to the purchaser for all rents received by them from the tenant since April 16, 1955, in the ascertainment of the amount owing to the Ghana Bank on the security of the equitable mortgage, and their Lordships consider that a declaration to this effect should be substituted for the award of mesne profits so far as the Ghana Bank is concerned, provided they take proceedings to enforce the equitable mortgage within a reasonable time. As to the order for possession against the Ghana Bank, it would seem that the Ghana Bank as equitable mortgagees are *prima facie* not entitled to possession or receipt of the rents and profits except under an order of the

court. This matter of possession as between the Ghana Bank and the purchaser will, their Lordships think, best be dealt with by a declaration to the effect that the purchaser is to be entitled as against the Ghana Bank to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in any further proceedings taken to enforce the equitable mortgage.

The tenant has not been represented in the appeal, but their Lordships see no sufficient justification for the order for possession and mesne profits made against him, which in their judgment cannot stand. The tenant must, however, pay all arrears of rent not accounted for by payment to the Ghana Bank. It is clear that if the Ghana Bank pay or account to the purchaser for the rent received by them in accordance with the present judgment, an order upon the tenant to pay the same rent in respect of the same period to the purchaser would in effect result in the purchaser receiving it twice over, which could not be right.

In all the circumstances of this somewhat unsatisfactory case it appears to their Lordships that the proper course to be taken will be as follows: (i) The judgments and decrees of the Land Court and the Court of Appeal should be discharged. (ii) The rent paid by the tenant to the Ghana Bank since April 16, 1955, should be taken to have been paid in or towards satisfaction of the rent payable by the tenant to the purchaser since the same date. As regards any rent not so satisfied the tenant should be ordered to pay the same down to the date of the commencement of the action and will thenceforth be liable for all further rent accruing during the continuance of the tenancy. (iii) It should be declared that as between himself and the Ghana Bank the purchaser is absolutely entitled to the premises, subject to the charge thereon created by the equitable mortgage of July 16, 1954, to the benefit of which the Ghana Bank became entitled on October 27, 1954. (iv) The Ghana Bank should be ordered to pay to the purchaser all rent received by them from the tenant in respect of the premises since April 16, 1955, but such order should be suspended for six weeks from the date of Her Majesty's Order in Council herein and should not take effect if the Ghana Bank within that period commence proceedings for the enforcement of the equitable mortgage and submit to account in those proceedings for the rent received as aforesaid. (v) It should be declared that as against the Ghana Bank the purchaser is entitled to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage.

Their Lordships will humbly advise Her Majesty accordingly. Their Lordships make no order as to the costs of the proceedings below or of the present appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; T. L. Wilson & Co.*

ANOJE IGWE AND OTHERS FOR THEMSELVES AND ON
BEHALF OF THEIR PEOPLE OF UMUNAHU URATTA APPELLANTS
AND
OPARA UKWEJE AND OTHERS FOR THEMSELVES AND AS
REPRESENTING THEIR PEOPLE OF UMUOFA UZOAGBE RESPONDENTS
[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

The Privy Council will not interfere with concurrent findings of fact unless there are some special circumstances which would justify a departure from the practice.

MR. L. M. D. DE SILVA. This appeal concerns three cases which were consolidated and tried by the Supreme Court of Nigeria. They related to conflicting claims made to a tract of land by the appellants representing themselves and certain Uratta families and the respondents representing themselves and certain Uzoagbe families. The tract is shown edged green in a plan produced by the appellants.

The appellants say Urattas have been the owners of the tract from time immemorial. They claim the whole of the tract but say that the Urattas gave permission to the Uzoagbas to occupy the portion to the east of a road shown on the plan. They say the Uzoagbas have no right of occupation or any other right to the portion (edged pink) west of the road. The appellants ask that they be declared owners of the whole tract subject to the rights of occupation of the eastern portion by the respondents. They ask also for certain other ancillary relief.

The respondents say that the whole of the tract belongs to Uzoagbas who have for generations been in occupation without payment of rent or tribute. They ask that they be declared entitled to the land and other consequential relief.

The Supreme Court of Nigeria dismissed the appellants' claim and entered decree in favour of the respondents as prayed for by them. On Appeal the Federal Supreme Court affirmed the Order of the Supreme Court.

Traditional and other evidence was led on each side. There was a sharp conflict of evidence on the facts. With regard to the witnesses called by the appellants the Supreme Court after considering the oral and documentary evidence said:

“ They did not impress me as witnesses of truth. Their evidence on their traditional history was not impressive and I did not consider them reliable. Neither were they impressive over matters during their lifetime.”

With regard to the respondents the Supreme Court said: “ I find I could rely upon their evidence and that of their witnesses.” As already stated it dismissed the appellants' claim and entered a decree in favour of the respondents.

On appeal the Federal Supreme Court of Nigeria said that it was clear that the trial Judge had carefully weighed and considered the evidence given by both sides and that having done so he had rejected the evidence led for the appellants and accepted the respondents' evidence. It said further:

“ Nothing that has been said by Mr. David on their behalf has convinced us that the learned trial Judge erred in taking the view he did, nor do we think there is any substance in the allegations of misdirection.”

The main point made against the appellants is that there are in this case concurrent findings of fact against them. The Federal Court in its judgment did not refer to the questions of fact in detail or even refer to each one separately. The appellants argue that for this reason there are no concurrent findings of fact. Their Lordships do not agree. They are satisfied that the Federal Court considered the whole of the evidence, considered the points

upon which argument could have been addressed to them and thereafter affirmed the findings of the trial court. In such circumstances there clearly are concurrent findings of fact.

It was sought by the appellants by reference to various matters of detail to argue that some of the findings were wrong. In the case of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 at p. 513 it was said by Lord Thankerton delivering the judgment of the Board:

“ The appellant is at once faced with the concurrent judgments of two courts on a pure question of fact, and the practice of this Board is to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice.”

The “ special circumstances ” referred to are set out in the judgment in the case mentioned and need not be repeated here. It is sufficient for their Lordships to say that none of them exist in this case. The appellants have in effect invited their Lordships to “ review the evidence for a third time ” but to do so would be contrary to established practice.

To illustrate what has just been said their Lordships will take one instance of the submissions made to them. It was argued that the view of the trial Judge with regard to a witness called Okorie Ofaha namely “ I cannot accept this witness’s evidence. He struck me as most unreliable ” could not be sustained. The chief ground on which this argument was based was that he had not been cross-examined upon the point to establish which he had been called. This and similar points were fit material for consideration by the Court of Appeal in the context of the whole of the evidence in the case. But when the Court of Appeal after considering the relevant material saw no reason to disturb the findings of the trial court then those findings became concurrent findings which their Lordships will not review.

It was urged for the appellants that even if the dismissal of the appellants’ claim was correct the entering of a decree for the respondents was erroneous. The argument was based upon the view expressed in *Ntoe Ekpo Eta Ekpo v. Chief Eta Eta Ita* Nigeria L.R. Vol. XI p. 68 in the following words:

“ In a claim for a decree of declaration of title the *onus* is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact.”

This view was approved by the Board in *Idoko Nwabisi and another on behalf of themselves and the Umeleri people v. R. A. Idigo and another on behalf of themselves and the Aguleri people* (delivered on the 28th July, 1959). In the present case there is no failure of traditional evidence but it was said that the principles laid down with regard to acts of ownership had not been applied. It is true that the decisions were not referred to but there is no reason to doubt that the courts in Africa were well acquainted with those decisions and had them in mind when forming their views. There was material upon which those courts could have arrived at the conclusions which they reached and there is no reason to disturb their judgments.

Their Lordships will humbly advise Her Majesty that for the reasons they have given this appeal should be dismissed. The appellants will pay the costs of this appeal.

LAWAL BURAIMAH FATOYINBO AND OTHERS . . . APPELLANTS
AND
SELIATU ABIKE WILLIAMS ALIAS SANNI
AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1960 Nov. 16

Lords Goddard, Keith of Avonholm,
Hodson

*Succession—Customary law—Property formerly owned by a woman—
Insufficiency of evidence.*

LORD HODSON. This is an appeal by special leave from a judgment of the Federal Supreme Court of Nigeria (Jibowu, Acting F.C.J., Nageon de Lestang, F.J. and Hubbard, Acting F.J.) allowing the respondents' appeal from a judgment of the High Court of Lagos (Jobling, J.).

The appellants claim and Jobling, J. held, that they are jointly with the respondents owners of property situate at 42 and 44 Ereko Street, Lagos. The respondents claim to be the sole owners of that property and their contention was upheld by the Federal Supreme Court, who accordingly dismissed the claim of the appellants.

This appeal raises a question of pedigree and relates to the devolution under native law and custom of the property which was formerly owned by a woman named Opoola, she having derived her title from a Crown grant.

On Opoola's death in 1885 the property devolved on her surviving children if more than one in equal shares. She had without question two children, Aina, who died in 1933 and Oniyoku, who predeceased her without issue.

The appellants are the surviving children of Buraimah Fatoyinbo who died in 1912 and are the grandchildren of Dada who died in 1896, and the question is whether, as the appellants claim, Dada was a child of Opoola and a sister of Aina. The respondents are the only surviving children of Aina's son Sanni who died in 1921.

As might be expected, a body of oral evidence was called on behalf of each side directed to family history and tradition based to a great extent on hearsay.

Jobling, J., having heard this evidence, found it too contradictory to be relied upon but reached his conclusion in favour of the appellants by inferences which he drew from documents and by reliance upon an admission made by the first respondent at the trial to the effect that on one occasion he received an amount of £175 as rent of the property and paid £87 10s. 0d. (half of it) to the first appellant.

The Federal Supreme Court was of opinion that the oral evidence given on behalf of the respondents was more direct than that given by the appellants and further that the inferences to be drawn from other evidence, principally documentary evidence, carried more weight in favour of the respondents than in favour of the appellants and accordingly allowed the appeal.

As the Federal Court pointed out, the learned trial Judge did not in coming to his decision rely on the advantages of having seen and heard the witnesses and it was open to the Appellate Court to examine all the evidence and decide for itself whether the relationship claimed was established.

It is unnecessary to refer in detail to the oral evidence of family history since the trial Judge's failure to assess this in favour of one party or the other cannot be criticised. Their Lordships are of opinion that there is little to choose between the witnesses on both sides so far as direct evidence of relationship is concerned, although, as the Federal Court said, one witness for the respondents, Kasali Ipakodo, testified that he knew Opoola herself, that she had two children, Aina and Oniyoku, and that Dada was not a daughter of Opoola but of Opoola's sister Efunte.

If the appellants' case depended on evidence directed to relationship, they failed to prove it and the substantial matter for consideration is whether the other evidence in the case leads to a conclusion in favour of the appellants.

First there was produced a deed of gift made in January, 1914, between Aina and her son Sanni, wherein it was recited that Opo (*i.e.* Opoola) died in 1885 leaving her surviving Oniyoku and Aina her children and that Oniyoka had since died leaving Aina his sister surviving him. This statement in the recital to the deed made over forty years ago before any dispute arose strongly supports the respondents.

The deed is a formal one professionally prepared and the only explanation put forward in support of the view that the recital was false, in that Dada's name was wrongly omitted, rests on the assumption that the deed of gift which was made in favour of Sanni to enable him to raise money by mortgaging the property never had any practical effect and that it mattered not that the recital was untrue since Dada's issue never suffered any loss or were intended to be injured whereas if Dada had been named, in view of the minority of her grandchildren; of whom the first appellant, the eldest, was only twelve years of age, it would have complicated the transaction or made it impossible to carry out.

This explanation is based largely on conjecture and there is no sufficient reason to draw the inference that the recital in the deed of gift should be regarded as false.

Their Lordships agree with the observations of the Federal Court as to the other matters which were thought by Jobling, J. to support the appellants' claim.

These other matters stem from 1933 when the fifth respondent, then about twenty-two years of age, was advised by the family solicitor to get an older relation to join in the administration of Aina's estate. He accordingly asked the first appellant to join with him and Letters of Administration were issued to both of them jointly on 30th December, 1933. It appears to be the Yoruba custom for the older man to take charge of family financial responsibilities and there was nothing inherently strange in the first appellant collecting the income of the estate and paying money to the fifth respondent on his request. Subsequently in 1934, 1935, 1939 and 1940 and on two other occasions the dates of which are not fixed the fifth respondent wrote to the first appellant asking for small sums of money. These letters are relied upon by the appellants as indicating that they were interested in the rents of the property. Each respondent's share of the rents would be small during the years covered by the dated letters and there is nothing to show whether the fifth respondent was asking for money to which he was entitled as his share of the rents or whether he was asking for assistance from the first appellant's own personal resources. In neither case is there any support for an inference that the letters show that the respondents and the appellants were jointly entitled to the property.

There was, however, an occasion in July, 1950, when, according to the fifth respondent's own admission, he received a cheque from the first

appellant for £175 which he paid into his own banking account and when he gave a cheque for £87 10s. to the first appellant. He gave an explanation of this transaction and denied that the £87 10s. was the half share of rent due to the first appellant.

The curious thing about this transaction is that it formed no part of the appellants' case and indeed the appellants produced no books nor made any attempt to obtain disclosure of any books of account to support their case that each family was entitled to half the rents of the property. The appellants never gave any evidence at all about sharing rents. If this admission is to establish the appellants' case, and their Lordships are of opinion that there is nothing else which tends to do so, it is open to the comment that the admission taken as a whole does nothing of the kind and even if that part which favours the appellants is taken in isolation, it is, as the Federal Supreme Court point out, only one isolated incident and not by any means conclusive of the fact that rent was invariably shared.

The other matters relied upon by the appellants can be disposed of shortly.

A solicitor named Wilson testified that Aina at some time said she had given some property at Great Bridge Street, Lagos, to her sister's son. As a matter of fact the deed of gift shows that she had given this property to her only son Sanni and there was no other evidence that she had given it to a child of Dada. Moreover, there is to be found in more than one document exhibited loose use of words of relationship which is readily understandable in a society where relations may on the decease of one member of the family be inherited by another. There is therefore no good reason to take the word "sister" if used by Aina as meaning that Dada was in fact the child of the same mother as herself.

Reliance was placed on the fact that the first appellant and fifth respondent had dealings with Aina's estate and it was sought to prove that they were co-owners: see paragraph 5 of the Statement of Claim. It is clear, however, that when they let the property, as they did by leases dated the 3rd October, 1934, and the 29th December, 1937, they did not do so as co-owners but purported to do so as administrators of her estate (although the grant was limited to personal property). The execution of these leases, therefore, is consistent with their having treated the property as that of Aina. No inference favourable to the appellants is to be drawn from the fact that six months before the expiry of the second lease the respondents asserted their title by granting a lease themselves alone without consulting the appellants.

Accordingly their Lordships are of opinion that the other evidence adduced on behalf of the appellants including such admissions as can be extracted from the respondents' own witnesses do not advance the claim of the appellants, which must fail for want of proof.

For these reasons their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

NANA OWUSU AHENKORA II APPELLANT
AND
KWABENA OFE AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE COURT OF APPEAL OF GHANA]

(1961) G.L.R. 17

1960 Nov. 22

Lords Keith of Avonholm,
Morris of Borth-y-Gest and Hodson

Certiorari—Destoolment of Chief—Lack of jurisdiction.

The Supreme Court granted an order of *certiorari* on the view that the destoolment of Ntiamoah Kofi III by the State Council was final; that the reference to the Committee of Enquiry covered no power to recommend his restoolment and that the Committee in recommending his restoolment and the Governor in confirming that recommendation had acted without jurisdiction.

On appeal, *held*: that proceedings by way of *certiorari* were competent in the circumstances of the case. On further appeal to the Privy Council the argument on the point of jurisdiction was that the reference to the Committee of Enquiry did not entitle to do more than examine the charges made against the appellant and to decide whether any of them were established against him and merited his destoolment as not being a fit and proper person to be the Ohene of Adowsena. It was not entitled to find that his predecessor was still the true Ohene of Adowsena.

Held: The reference was in terms sufficient to entitle the Committee to report as it had done The question whether charges had been proved to merit the destoolment of Ntiamoah Kofi III was one of the matters in issue in the dispute referred to the Committee, and one of the matters on which it was entitled to report.

LORD KEITH OF AVONHOLM. This appeal, by final leave of the Ghana Court of Appeal, arises out of matters relating to the destoolment of a former occupant of the Stool of Adowsena, Ntiamoah Kofi III, and the enstoolment in his place of the appellant, Nana Owusu Ahenkora II, as Ohene of Adowsena.

The history of the matter is as follows. On 1st September, 1952, the then Ohene, Ntiamoah Kofi III, was destooled by the Akim Kotoku State Council, the competent authority under the State Councils (Colony and Southern Togoland) Ordinance, 1952. The precise reason for his destoolment does not appear apart from an indication in one of the documents in the case that it was for purported infringement of some sacred custom. Following the destoolment the State Council ordered the properties belonging to the Stool and the Stool itself to be delivered up forthwith to the customary custodian, the Gyasehene of Adowsena, "until such time as a new chief will be elected." After a variety of procedure in respect of the failure of Ntiamoah Kofi III to deliver up the Stool property it was ultimately held by the Supreme Court of the Gold Coast that he had been properly convicted for such refusal by the District Magistrate, under the State Councils Ordinance of 1952. The date of this judgment of the Supreme Court was 29th August, 1955. In the meantime the appellant had been enstooled a few months earlier, on 26th March, 1955, as Ohene of Adowsena. On 5th November, 1955, certain elders, electors of the Stool of Adowsena, of whom the first was the respondent, Kwabena Ofe, preferred

certain charges against the appellant before the Akim Kotoku State Council. It is necessary to set out the relevant document in full.

Adowsena,
5th November, 1955.

The President,
Akim Kotoku State Council,
Oda.

And Nana Owusu Ahenkora II of Adowsena.

Charges against Nana Owusu Ahenkora II, Ohene of Adowsena in the Akim Kotoku State in the Eastern Region of the Gold Coast Colony.

We, the undersigned, Elders, Electors of the Stool of Adowsena in the Akim Kotoku State in the Eastern Region of the Gold Coast Colony, do hereby prefer the under-mentioned charges against the Ohene Nana Owusu Ahenkora II of Adowsena, Ohene (Divisional Chief) by virtue of Government Gazette Notice No. 2535 (Gazette No. 73 of 20th August, 1955 page 1397) for him to stand his trial under Native Customary Law by the Akim Kotoku State Council namely:

1. That he is not a fit and proper person to be the Ohene of Adowsena because:

a. he during his service with the United Africa Company Limited misconducted himself and was dismissed from service.

b. he, after his dismissal from the employment of the United Africa Company Limited, entered the Police Force of the Gold Coast Government and as a result of a bad behaviour was again dismissed from service.

c. he after or during his dismissal from the service of the Gold Coast Police joined the fighting forces of the British Commonwealth and while serving as such stationed at Kintampo in Ashanti was convicted of the crime of burglary and served a prison sentence of five (5) years.

2. That he by his correspondence and conduct has insulted the Ebusuapanin Nana Kwabena Ebu of the Stool Family and caused his destoolment without the knowledge and consent of the Stool Family of Adowsena.

3. That he by his act and conduct has undermined the right and authority of the Abusuapanin Ebu and the Gyasihene Boateng Kurankyi II over the property of the Stool of Adowsena which by Customary Law is vested in the said Abusuapanin and Gyasihene.

4. That he, being the Ohene of Adowsena as aforesaid, hath caused the arrest and prosecution of servants of the Stool of Adowsena duly appointed by the Abusuapanin Ebu in accordance with custom to look after the cocoa farms belonging to the Stool, intervention of the Gold Coast Police [*sic*] a riot would have ensued and as a result of which one of such servants was seriously wounded and admitted in hospital.

5. That he by unlawful means aided and abetted Kwame Ayim and an Ex-Ohemaa Abena Foriwaa, members of the Stool Family but not Electors of the Stool, to bring charges against the recognised Ohene Ntiamoah Kofi III, alias Kofi Ntoa, for his destoolment and thereby caused his destoolment unlawfully by the State Council without the knowledge and consent of the Stool Electors and contrary to their

wishes and directions whereby he the said Ntiamoah Kofi III is now serving a prison sentence of three (3) months in Her Majesty's Prison at Winneba and contrary to Gazette Notice No. 1235 in Gazette No. 57 of the 24th June, 1950.

THESE ACTS and facts being contrary to Native Law and Custom, the said Ohene is hereby called upon to defend and in failure of good defence the Electors do demand his destoolment.

SIGNED OR MARKED at Adowsena the 5th day of November, 1955.

(mkd)	Kwabena Ofe Krontihene	.	.	.	Their
(mkd)	Adjua Tenewah Ohemas	.	.	.	X
(mkd)	Kwabena Ebu Ebusuapanin	.	.	.	marks
(sgd)	Kwasi Boateng Kurankyi Gyasehene				
(mkd)	Kodjo Boateng Sanahene	.	.	.	Their
(mkd)	Kwesi Bayie Akyeamehene	.	.	.	X
(mkd)	Kofi Ageyikum Akwamuhene	.	.	.	marks
(mkd)	Kodjo Fordwo Babihene	.	.	.	

Electors of the Stool of Adowsena
 Witness to Signature and Marks

(sgd) ? Edmund.

By notification in the Gold Coast Gazette of 24th March, 1956, announcement was made of the appointment by His Excellency the Officer administering the Government under section 8 of the State Councils Ordinance of a Committee of Enquiry consisting of three members, a barrister-at-law as chairman and two chiefs, " to enquire into a dispute in Adowsena of the Akim-Kotoku State being a matter of a Constitutional nature, between Kwabena Ofe, Krontinhene of Adowsena of Akim-Kotoku State and others of Adowsena of Akim-Kotoku State and Nana Owusu Ahenkora II, Ohene of Adowsena of Akim-Kotoku State and to report on the dispute."

The section 8 referred to is as follows:

" (1) If in the opinion of the Governor it is inexpedient that a State Council should enquire into any matter of a constitutional nature, or if in his opinion a State Council or a Committee is unable to arrive at a conclusion on such a matter without undue delay, or if such matter is not cognizable by a State Council or a Committee, he may appoint a Committee of Enquiry consisting of three persons, of whom at least two shall be Chiefs, to enquire into such matter, and such Committee of Enquiry shall enquire into the same and shall submit a report thereon to the Governor, who may confirm, vary or refuse to confirm the findings thereof or may remit the matter to the Committee of Enquiry for further consideration with such directions as he may think fit as to the taking of additional evidence or otherwise. The Governor's decision upon the report shall be final and conclusive.

(2) Where a Committee of Enquiry has been appointed under subsection (1) of this section to enquire into a matter of a constitutional nature, a State Council or a Committee, as the case may be, shall not have jurisdiction over the same, and any proceedings relating to the same then pending before a State Council or a Committee shall thereupon be stayed.

(3) In the performance of the duties imposed upon it under the provisions of sub-section (1) of this section, a Committee of Enquiry

shall have power to regulate the conduct of proceedings before it and for the purpose of compelling the attendance of parties and witnesses and the production of documents a Committee of Enquiry shall have the like powers as are possessed by a Magistrates' Court in the exercise of its civil jurisdiction."

It will be convenient here to dispose of a submission made by counsel for the appellant on a minor point with reference to the appointment of this Committee of Enquiry. It was said that there was no identification of the dispute into which inquiry was to be made. In their Lordships' view there is no substance in this point. The dispute is sufficiently identified by the reference to the parties between whom it exists and refers to the charges preferred against the appellant. The appellant himself recognised this in the proceedings which he subsequently raised. If further corroboration is required it is to be found in a letter of 12th December, 1955 (Exhibit 3), addressed by the Government Agent to the State Secretary, Akim Kotoku State, in the following terms:

Adowsena Affairs

" Sir,

I am directed to refer to the charges it is understood have been preferred against Nana Owusu Ahenkora of Adowsena and which are pending for hearing at the next meeting of the State Council and to inform you that the Minister of Local Government is recommending to His Excellency the Governor the appointment of a Committee of Enquiry under the provisions of Section 8 (1) of the State Councils (Colony and Southern Togoland) Ordinance No. 8 of 1952.

2. I am accordingly to inform you that the State Council should not hear this case."

Their Lordships will have no occasion to refer further to this matter.

To resume the narrative of events, the Gold Coast Gazette of 10th November, 1956, noted the issue of the Report of the Committee of Enquiry and confirmation by the Governor in the following terms:

Report of a Committee of Enquiry

It is hereby notified for general information that the Committee of Enquiry, the appointment of which appeared under Gazette Notice No. 637 of Gazette No. 20 dated 24th March, 1956, appointed under Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952, to enquire into a dispute in Adowsena of the Akim-Kotoku State being a matter of a constitutional nature between Kwabena Ofe, Krontihene of Adowsena of Akim Kotoku State, and Nana Owusu Ahenkora II, Ohene of Akim Kotoku State, has reported to the Governor that it has not been proved to the satisfaction of the Committee that, by custom, any barrier existed which precluded Nana Ntiamoah Kofi III from ascending the Adowsena Stool, and that no charges have been proved to merit his destoolment.

In the opinion of the Committee Ntiamoah Kofi III has not been destooled, he is therefore the Ohene of Adowsena and not Owusu Ahenkora II.

On the 5th day of November, 1956, His Excellency upon consideration of the report of the Committee confirmed the above findings.

Following this the appellant on 6th December, 1956, commenced the present proceedings by motion in the Supreme Court at Accra for leave to issue Writ of Certiorari to the Minister of Local Government, Accra, and Kwabena Ofe, the respondents in the present appeal, and also to the Committee of Enquiry appointed by the Governor.

The Supreme Court (Windsor-Aubrey, J.) on 7th February, 1957, granted an order of certiorari on the view that the destoolment of Ntiamoah Kofi III by the State Council was final, that the reference to the Committee of Enquiry covered no power to recommend his restoolment, and that the Committee in recommending his restoolment and the Governor in confirming that recommendation had acted without jurisdiction. Kwabena Ofe and the Minister of Local Government appealed against this decision and on 4th November, 1957, the Ghana Court of Appeal (Granville Sharp, J.A., Van Lare, Ag. C.J. and Adumua-Bossman, J.) allowed the appeal, set aside the order appealed from and dismissed the application. All three of the learned judges proceeded on the ground that the Committee of Enquiry did not act in excess of jurisdiction under its terms of reference in the recommendations it made, nor the Governor in confirming its findings. In the course of their judgments Granville Sharp J.A. and Van Lare, Ag. C.J. gave opinions (in this respect upholding the view of the Supreme Court), that proceedings by way of *certiorari* were competent in the circumstances of the case. Adumua-Bossman, J. took the opposite view holding that such proceedings were excluded by the terms of section 88 of the Courts Ordinance. Their Lordships have heard no argument on this matter. They decided to consider first whether the appeal could succeed in face of the reasons unanimously come to by the Court of Appeal for dismissing the appellant's application. As the Board has decided that for these reasons the appeal must fail, their Lordships have found it unnecessary to hear argument on the question on which difference of opinion has manifested itself in the Court of Appeal.

The argument for the appellant on the point of jurisdiction is that the reference to the Committee of Enquiry did not entitle it to do more than examine the charges made against the appellant, as narrated above, and to decide whether any of them were established against him and merited his destoolment as not being a fit and proper person to be the Ohene of Adowsena. It was not entitled, it is said, to find that his predecessor was still the true Ohene of Adowsena.

In finding that the Committee had not acted in excess of jurisdiction Granville Sharp, J.A. added:

“ Having regard to the provisions of section 8 of the Ordinance of 1952 I think it is clear that the reason, and the only reason why the Governor appointed a Committee of Enquiry was that because of the inclusion of charge 5 the State Council would, if they were to adjudge the matter, be in the embarrassing position of being in some sense judges in their own cause. From this it would seem to follow that the real kernel of the matter when the enquiry was held was the question raised by charge 5. Into this question the Committee made their enquiry and understandably did not appear to enquire further. As to their conduct in the course of the enquiry no serious objection is raised nor was any objection urged before the Court.”

In their Lordships' opinion the reference was in terms sufficient to entitle the Committee to report as it has done. The Committee came in place of the State Council and in investigating “ the dispute ” had necessarily to take

cognisance of the matters mentioned in the fifth of the charges against the appellant. That involved considering the charges brought against Ntiamoah Kofi III on the occasion of his destoolment and whether they were a lawful reason for his destoolment. The destoolment may have been unlawful because the charges were false or because, on custom or otherwise, they were insufficient to warrant the destoolment. The report is not one of the documents in the present proceedings and the Board have before them only the conclusion of the Committee as notified in the Gazette, which was "that it has not been proved to the satisfaction of the Committee that, by custom, any barrier existed which precluded Nana Ntiamoah Kofi III from ascending the Adowsena Stool, and that no charges have been proved to merit his destoolment. In the opinion of the Committee Ntiamoah Kofi III has not been destooled, he is therefore the Ohene of Adowsena and not Owusu Ahenkora II." If this were so it was, in a sense, irrelevant to go on to consider whether the appellant aided and abetted the bringing of the charges. The destoolment was unlawful and it would seem to follow that Ntiamoah Kofi III was still the Ohene. That was the view of the Committee, two of whom were chiefs, who were presumably versed in such questions, and who under the Ordinance had, in place of a State Council, jurisdiction to inquire into matters of a constitutional nature. Such a matter is defined in section 2 of the Ordinance as a cause, matter, question, or dispute relating to, *inter alia*,

"(a) the nomination, election, or installation of any person as a Chief, or the claim of any person to be elected or installed as a Chief; or

(b) the deposition or abdication of any Chief."

The Committee of Enquiry under the Ordinance had, in the view of their Lordships, a freedom to operate within the limits of the jurisdiction conferred upon it, just as has a State Council in a similar matter, or dispute. The Committee was not bound to exhaust all the matters referred to it. The question whether charges had been proved to merit the destoolment of Ntiamoah Kofi III was one of the matters in issue in the dispute referred to the Committee and in their Lordships' view one of the matters on which it was entitled to report. The Court of Appeal, in their Lordships' opinion, reached a right conclusion.

The Board will accordingly report to the President of Ghana as their opinion that this appeal should be dismissed, and that the appellant should pay the costs of this appeal.

ANGELINA AREFUNWON AND OTHERS APPELLANTS
AND
SALLY SHOLA BARBER AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1961) All N.L.R. 887

1960 Nov. 29

Lords Keith, Hodson and
Mr. L. M. D. de Silva

Mortgage—Repayment—Extinguishment of Mortgagee's Title—Reconveyance not essential.

Evidence—Possessory Title—Quantum of proof necessary to support claim—Practice and Procedure—Pleading—Admission—Sufficiency to constitute admission of possessory title.

The respondents were the successors in title to one William George Barber, who was the owner in fee simple of two properties known as Nos. 19 Williams Street, Lagos and 90/92 Broad Street, Lagos, respectively. The appellants were the successors of one James Emmanuel Wright. In 1896, Barber mortgaged both properties to Wright to secure a loan of £125. In 1898 Barber sold the Broad Street property to the mortgagee for £300. In 1901 and 1902 Barber borrowed money from persons, other than Wright, on the security of the title deeds to the Williams Street property; and after his death, in 1904, his wife Rebecca and her son mortgaged the property to secure a loan which they repaid in 1919 and 1920. Wright died in 1928 but his successors in title continued in possession of the Williams Street property up to 1959. In 1959 the respondents commenced this action in the Supreme Court of Nigeria seeking re-conveyance of the lands to them alleging that the loan of £125 had been repaid and that they were entitled to have the property re-conveyed to them as successors in title to Barber. They alleged in their Statement of Claim that, after the death of Wright in 1928, "his sister Henrietta de Souza took possession of the land and that after her death the defendants continued in possession." The appellants contended that the mortgage was not repaid; that on instructions from the mortgagee the property was sold by public auction and purchased by a lawyer, Akinsemoyin, on behalf of the mortgagee, that independently of the purchase, they were entitled under the Statute of Limitations to retain the property by reason of long possession. At the trial, the appellants adduced evidence to show that Henrietta, the immediate successor-in-title to Wright, had used the land (the building having been demolished by the Lagos Town Council in 1926) for occasional deposit of firewood; and that, after her death in 1946, it had been let in separate allotments to tenants for the same purpose. A summons dated the 3rd of February, 1944, in which Henrietta was named as plaintiff claiming rent for four months from October, 1943, in respect of the land was tendered in evidence.

It was further urged on behalf of the appellants that possession and user by them for a period of twelve years was necessary and sufficient to acquire title and that Henrietta and her successors had been in possession for this period. The court was asked to hold that the letting of the premises by Henrietta must have commenced at least two years before 1943, namely in 1941. Receipts were produced from tenants but none prior to 1946. The Supreme Court gave judgment for the respondents as prayed and the Federal Court affirmed the judgment. The appellants appealed to the Privy Council.

On appeal:

Held: (1) The occasional deposit of firewood on vacant land is not sufficient to support a plea of title by possession.

(2) Continuous possession and user of land for a period of twelve years is necessary to create title by possession.

(3) An averment in a pleading in general terms to the effect that another person had wrongly taken possession of lands and that after his death his successors in interest continued, wrongly, in possession, cannot be taken as an admission of title by possession in those successors in interest; since it contains no dates from which such inference could be drawn and gives no indication of the nature of the possession averred.

(4) In Nigeria, where a mortgagor in possession pays the mortgage debt but fails to obtain a reconveyance of the mortgaged property at the time of payment, the mortgagee's title is extinguished by the relevant law; and his successors in interest, since they have nothing to convey, cannot be required to execute a reconveyance of the mortgaged property to the successors in interest of the mortgagor.

Walton, for the appellants.

Respondents *ex parte*

MR. DE SILVA (delivering the Judgment of the Lords of the Judicial Committee): The respondents instituted this action in the Supreme Court of Nigeria claiming against the appellants an order for possession of the

property 19 Williams Street, Lagos, and for an order that the appellants do execute in their favour a deed of conveyance of the said property. The Supreme Court gave judgment as prayed for [the respondent] and this judgment was on appeal affirmed by the Federal Supreme Court.

The property in question and an adjoining property 90/92 Broad Street at one time belonged to one William George Barber. In 1896 Barber mortgaged both the properties to one James Emmanuel Wright to secure a loan of £125. In 1898 Barber sold the Broad Street property to the mortgagee for £300. A material question in the case upon which the parties are at issue is whether the loan of £125 was repaid.

William George Barber left one son, Gabriel, by his wife Rebecca. Gabriel left seven children, five of whom are the respondents. The two others are dead. It is not disputed that the respondents are the successors of W. G. Barber.

James Emmanuel Wright died in 1928. The appellants, who are the children of his sister Henrietta, claim the property through her. It is not disputed that the property would have passed to her if it had belonged to J. E. Wright and that the appellants are the successors in title to her.

The case for the appellants is that the mortgage was not repaid, that on instructions from the mortgagee the property was sold by public auction and purchased by a lawyer Akinsemoyin on behalf of the mortgagee. The appellants also plea that independently of the purchase they are entitled under the Statute of Limitation to retain the property by reason of long possession.

The case for the respondents is that the mortgage was repaid, that there was no sale and purchase on behalf of the mortgagee and that the Statute of Limitation did not operate against them. They say that they are entitled to a conveyance from the successors of J. E. Wright and to an order for possession.

It is convenient to deal first with the question of purchase. No documents were produced in support of the alleged purchase and, on the facts, for this and other reasons the trial Judge rejected the appellants' assertion. The Federal Supreme Court affirmed this view and their Lordships can find no reason for disagreeing with it.

On the question of the repayment of the mortgage the appellants relied strongly on the fact that there had been no reconveyance and that the deed of mortgage itself has remained in the possession of the mortgagee and his successors (the appellants). As against this it has been established that the title deeds to the property are in the possession of the respondents, the successors of the mortgagor. Further, Barber in 1901 and 1902 borrowed money on the security of the property from other persons on documents which have been produced; and after his death in 1904 his wife Rebecca and her son Gabriel mortgaged the property to secure a loan which they repaid in 1919 and 1920.

The trial Judge held that it was not likely that the mortgagee who was, as already stated, the purchaser from the mortgagor of the adjoining property, 90/92 Broad Street, would not have deducted the amount of the mortgage from the purchase price. If he had not done so he would have continued the loan on security smaller than the original. For this reason and on a consideration of the evidence as a whole he held on the facts that the mortgage had been repaid. The Federal Supreme Court affirmed this finding. Their Lordships can find no reason to disagree with it.

The Lagos Town Council for reasons not relevant to this case demolished the building which stood on 19 Williams Street in 1926. Up to the date of

demolition William George Barber (till his death in 1904) and his successors were in possession of the building. It has been held by the Courts in Africa and it is not disputed on this appeal that if the mortgage had been paid off and the mortgagor and his successors had been in possession until 1926 the mortgagee's title would have been extinguished under the relevant law. It is therefore on this basis that their Lordships will proceed.

Their Lordships will not consider the plea that by reason of long possession and user the appellants are entitled to succeed. It is urged on this appeal that possession for a period of twelve years is necessary and sufficient to acquire title and that Henrietta and her successors (children) had been in possession for this period. It has been found by the Courts in Africa that the premises 19 Williams Street, which had become a vacant yard after the demolition of the building, had been used by Henrietta "for the occasional deposit of firewood" and that at a later date it had been let in separate allotments to tenants for the same purpose. The trial Judge held that this letting commenced after the death of Henrietta in 1946. On this appeal reference has been made to Exhibit 16 which is a summons dated 3rd February, 1944, in which Henrietta is named as plaintiff and a claim is made for rent for four months in respect of the premises 19 Williams Street from October, 1943. It is argued that the trial Judge overlooked this document. No reference is made to the document in the petition of appeal to the Federal Supreme Court and it would appear that no suggestion of such an error was made to the Federal Supreme Court. Its judgment does not discuss the document or its implications. What has just been said indicates that there may have been a good reason for ignoring this document although that reason cannot be ascertained from the recorded proceedings. Their Lordships will not pursue the matter further because, for reasons which follow, they are of opinion that, even if it is assumed that a tenant was in occupation in October, 1943, and that such occupation satisfied all the requirements of possession on behalf of the appellants, the appellants nevertheless fail.

The trial Judge held that "the occasional deposit of firewood on the land by Henrietta de Souza was not an entry into possession." The Federal Supreme Court agreed. Their Lordships are of opinion that the facts found on this point are too slender to afford support to a plea of title by possession.

The Courts in Africa have held that the letting to tenants did not commence till 1946. This action was commenced in 1943. Even if the date of commencement of letting be regarded as 1943 (date appearing in Exhibit 17) possession for twelve years prior to action is not established. Counsel asked their Lordships to hold that letting must have commenced at least two years prior to 1943, namely in 1941. Receipts from tenants have been produced but none prior to 1946. Nor has any document (other than the one mentioned) been produced which support the suggestion of tenancies prior to 1946. Their Lordships have considered the oral evidence in the case and the views of the Courts in Africa of that evidence and find it impossible to hold that there have been tenancies for twelve years. The appellants' case therefore fails.

It was strongly urged on this appeal that the respondent's statement of claim contained admissions of possession by Henrietta and her children which supported the appellants' case. Of this the Federal Supreme Court said:

"The onus of proving long possession was on the defendants-appellants; and although the plaintiffs-respondents alleged in their

Statement of Claim that some time after the death of James Emmanuel Wright, his sister, Henrietta de Souza, took possession of the land and that after her death the defendants continued in possession, the evidence adduced supported the finding of the learned trial Judge that the defendants had not proved long possession.”

The Statement of Claim could not be said to contain an admission of the appellants' title as it contains no dates (possession by Henrietta at least from 1941 was necessary to establish the appellants' title as already stated) and it gave no indication of the nature of the possession averred. A more precise statement would have made simpler the clarification of the points in issue. Their Lordships agree with the view of the Federal Supreme Court that long possession for the period, and of the nature, necessary to establish title have not been proved by the appellants.

The order made by the trial Judge and affirmed by the Federal Supreme Court contains a direction for a reconveyance by the appellants to the respondents of the property in question. But as stated above and held by the Courts in Africa the title of the appellants has been extinguished and there is nothing they can convey. That part of the order which contains the direction has therefore to be deleted.

For the reasons which they have given their Lordships will humbly advise Her Majesty that subject to the variation indicated in the last paragraph this appeal be dismissed. As the respondents did not appear there will be no order as to costs.

Appeal dismissed: Order varied.

Solicitors for the appellants: *Messrs. Hatchett Jones & Co.*

JOE APPIAH AND OTHERS APPELLANTS
AND
BASIL NOAH BASIL RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 23

1960 Dec. 8

Lords Keith of Avonholm, Morris of Borth-y-Gest
and Hodson

Mortgage—Redemption—Clog on the equity of redemption.

Where parties entered into a mortgage deed which was said to contain a clog on the equity of redemption, but subsequently made other collateral arrangement in respect of the same property secured by the deed of the property in respect of which the mortgage was made, they will be held to their subsequent independent arrangement which cannot be held or described as a clog on the redemption of the original mortgage.

LORD MORRIS OF BORTH-Y-GEST. The appellants as the personal representative of one Yaw Anthony, who may be referred to as Anthony, brought an action in the Supreme Court of the Gold Coast in which they claimed a declaration that they were entitled to redeem certain land which they asserted formed part of a mortgage security. The action was brought against the respondent as the successor in title to one Noah Basil Basil who may be referred to as Basil. Anthony and Basil were parties to an Indenture

(made on the 11th November, 1927) the terms and effect of which call for consideration. The action succeeded but on appeal to the West African Court of Appeal it was held that the appellants were not entitled to the declaration that they sought. The appellants now appeal (by leave of that Court) from the judgment of the West African Court of Appeal.

Anthony held a plot of land under a lease from the Government of Ashanti. The plot was No. 435 Old Town, Section B, Kumasi. The lease was dated the 16th February, 1923, and was for a term of fifty years from the 1st January, 1923. On the 11th November, 1927. Anthony and Basil set their hands and seals to an Indenture in which the former was called the mortgagor and the latter the mortgagee. The above-mentioned lease was recited and a further recital was in these terms: "And whereas the mortgagor has requested the mortgagee and the mortgagee has agreed to erect a building with stores and outbuildings on the said plot No. 435 Old Town Section 'B' to the value of Seven Thousand Pounds (£7,000) more or less on the mortgagor giving security for the repayment of half of the amount to be expended on the said buildings namely the sum of Three Thousand Five Hundred Pounds (£3,500) and the mortgagor has agreed to execute this mortgage for that purpose on an agreement made between them." The Indenture then witnessed "that in consideration of the said sum of Three Thousand Five Hundred Pounds (£3,500) to be advanced by the mortgagee to the mortgagor for the purpose of erecting the said building with stores and outbuildings on the said plot No. 435 Old Town Section 'B' he the mortgagor both hereby grant and convey to the said mortgagee his heirs executors administrators and assigns All his interests in the said plot No. 435 Old Town Section 'B' with the building now erecting on the land . . . To hold the same unto and to the use of the mortgagee his heirs executors administrators and assigns." There then followed a provision in these terms: "that if the mortgagor shall pay to the mortgagee the sum of Three Thousand Five Hundred Pounds (£3,500) then the mortgagee will at any time thereafter upon the request and at the cost of the mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the mortgagor his heirs executors administrators or assigns or as he or they shall direct and the mortgagor doth hereby covenant with the mortgagee that he the mortgagor will pay the mortgagee the said sum of Three Thousand Five Hundred Pounds (£3,500) as provided for in the aforesaid agreement."

It is not clear whether the reference to "the aforesaid agreement" was to the earlier stipulation in the Indenture or whether it was to some separately recorded agreement. The land forming plot No. 435 was Government land and Government consent to a mortgage of it was obtained. In this connection Basil had written a letter to the appropriate Government officer dated the 1st December, 1927, in which he stated: "I have the honour to forward you herewith a Deed of Mortgage and a Deed of Agreement between Mr. Yaw Anthony and myself." This was on the one hand said to denote that there were two separate Deeds the second of which was not before the Court: on the other hand it was said that the reference was merely to the Indenture of the 11th November, 1927. There is no way of resolving the issue raised by these competing submissions. The only document before the Court is the Indenture of the 11th November, 1927 and if the words of Basil's letter were thought to denote that he regarded the Indenture as embodying both a "mortgage" and an "agreement" it is manifest from a consideration of the document that it contained terms in addition to those of the mortgage transaction itself.

There was a further provision in the Indenture that if the £3,500 or any part of it was not paid then (subject to certain conditions) the mortgagee could (with Government permission) sell "the messuages hereditaments and premises hereby granted and conveyed" and out of the proceeds of sale first satisfy the monies owing on the security and then pay any balance to the mortgagor. There was no provision for the payment of any interest on any sum of money said to be "advanced" by the mortgagee to the mortgagor and no date was fixed for repayment of the "advance" and accordingly there was no provision which would have prevented the mortgagor from paying £3,500 to the mortgagee as soon as the building was erected by the mortgagee.

It would appear to be beyond controversy that Anthony had a lease of plot 435 and that Basil agreed to erect a building (with stores and outbuildings) on the land. The building was to be of the value of approximately £7,000. There is no doubt that Basil had to provide the cost of the building. Though the Indenture referred to a sum of £3,500 "to be advanced by the mortgagee to the mortgagor for the purpose of erecting the said building" it is common ground that no money actually passed from the mortgagee to the mortgagor. Notionally the transaction might thus have been stated by the mortgagee: "Out of my own money I will erect a building to the value of £7,000 and subject to my being paid £3,500 I will hand back half the security." As security for the £3,500 "advanced" by the mortgagee to the mortgagor there was a mortgage of the land. There was the further provision that when the mortgagor paid £3,500 to the mortgagee then the latter would reconvey half of the land with the building on it. Their Lordships think that there is great force in the view expressed by Korsah C.J. in his judgment in the West African Court of Appeal that "this was not an ordinary mortgage transaction." The Chief Justice considered that it was in fact a building agreement whereby in consideration of a speculator building upon an entire plot of land one party, the owner, should take half of the property and the other party, the speculating builder, should take the other half of the property.

It is said however by the appellants that the Indenture refers to an advance of £3,500 and that the security for the payment of this amount was effected by mortgaging all the mortgagor's interests in the land: it is further said that the provision that upon payment by the mortgagor of £3,500 the mortgagee should reconvey half of the messuages hereditaments and premises with the building thereon would result in imposing a clog on the equity of redemption. It is said therefore that such clog should be ignored with the result that upon payment of £3,500 the mortgagor was entitled to have all the land and all the building. On that basis Basil was under obligation to erect a building to the value of £7,000 upon Anthony's land and Anthony would be entitled as soon as the building was completed and upon payment of £3,500 to have the land and the new building. It would be a strange commentary if anyone could invoke an equitable doctrine to produce so inequitable a result. The mortgagee was under an obligation to improve the character of the security, he was to add approximately £7,000 to its value. If therefore there was an "advance" of £3,500 and if the lease of a plot of land was the security, the contractual arrangements for the erecting by the mortgagee of a building of the value of £7,000 would bring it about that the mortgagor by paying £3,500 would not merely be able to redeem his security but would be able to recover the mortgage property enhanced in value by the existence upon it of a £7,000 building.

Had there been no further arrangements the question would have called

for decision as to whether the mortgagor could assert that his "equity" of redemption could not be impeded and that he could, greatly to his advantage, be treated as not bound by his agreement to take half the land but could claim the whole. Furthermore, had there been no further arrangements, remembering that what the Indenture conveyed was the mortgagor's interest in a lease it would have had to be considered how, assuming that there were no clog on the equity of redemption, the provision in the Indenture that upon payment to him of £3,500 the mortgagee would "reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid" could be operated and made effective. The effect and meaning of the power of sale would also have called for consideration. It would have been necessary to decide whether there was merely a mortgage agreement or whether there was a mortgage agreement and also a collateral agreement.

These questions would have required examination in the light of the principles laid down in such cases as *Noakes & Co. Ltd. v. Rice* [1902] A.C. 24, *Samuel v. Jarrah Timber and Wood Paving Corporation Ltd.* [1904] A.C. 323 and *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.* [1914] A.C. 25.

Certain further arrangements were however made and these now call for mention. In 1930 Anthony wrote a letter to the Commissioner of Lands in these terms: "In accordance to Indenture Number 5922/27 dated 11th November, 1927, between myself and N. B. Basil of Ashanti on plot 435 I hereby give under my hand that Mr. Basil's name be inserted on the list of the new layout with equal half share of the said plot from date. Dated at Accra this 24th day of January 1930." Anthony later surrendered his lease of the land (plot 435) to the Government of Ashanti. The plot was then divided into two. Thereafter one plot was known as plot 435 and the other as plot 435A. The Government then granted two leases: one, of plot 435, was to Anthony; the other, of 435A, was to Basil. Each lease was dated the 4th February, 1931, and each was for a term of forty-two years from the 1st January, 1930. It is to be noted that the original lease was for a term of fifty years from the 1st January, 1923.

Anthony obtained the leave of the Government of Ashanti to mortgage his interest in the new plot No. 435 to Basil. No formal mortgage was executed but the new lease of the new plot 435 was deposited by Anthony with Basil.

Basil had gone into possession of the whole of the plot formerly called plot 435 in 1927 and after the making of the new arrangements he was in possession of the new plot No. 435 and of plot No. 435A which was leased to him. Basil died in 1937. His widow became his sole executrix and in 1943 she assented to a bequest to Basil Noah Basil of the deceased's right title interest and claim in and to the Indenture of the 11th November, 1927. Basil Noah Basil was the defendant in the proceedings which were subsequently brought and is the respondent to this appeal. Basil, and after his death the respondent, was permitted to collect rents accruing from the portion of the building on the new plot 435 which is separated by partition wall from the portion of the building on plot 435A. From 1938 both the plots were managed by one Mead. He received the rents from the buildings and credited to each plot one half of the net proceeds resulting from the two. By 1949 the amount standing to Anthony's credit had reached the sum of £3,500. What happened then was that Mead (who was a legal practitioner) prepared an Indenture which was expressed to be made between the respondent and Anthony. The Indenture, dated the 25th November, 1949,

was executed by the respondent—though not by Anthony. After reciting the lease to Anthony of the 16th February, 1923, it recited that by the Indenture of the 11th November, 1927, Anthony had assigned by way of mortgage to Basil “the hereditaments and premises comprised in and demised by the hereinbefore recited Indenture of lease to secure the payment of the sum of Three Thousand Five Hundred Pounds (£3,500).” There followed a recital that by the mutual consent and agreement of Anthony and of Basil, Anthony had surrendered to the Government the hereditaments and premises comprised in the lease of the 16th February, 1923, and that the Government had divided “the said hereditaments and premises known as Plot Number 435 into two separate plots thenceforth to be known as Plots Number 435 and Number 435A respectively.” The new lease to Anthony of the 4th February, 1931, was then mentioned as also was a form of consent of the 11th March, 1931, permitting Anthony to assign to Basil by way of mortgage the hereditaments and premises comprised in and demised by the lease. It was further recited that no formal mortgage “other than the hereinbefore recited Indenture of Mortgage” was executed but that the documents of title of the new plot Number 435 had been deposited with Basil by way of equitable mortgage. Basil’s death in 1937 and the succession of the respondent to Basil’s rights in reference to the Indenture of the 11th November, 1927, were also recited. Finally it was recited that: “The principal sum of Three Thousand Five Hundred Pounds (£3,500) secured by the hereinbefore recited Indenture of Mortgage has been paid to the mortgagee.” The respondent having acknowledged the receipt of the £3,500 the Indenture witnessed that the respondent assigned to Anthony “All that the hereditaments and premises comprised in and demised by the lease and now vested in the mortgagee To Hold the same unto the mortgagor from the first day of June One Thousand nine hundred and forty-nine for all the residue of the term now subsisting therein freed and discharged from the hereinbefore recited mortgage or by any means now charged and from all moneys secured thereby and all claims and demands in respect thereof.” The lease referred to is the new lease of 1931 granted by the Government to the mortgagor of the plot known as Number 435.

Though that Indenture was not executed by Anthony it appears to have been handed over at about the time of its execution to a Mr. Hinterman who was acting for Anthony. Anthony was said to have been at that time both old and ill. Also the lease of the new Plot 435 was then handed to Mr. Hinterman. No demand in respect of the Lease to Basil of Plot No. 435A appears to have been made nor is there any record of any objection having been raised by Anthony or Hinterman to the transaction or to the recitals in the Indenture.

Anthony died in December 1952. Down to that date no claim appears to have been made but some years later *i.e.* on the 2nd February, 1956, the personal representatives of Anthony (who are the present appellants) commenced an action against the respondent. They claimed that the provision in the Indenture of the 11th November, 1927, under which Basil was to retain half of the mortgaged property amounted to a clog on Anthony’s right of redemption. They contended that the surrender by Anthony in 1931 of the Lease of the original Plot 435 and its division into two moieties was a step in the fulfilment of the provisions of the 1927 Indenture. The statement of claim contained the following paragraphs:

“5. In pursuance of the said mortgage agreement, the Mortgagor surrendered unto the Government of Ashanti Plot No. 435 Old Town

Section " B " and the Government of Ashanti divided the Plot 435 Old Town Section " B " into two separate Plots thenceforth known as Plots Nos. 435 and 435A and the Mortgagee took possession of both and erected buildings thereon.

6. In 1949 the present defendant as successor and beneficiary to Noah Basil Basil assigned Plot No. 435 to Yaw Anthony, the sum of £3,500 having been paid to the Mortgagee but retained Plot No. 435A which is the other half of the original Plot No. 435 which was divided into two in pursuance of the Mortgage Agreement of 1927.

7. The plaintiffs say that the provision in the mortgage agreement of 1927 ' that if the mortgagor shall pay the mortgagee the sum of £3,500, the Mortgagee will at any time thereafter upon the request and at the cost of the mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the mortgagor his heirs executors administrators or assigns or as he or they shall direct ' . . . if and in so far as it prevents the plaintiffs from redeeming the whole mortgage property upon proper payment of the principal is illegal and void as a clog on the plaintiffs' right to redeem and is not capable of being enforced against plaintiffs."

The claim of the plaintiffs was for a declaration as follows:

" 8. Wherefore plaintiffs claim declaration that notwithstanding the provision in a deed of mortgage dated 11th November, 1927, between Yaw Anthony (deceased) and Noah Basil Basil (deceased) that on the said Yaw Anthony Mortgagor paying £3,500 to Noah Basil Basil the Mortgagee the said Basil will reconvey only half of the premises on Plot No. 435 Old Town Section ' B ' the said Plot having been since divided into two and described as Plots 435 Old Town Section ' B ' and Plot No. 435A Old Town Section ' B ' they may also redeem the said Plot and premises on 435A Old Town Section ' B ' the principal sum of £3,500 having been already paid by the said Yaw Anthony."

By the amended statement of defence it was stated that Anthony did not contribute to the sum of £7,000 but that " by agreement recited in " the Indenture of the 11th November, 1927, Anthony agreed that Basil should build for himself on half of the original Plot 435. Included in the contentions of the defendant (the present respondent) were those contained in the following paragraphs:

" 8. The defendant says that it was agreed between late Anthony and Basil that the amount of £3,500 so lent in erecting Anthony's portion of the building on his Plot 435, was to be repaid by late Basil collecting the rents from the property less payments made for ground rents, Town and Water rates, repairs and management expenses thereof, until the amount was finally settled and that law [sic] Yaw Anthony had the right at any time to pay off the balance of the principal remaining due and to redeem the Mortgage. .

9. The defendant admits that Plot No. 435 was in 1949 reassigned by him to late Anthony upon the repayment of the mortgage debt of Three thousand five hundred pounds (£3,500) but denies that Plot 435 ' A ' formed part of the mortgage transaction as herein explained or that it belongs to late Anthony.

12. The defendant says that the said mortgage of 11th November

1927 became null and of no effect upon the execution of the said further transactions in 1931.

13. Alternatively, if, which is denied, the said mortgage is deemed to have present effect the defendant says that he has been a mortgagee in possession since 1927 and that the plaintiff is barred from his remedy by the operation of the Real Property Limitation Act 1833."

The case was heard in the Land Court at Kumasi, a Court of the then Supreme Court of the Gold Coast, and the claim of the plaintiffs was successful. The learned Judge accepted the view that the Indenture of 1927 was a mortgage which contained a provision which constituted a clog on the equity of redemption. In regard to the events of the year 1931 the learned Judge said that it was argued by the plaintiffs that they were in pursuance of the Mortgage of 1927 and by the defendant that they were in implementation of the wider agreement whereby one half of Anthony's land was to go to Basil. The learned Judge thought that the events of 1931 were consistent with either of these views but he concluded that there was not sufficient evidence from the mere fact of the surrender of his lease by Anthony in 1931 to warrant his holding that the mortgage of 1927 came to an end in 1931: he found no evidence of an agreement subsequent to the mortgage such as was made in *Reeve v. Lisle* [1902] A.C. 461. The learned Judge made a declaration that the plaintiffs were entitled to redeem the Plot and Premises No. 435A. He limited his judgment to making a declaration that the appellants were entitled to redeem: he did not make an order for conveyance and no accounts were before him. He did not deal with the alternative defence (which, on the view that he formed, came in issue) that the plaintiffs were barred by the operation of the Real Property Limitation Act 1833.

The defendant appealed to the West African Court of Appeal (Coussey P., Korsah C.J., Verity Ag.J.A.) and the appeal was allowed. The leading judgment with which the other two members of the Court concurred was delivered by Korsah C.J. In the course of his judgment the learned Judge said:

"It is clear from evidence that the subsequent transaction after execution of the mortgage of 1927 both in form and substance cannot be said to be harsh or unconscionable. Looking at all the circumstances and not by mere reliance on some abstract principle, it will be observed that it was the intention of the original parties to enter into a separate and collateral contract independent of the mortgage upon which plaintiffs rely. This view is amply supported by the fact that Yaw Anthony surrendered to the Government the lease of the original plot, and the Government subsequently divided it into two plots and demised No. 435 to Yaw Anthony and 435A direct to Noah Basil Basil in 1931, the Government's consent granted to Yaw Anthony to demise his new plot 435 to Noah Basil Basil and the subsequent deposit of the title deeds with Noah Basil Basil by Yaw Anthony, the re-assignment in 1949 of the building on Yaw Anthony's new plot 435 by the defendant after cost thereof was paid are circumstances from which may be inferred that the parties acted upon a separate and independent agreement which cannot be described as a clog on the equity of redemption under the mortgage of 1927. *G. & C. Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.* [1914] A.C. 25.

If the clause in the original mortgage of 1927 were deemed to be a

clog on the equity of redemption and thus make the agreement void as contended by plaintiffs, the result would be that the mortgagee has spent £7,000 in erecting buildings on the original plot under the mortgage in which no date was fixed for repayment of the capital and no interest charged. The mortgagor would be the beneficiary of the whole building and stores on both plots Nos. 435 and 435A without any outlay by him. It would mean that the surrender to the Government of the original lease and the subsequent division of the original plot into two, and the demise by Government of one plot to Yaw Anthony and the other to Noah Basil Basil would have no legal effect whatsoever."

The learned Judge proceeded to point out that the mortgage of 1927 was all in favour of the mortgagor: he was the lessee of the bare land in 1927 and the mortgagee spent his money in erecting the buildings. In regard to the new plot 435A the learned Judge concluded (a) that there was no agreement by Basil to reconvey it, (b) that Anthony had surrendered his title to it, and (c) that Basil held it by direct demise from the Government unfettered by any equities.

If the events of 1931 had not occurred difficult questions as to the construction and effect of the 1927 transaction would have arisen. But in their Lordships' view the events of 1931 fully warrant the result reached by the West African Court of Appeal. The Indenture of 1927 shows that it was the intention of the parties that Basil should erect buildings to the value of £7,000 upon Anthony's land and that Anthony was not to find any part of the £7,000. There was however to be the notional loan of £3,500 from Basil to Anthony. As security for the £3,500 notionally advanced by Basil to Anthony there was the mortgage of the land by Anthony to Basil with the stipulation that when Anthony paid £3,500 to Basil he (Anthony) was to have a reconveyance to him of half the land. There was also the stipulation that if Anthony did not pay the £3,500 then Basil could exercise a power of sale over all the land but after recouping himself to the extent of £3,500 would have to pay the balance to Anthony. Whatever be the complications that the parties may have created for themselves by these strange provisions the issues raised in the litigation must be decided by taking the later history into account. It is said by the appellants that the transactions of 1931 took place "in pursuance of" the mortgage indenture of 1927 and reflected a continuance of what was said to have been a previously created clog on the equity of redemption.

In their Lordships' view the facts point irresistibly to the conclusion that in 1931 the parties were seeking to give effect to what had previously been the plan as revealed by the Indenture of 1927: shortly stated it was that Basil should spend £7,000 of his own in erecting buildings on Anthony's land in return for Anthony paying him £3,500 and assigning to him half of the land. Even if that view is not correct the effect of the 1931 transactions was that Anthony and Basil both agreed that the Lease of the 16th February, 1923, was to be surrendered. The difficulties which might have confronted the parties in regard to the construction and effect of the 1927 Agreement had the original lease remained in being do not therefore present themselves after the surrender of that lease. There could thereafter be no question of a mortgage of that lease by Anthony to Basil. Any mortgage applying to that lease ceased to exist or to operate when that lease by mutual assent came to an end. The new lease of the new Plot 435A was, with Anthony's concurrence, granted by the Government to Basil direct. If there had been any intention that Anthony should have any rights of any kind over the land

demised to Basil direct, he, Anthony, would never have concurred in the new arrangements. There are no indications that in 1931 Anthony was deceived or overborne or wrongly persuaded: nor were the arrangements unfair to Anthony or oppressive or unconscionable. He himself received a new lease of the new Plot called Plot 435 and it seems quite clear that the parties intended that his deposit by way of equitable mortgage of his new lease was as security for the payment by him of the £3,500 notionally advanced to him. The handing back of that lease in 1949 after the receipt by Basil and his successor of moneys which in total were £3,500 was in accord with and reflects such intention. The handing back of the lease coupled with the handing over of the Indenture of 1949 signed by Basil's successor were not met by any assertion of any rights in respect of the new Plot 435A.

The fact that the new lease to Basil direct of the new Plot 435A was consequential upon the surrender by Anthony of his lease of the former Plot 435 and was made with the consent of both mortgagor and mortgagee, takes the case outside the scope of the dictum of Romer L.J. in *In re Biss* [1903] 2 Ch. 40. which was relied on by the appellants.

For these reasons their Lordships consider that the Court of Appeal came to the correct result. On this view of the case the alternative defence raised in the action based upon the provisions of the Real Property Limitation Act, 1833, does not arise for consideration.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeal ought to be dismissed and that the appellants ought to pay the respondent's costs of the appeal.

H. E. GOLIGHTLY AND ANOTHER APPELLANTS
 AND
 E. J. ASHRIFI AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 28

1960 Dec. 10

Lords Cohen, Keith of Avonholm
 and Denning

Possession: as against a wrongdoer. Res judicata—Customary law: proof of Caretaker position in customary law—Appeal—Grounds not previously canvassed in lower courts.

1. As against a wrongdoer, possession is sufficient to maintain an action.

2. The Korle priest sued in different capacities in the two proceedings. In the previous proceeding he claimed on behalf of the Korle family or stool, solely as absolute owners of the land. In the present proceedings he claimed on behalf of the three stools as owners together. Both the trial judge and the Appeal Court made it quite clear that the decision in the previous proceedings was not to prejudice such a claim as that made in the present proceedings.

3. Native customary law "has to be proved in the first instance by calling witnesses acquainted with it until the particular customs have by frequent proof in the Courts become so notorious that the Courts take judicial notice of them" (*Kobina Angu v. Cudjee Attah* [1874-1928] P.C. 43).

4. There are some cases where under customary law a caretaker may correspond to a caretaker in English law (*Yawah v. Maslieno* [1930] 1 W.A.C.A. 87). But there are many others where he may be a person who not only takes care of the land but also has a right or interest in it himself.

5. A caretaker of lands (in this case the Korle priest) may make grants of lands to members of the stool for specific purposes, *i.e.* to farm or to build for the purposes of residence or trade; but this right can only be exercised over land which is deemed to be unappropriated.

6. The outright alienation or sale of the lands can only be effected with the prior consent of the Stool (in this case the three Stools of Ga, Gbese and Korle Stools) and that publicity is necessary in such transactions, the publicity being a safe-guard provided by native customary usage against the clandestine disposal of land without the knowledge of the necessary parties.

7. The Stool (in this case, the three Stools) cannot however alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land such as (in this case, subjects of the Gbese stool who are in occupation) strangers who have been properly granted some interest, be it a farming or occupation interest, in the land.

8. Only in the most exceptional circumstances would the Privy Council allow a point to be taken before them which had not been taken in the Court of Appeal.

LORD DENNING. This case concerns a tract of land lying to the north of Accra known as "the Kokomlemle lands." These lands are some two square miles in extent. Some years ago it was open country with a few mud huts on it. It is now being developed as a residential suburb. There has been much dispute as to the ownership of it. The principal contestants for years have been, on the one hand, the Atukpai family (which was represented before their Lordships by Nii Tettey Gbeke II); and on the other hand, the Korle family (which was represented before their Lordships by Numo Ayitey Cobblah, the Korle Priest). The trial Judge, Jackson, J., on 31st May, 1951, held that the Atukpai family had no right to the land at all: but that the Korle family had a right to it, not by itself alone, but only in conjunction with two other stools, the Ga Stool and the Gbese Stool. The West African Court of Appeal, Stafford Foster-Sutton, P., Smith, C.J. and Henley-Coussey, J.A., on 4th March, 1955, affirmed his decision on both these points. The Atukpai family now appeal to their Lordships' Board. They do not seek to dispute the finding that the Atukpai family had no right to the land. They realise that there are two concurrent findings of fact against them on that point. But they do dispute the finding that the Korle family had any right or interest in the land, save as caretakers of it. Mr. Khambatta for the Atukpai family said that the sole question for determination in the appeal is: What is the position of the Korle priest?

According to tradition the Korle people were hunters who discovered the Korle lagoon which runs into the sea just west of James Town. They found there two large pots containing some beads named "Korle" which they took home to their hunting camp. There a woman named Dede became inspired by the spirit of the lagoon—the Korle fetish—and the lands all around were placed under the protection of the priestess of that spirit—the Korle Wulomo. In consequence in those ancient days the Korle family was regarded as the owner of these lands with the Korle fetish as its spiritual protector. They included the Kokomlemle lands now in dispute. But in course of time the Korle family ceased to be regarded as the absolute owners of the land. They were only a section of a larger people called the Gbese and these in turn were only a section of a much larger people called the Gas. These peoples combined together into a system under which the paramount chief was the head of all Ga people, the Ga Manche. Under him were subordinate chiefs including the chief of the Gbese people, the Gbese Manche. Under him were five families one of whom was the Korle family with the Korle priest at its head. Under this system, the overlords, seeing that they were under a duty to protect the lands of the Korle family,

acquired rights and exercised control over the lands. The Ga stool had the reversion and ultimate control. The Gbese stool and all its subjects acquired a usufructuary right. The Korle family administered the lands and were described as " caretakers."

Such is the tradition which is regarded as binding on the Gbese stool and on the Ga stool in its relation to the Gbese stool: though it might be denied by other sections of the Ga tribe. But so long as the Kokomlemle lands were agricultural lands of little value, there does not seem to have arisen much controversy about it.

The trouble seems to have arisen in 1938 or thereabouts when the Kokomlemle lands were seen to have potentialities as building lands. Both the Korle family and the Atukpai family claimed it as their own. The Korle family claimed to be, not only caretakers, but absolute owners of the land and they said they had a right to alienate it without the consent of the paramount stools at all. The Atukpai family also claimed to be absolute owners. They were one of five families in the Gbese quarter and they claimed that they were granted the land absolutely in 1827. They had in that year saved the Gas from danger of invasion and had been rewarded by the grant of the land. The land was Ga Stool land and the grant was made, they said, by the senior Ga chiefs and the priests.

In pursuance of these rival claims the two families began to sell off plots of land to purchasers who started to build on them: and as soon as they started to build, the rival family or their purchasers brought actions against them. Hence all this prolonged litigation over the last 20 years. But not only these two families: other families also made claims and actions followed. All of these actions were started in the Tribunal of the Paramount Chief of the Ga State and all were in due course transferred to the Supreme Court of the Gold Coast. Some of them need particular mention.

The first action to come on for hearing was an action commenced on 24th March, 1942, by Dr. Nanka-Bruce against the Atukpai family and a purchaser from them. Dr. Nanka-Bruce claimed that the Korle priest had granted the land to his ancestor many years ago. He complained that the purchaser had begun building on the land. The plaintiff claimed a declaration of title and an injunction. On 1st December, 1942, Lane, J. non-suited the plaintiff because he failed to prove title. The learned Judge was far from being impressed by the title set up by the Atukpai family, but he rightly observed that the plaintiff must succeed on the strength of his own title and not on the weakness of that of the defendants. His decision was affirmed by the West African Court of Appeal on 7th March, 1944, and by their Lordships' Board on 11th July, 1950.

The second action to come on for hearing was Suit No. 12 of 1943. This was an action commenced on 29th April, 1943, by the Korle Priest against the Atukpai family and many purchasers from them. The Korle Priest claimed that he was entitled to a large tract of the Kokomlemle lands and sought a declaration of title and damages for trespass. On 31st May, 1947, McCarthy, J. non-suited the plaintiff and on 13th December, 1947, his decision was affirmed by the West African Court of Appeal. It is important to notice that in this action the Korle priest claimed that the land belonged to or was the property of the Korle family in the fullest legal sense of that expression, excluding altogether any rights of the Ga Mantse, the Gbese Mantse or anybody else. McCarthy, J. said that " as the plaintiff has totally failed to establish his right to bring this action in the capacity of absolute owner, he will be non-suited." The West African Court of Appeal said that: " If the plaintiffs are in fact the caretakers, no matter what definition is

placed upon that word, they certainly cannot claim to hold the land in what would amount to a fee simple . . . the learned trial Judge was perfectly correct to non-suit the plaintiffs rather than dismiss the case thus giving them the opportunity of clarifying their position if possible." Their Lordships look upon this case as a clear rejection of the claim of the Korle family to be absolute owners but as leaving it open to them to claim to have some interest in the land short of absolute ownership. True it is that a non-suit is by Order 40 Rule 3 equivalent to a judgment for the defendant: and that it is not open to the plaintiff to bring an action for the same matter unless the Court otherwise orders. But here the Court did in effect otherwise order.

Finally, there came for trial the actions now under appeal to their Lordships. These formed part of a group of 25 consolidated actions, the first of which was commenced early in 1940 and the last on 27th July, 1950. They were tried before Jackson, J. for 15 weeks in the beginning of 1951 and he gave a judgment on 31st May, 1951, which runs to 142 pages of the Record of the proceedings before their Lordships. In 16 out of the 25 actions appeals were taken to the West African Court of Appeal who on 4th March, 1955, affirmed the decision of Jackson, J., on all the issues in the 16 cases save one issue in one of the cases. That issue does not now concern their Lordships. In eight of the 16 actions appeals are now brought before their Lordships' Board.

Now in four of these actions the Atukpai family succeeded, namely, in Suits No. 11 of 1943, 7 of 1944, 5 of 1949, and 39 of 1950. The Atukpai family were defendants in those actions: and the actions were dismissed against them because the plaintiffs in each had not proved the case against them. Their Lordships do not see how the Atukpai family can appeal against these four decisions in which the claims against them were dismissed. Their Lordships need, therefore, say no more about those actions.

In two of the actions, namely, Suit No. 2 of 1944 and Suit No. 46 of 1950, the Atukpai family were plaintiffs claiming to be entitled to the land by reason of a grant made in 1826 to them. The Judge held there was no such grant and that the Atukpai family have no title to these lands. He was very outspoken about their conduct. He said their claim was bogus. The West African Court of Appeal affirmed his decision on that point. It was conceded before their Lordships that these two concurrent findings cannot be challenged. Their Lordships need, therefore, say no more about those two actions.

There remain only two more actions under appeal. In both of them the Atukpai family were defendants and in both of them judgment was given against them. There is something, therefore, against which they can appeal. So their Lordships will consider them in more detail.

Suit No. 7 of 1951. In 1937 Mr. Ashrifi and Mr. Narh bought a piece of land from Mr. Allotey and entered into possession. In 1939, however, the Atukpai family claimed the land and on 20th January, 1940, they conveyed it to Mr. Golightly, who thereupon entered on to the land. Mr. Ashrifi and Mr. Narh brought an action against Mr. Golightly for £25 damages for trespass and an injunction. In order to support their action, Mr. Ashrifi and Mr. Narh relied on a claim of title from the Korle priest, and in particular on a Deed of Conveyance in 1918 whereby the Korle priest and his elders (without the consent of the Ga or Gbese Stools) conveyed the land to their predecessor in title. In order to resist the claim, Mr. Golightly relied on the title of the Atukpai family who had sold the land to him: and they claimed it

by the supposed grant of 1826.

The learned Judge held that the plaintiff's title was defective. He said: "Quite clearly the Korle priest could not convey the absolute ownership in land in which he only possessed a joint interest with the Ga and Gbese Manches." He held also that the Atukpai family had no title at all. But inasmuch as the plaintiffs had possession, he decided in their favour. He said, as their Lordships think quite rightly, that "it is quite clear that a person deriving a title (however defective), coupled with possession from the Korle priest, has a better title than the one derived from Golightly, who derived it from the Atukpai family who had no title at all and no possessory interest." He therefore awarded the plaintiffs £25 damages and granted them an injunction.

Their Lordships think this decision was clearly right on the settled principle that as against a wrongdoer, possession is sufficient to maintain an action. In the circumstances, this case cannot constitute a binding authority on what is the title of the Korle priest. So it does not enable the essential issue in this appeal to be resolved.

Suit No. 15 of 1943. A family named Okaikor Churu had been in possession of land at Kokomlemlé ever since 1875. They had been given the right to farm it by the Gbese Stool. Distinguished members of the Gbese Stool were buried on the land. When the trial Judge visited it he found a tomb with a headstone showing that in 1932 a priest was buried there. In 1942, however, the Atukpai family claimed to be the owners of the land. They sold it to purchasers who put up buildings on it. In 1943 the head of the Okaikor Churu family brought an action against the Atukpai family claiming a declaration of title, £100 damages for trespass and an injunction. Later on the Korle priest was apparently joined as plaintiff. At the trial in 1951 the learned Judge decided in favour of the plaintiffs and made a declaration which does decide the essential issues in this appeal. His order was as follows:

"The plaintiff, Afiyie, is granted a declaration that she and the other members of the Okaikor Churu Family are possessory owners of that portion of land (here it is described) which they are entitled to use for purposes of farming and residence by the members of their family, *subject to the rights of the Ga and Gbese and Korle Stools who are recognized by customary law as being the allodial owners of that land.*

In respect of the trespass by authorising this building of a house (described) the nature of the trespass was one which has destroyed the character of the land as farming land and was perpetrated without any *bone fide* claim of right, and was persisted in despite protest . . . I assess the general damages at £100.

The plaintiff is granted the injunction prayed for (that is to say, a perpetual injunction restraining the Atukpai people from entering upon the land or dealing with it in any manner whatsoever)."

Their Lordships are clearly of opinion that this Declaration and Injunction does decide the rights of these families in a manner which is binding on them. Their Lordships read the word "allodial" as meaning that the three stools are owners free of external control. They do not hold of anyone else. The declaration in that suit, therefore, is similar to the declaration in Suit No. 33 of 1950 (which is not subject to appeal to their Lordships) where the Judge granted to the Korle Priest "a declaration that he is the 'caretaker' of Stool Lands on behalf of the Ga, Gbese and Korle Stools and of which lands described in the writ they are the owners." It

appears to their Lordships that, by appealing in Suit No. 15 of 1943 against the declaration, the Atukpai people are entitled to have resolved the question they desire: What is the position of the Korle Priest?

Mr. Khambatta for the Atukpai family argued that the question was concluded by the action (Suit No. 12 of 1943) decided by McCarthy, J., in 1947 which was affirmed by the West African Court of Appeal, to which their Lordships have already referred. He said that in that action the Korle priest claimed to be the owner of the Kokomlemle lands, and having failed in his claim, he must abide by that failure and could not claim any interest in the Kokomlemle lands now. The question was, he said, *res judicata*.

Mr. Dingle Foot took a preliminary objection. He said that it was not open to Mr. Khambatta to take this point of *res judicata*. Their Lordships ruled in favour of Mr. Foot's submission. True it is that the point had been pleaded in one of the consolidated actions (Suit No. 33 of 1950) but the trial Judge decided against it. And it had not been raised in the West African Court of Appeal. The appellants at that time apparently acquiesced in the view that there was no *res judicata*. In these circumstances their Lordships held that they would not allow it to be raised before them. Only in the most exceptional circumstances would their Lordships allow a point to be taken before them which had now been taken in the Court of Appeal. And there were no such exceptional circumstances here.

Now that their Lordships have heard all the case, they would like to say that there is no foundation whatever for the suggestion that the question was *res judicata*. In the previous action, No. 12 of 1943, the Korle Priest claimed to be absolute owner of the land free of any control by the Ga or Gbese Stools. The Ga Stool and the Gbese Stools had applied to come in as parties and had been refused. Whereas in the 25 consolidated suits the Korle priest no longer claimed to be the absolute owner. He sued and was sued as the "Korle priest for and on behalf of the Korle Stool, Gbese Stool and Ga Mantse Stool." The trial Judge especially amended the proceedings in the consolidated suits so as to enable him to be so described. At the trial the three stools were represented by counsel. Mr. Hutton-Mills appeared for the Ga Manche Stool, and Mr. Lamptey for the Korle and Gbese Stools: and at the hearing before their Lordships Mr. Dingle Foot expressly stated that he appeared for all three stools. It is quite apparent therefore that the Korle Priest sued in different capacities in the two proceedings. In the previous proceeding he claimed on behalf of the Korle family or stool solely as absolute owners of the land. In the present proceedings he claimed on behalf of the three stools as owners together. Both McCarthy, J., and the West African Court of Appeal made it quite clear that the decision in the previous proceedings was not to prejudice such a claim as that made in the present proceedings.

Mr. Khambatta, defeated on his plea of *res judicata*, then sought to say that the decision of the Judge was wrong in so far as he held that the three stools were the owners of the Kokomlemle lands. Mr. Khambatta argued that the Korle Stool was a mere caretaker, that is to say, a person who takes care of the property on behalf of another but has no right or interest in the lands himself. Their Lordships cannot accept this view. There are some cases where under customary law a caretaker may correspond to a caretaker in English law, see *Yawah v. Maslieno* [1930] 1 W.A.C.A. 87. But there are many others where he may be a person who not only takes care of the land but also has a right or interest in it himself. In the present case the learned trial Judge said of the Korle family: "Today they are described as being the 'caretakers' of these lands for the Ga, Gbese and Korle Stools. But it must

be clearly understood that the word ' caretaker ' does not mean simply one who looks after land for another, but connotes one who has an interest in the land." Their Lordships accept this view which they think is clearly correct.

What then is the position of the Korle priest? This is a question of native customary law which " has to be proved in the first instance by calling witnesses acquainted with it until the particular customs have by frequent proof in the Courts become so notorious that the Courts take judicial notice of them," see *Kobina Angu v. Cudjoe Attah* [1874--1928] P.C. 43. In the present case it was found by the West African Court of Appeal on a careful consideration of all the evidence:

- (1) that the Korle priest as the caretaker of the lands may make grants of lands to members of the stool for specific purposes, that is, to farm or to build for the purposes of residence or trade: but this right can only be exercised over land which is deemed to be unappropriated:
- (2) that an outright alienation or sale of the lands can only be effected with the prior consent of the three stools, the Ga, Gbese and Korle Stools and that publicity is necessary in such transactions, the publicity being a safeguard provided by native customary usage against the clandestine disposal of land without the knowledge of the necessary parties:
- (3) that the three stools cannot however alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the Gbese stool who are in occupation, or strangers who have been properly granted some interest, be it a farming or occupation interest, in the land.

In making these findings the West African Court of Appeal was affirming the findings of the trial Judge save in one respect. He had held that the land could not be sold outright except to satisfy a stool debt. The West African Court of Appeal, as their Lordships think rightly, disagreed with him in this: but in all other respects affirmed his findings. There are therefore two concurrent findings on the points their Lordships have mentioned and they think they should be accepted.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeals should be dismissed and that the appellants should pay the costs.

UWECHIA	. . . . .	APPELLANT
	AND	
SAVAGE AND OTHERS	. . . . .	RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1961] 1 All E.R. 830

1961 Jan. 24, 25, 26;
Feb. 21

Lords Tucker, Hodson and
Mr. L. M. D. de Silva

*Privy Council—Nigeria—Specific performance—Conditional contract—
Promissory note—Document promising to pay money for " value received "*

or in default to convey property—Whether conditional contract for sale of land of which specific performance would be decreed.

In August, 1954, R. signed the following document, which was headed "Promissory Note": "I promise to pay to (the respondent) or order three months after date the sum of £780 for value received or in default to convey to him all those messuages together with appurtenances thereto situate at No. 6 New Market Road in the township of Onitsha, to hold the same unto the (respondent) or order in fee simple," R. died in September, 1954, the £780 not having been paid. The respondent sought specific performance of the document against the trustees of R.'s will on the ground that there was a conditional contract to convey.

Held: on the true construction of the document, the relationship of vendor and purchaser was never established between the respondent and R. since the words "value received" revealed no ascertained or ascertainable price and since value received, if referring to a past consideration, would be insufficient to support a contract for the sale of land; therefore, specific performance would not be granted.

Tapply v. Sheather (1862) 7 L.T. 298 distinguished.

[As to when specific performance will be ordered on a conditional contract, see *Halsbury's Laws* 31 (2nd edn.) p. 336, para. 369; and for cases on the subject, see 42 *Digest* 441, 117, 118.]

Case referred to:

Tapply v. Sheather (1862), 7 L.T. 298; 35 *Digest* 242, 27.

APPEAL by special leave by C. A. Savage, Solomon Kayode and Jonathan Sunday Rotibi, trustees of the Will of S. O. Rotibi, deceased, from an order of the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton, F.C.J., Olumuyiwa Jibowu F.J. and M. C. Nageon de Lestang F.J.) dated March 18, 1957, allowing an appeal by the respondent, Mr. M. O. Uwechia from a decision of the Supreme Court of Nigeria (Brown J.) dated December 14, 1955, dismissing an action by the respondent for specific performance. The facts are set out in the judgment of the Board.

Ian Percival for the appellants.

Dingle Foot Q.C. and *R. Millner* for the respondent.

LORD HODSON. This is an appeal against an order dated March 18, 1957, made by the Federal Supreme Court of Nigeria allowing an appeal from a dismissal by the Supreme Court of Nigeria of a claim for specific performance.

The appellants are the trustees of the will of Samson Omolona Rotibi deceased. The respondent by his statement of claim alleged that, by an agreement to convey made between him and the deceased on August 24, 1954, the deceased agreed to convey to him for the sum of £780 after three months from the date mentioned his freehold properties at No. 6 New Market Road, Onitsha. The deceased died on September 9, 1954. The respondent himself gave no evidence as to the circumstances in which the agreement was reached, and relied solely on the copy of a document in the following terms:

" PROMISSORY NOTE

£780

August 24, 1954.

I promise to pay to Mathew Uwechia or order three months after date the sum of £780 for value received or in default to convey to him all those messuages together with appurtenances thereto situate at No. 6 New Market Road in the township of Onitsha, to hold the same unto the said Mathew Uwechia or order in fee simple.

(Sgd.) S. O. Rotibi."

The original of this document, which does not correspond in terms with the agreement alleged in the statement of claim, was not produced by the respondent but was said to be in the possession of one of the appellants, namely, Savage; it was proved that the document was shown to the appellants on September 14, 1954. On this evidence, the case proceeded on the footing that the deceased and, after his death, the appellants, who stood in his shoes although they did not obtain probate until July 28, 1956, were in default, in that the £780 had not been paid. It was submitted by the respondent in the Federal Supreme Court that there was here a conditional contract to convey.

The trial judge dismissed the claim for a reason which is not now supported and need not be discussed. The Federal Supreme Court, however, admitted the claim and made an order for specific performance, having arrived at the following conclusion (expressed by the Federal Chief Justice with whom the other members of the court agreed): "It (that is to say the document of August 24, 1954) is an agreement to pay a specific sum by a certain date, and in default of such payment to convey the property referred to."

In ordering specific performance as they did, the court must have treated the agreement as a contract for the sale of land on the footing that the value received for the promise to pay £780 had been converted into the purchase price for the land. It is clear that, unless there is such a contract, namely, a contract for the sale of land at an ascertained or ascertainable price, specific performance cannot be ordered. Their Lordships agree with the Federal Supreme Court that the question whether the remedy of specific performance is available to the respondent turns on the construction of the document, but they do not agree with the conclusion that there was an agreement which amounts to a contract for the sale of land.

Argument has been directed to various meanings which the document is said to be susceptible of bearing. It was, for example, submitted that it is a mortgage, that the land was made security for the £780 and that it is necessary to imply that the words "by way of security for the debt" at the end of the document. The respondent's remedy thus, it is said, would be by way of foreclosure action. Their Lordships are in agreement with the Federal Supreme Court in rejecting this submission. The document contains none of the ingredients of a mortgage and no words to indicate that the respondent was to have security for his debt; see *Tapply v. Sheather* [1862] 7 L.T. 298, to which reference will later be made.

It is, in their Lordships' view, unnecessary to consider the various other submissions made by the appellants, for they are of opinion that the appeal succeeds on the ground that, on the true construction of the document, there was no contract for the sale of land or, to put the matter in another way, the relationship of vendor and purchaser was never established between the respondent and the deceased.

It is not without significance that the document is called a promissory note. It is true that the title given to it may not be an accurate description of it, but it is certainly appropriate to describe the first part down to and including the words "for value received." These words are commonly included in promissory notes, and may refer to a consideration which is past, remembering that past consideration is sufficient to support a promise in a promissory note: see the Nigerian Bills of Exchange Ordinance (2). The words "for value received" are the only words in the document which refer to consideration moving from the promisee and there is nothing in them to show what the consideration was. In short, no price is stated. It is

left uncertain and is neither ascertained nor ascertainable. Moreover, value received, if referring to a past consideration, would be insufficient to support a contract for the sale of land although, as stated earlier, it would be sufficient to support a promise to pay given in a promissory note.

The case is, in their Lordships' opinion, different from *Tapply v. Sheather* [1862] 7 L.T. 298 where the consideration for the sale of land was clearly expressed in the contract. There, an agreement was entered into between the plaintiff and the defendant, which, after reciting that the latter was entitled to two leasehold farms, and that the plaintiff had lent to him a certain sum and had agreed to make him further advances in consideration of the agreement thereafter contained, it was agreed that the said sum and such further sums as should be advanced, with interest, should be repaid on a day named but, if default should be made in payment, the defendant agreed to assign to the plaintiff the said lease for the residue of the terms without any further consideration together with the furniture, etc., growing crops, etc., at a valuation. It was held by Lord Westbury L.C., reversing the decision of Sir Samuel Romilly M.R., that the relationship of vendor and purchaser and not that of mortgagor and mortgagee was constituted by the agreement. Accordingly, as there was nothing in the agreement which should cause the court to refuse to exercise its discretion to grant specific performance, the agreement, he said, ought to be specifically performed. This case was naturally relied on by the respondent as bearing a strong resemblance to his own case on the facts, but their Lordships are of opinion that there is a vital distinction in that there was in *Tapply's* case [1862] 7 L.T. 298 a consideration clearly ascertainable in the document then to be considered, whereas here the requirements of consideration are not fulfilled and there is, therefore, no contract for the sale of land.

This is sufficient to dispose of the appeal, but their Lordships are of the further opinion, that, had it been necessary to consider the question of the exercise of the discretion to decree specific performance, they would have required to be satisfied that the circumstances were such that it was equitable to make a decree. The evidence before the court was meagre indeed. The respondent, who was the plaintiff in the suit, gave no evidence and failed in any way to explain the transaction which he had entered into with the deceased leading to the promise to pay £780 "for value received," whatever that may have been. It would be relevant also to take into consideration the position of the appellants who, though standing in the shoes of the deceased, had at the time of the default not yet obtained probate. Even if they could have raised the money before the expiration of the three months, they would have been under a duty to consider the interest of the beneficiaries entitled to share in the estate of the deceased under his will.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Federal Supreme Court set aside and the judgment of the trial judge restored. The respondent must pay the costs of the appellants, including the costs of the petition for special leave to appeal.

Appeal allowed.

Solicitors: *Knapp-Fishers & Blake & Redden* (for the appellants).

Rexworthy, Bonser & Simons (for the respondent).

CHIEF OKRO ORUKUMAKPOR (FOR HIMSELF AND
AJAMATAN FAMILY OF GBUMIDAKA) APPELLANT
AND

ITEBU AND OTHERS (FOR THEMSELVES AND ON BEHALF OF
THE PEOPLE OF ELUME) RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1961 Feb. 22

Lords Denning, Morris of Borth-y-Gest
and Hodson

Terms of Settlement: construction of—Extrinsic evidence admissible to explain the terms where they are inexplicit or ambiguous. Evidence Act, s. 132 (8).

If a document (in this case the Terms of Settlement drawn up by the Parties in a previous suit) is ambiguous, evidence would be admissible under the laws of Nigeria to explain it (Evidence Act, s. 132 (8)).

LORD DENNING. The Ajamatan family are the owners of a tract of land in the Western Region of Nigeria. It is called the Idale land, that is to say, the land across the river. It is so called because it is separated from the communal land of the Elume people by a creek or river. Many of the Elume people go to the Idale land to collect palm fruits. The question in this action is, what tribute is payable by the Elume people to the head of the Ajamatan family.

Each member of the Elume people who comes on to the Idale land for the first time in his life (that is to say, who has never been before to collect palm fruits) has to pay an "entrance" fee of 14s. There is now no dispute about that. But there is also a tribute payable—by someone—of four tins of palm oil each season. And this is the dispute: does each member of the Elume people have to pay four tins? or, do the whole people of Elume only have to pay four tins between them?

The plaintiff Chief Okro Orukumakpor, for himself and the Ajamatan family, claims that *each person* of the Elume people who enters the Idale land to collect palm fruits must pay a tribute of four tins of palm oil each season. But the defendants, for themselves and the people of Elume, say that *the whole* of the Elume people need only pay each season one lot of four tins of palm oil for their whole community, and that this covers everyone of their people who enters to collect palm fruits. On 16th August, 1956, the High Court of the Western Region (Onyeama, J.) decided in favour of the plaintiff; but on 3rd March, 1958, the Federal Supreme Court (Nageon de Lestang, Ag. F.C.J., Abbot, F.J., and Henly Coussey, Ag. F.J.) reversed that decision and decided in favour of the defendants. The plaintiff now appeals to Her Majesty in Council.

The decision of this dispute turns on the true construction of certain Terms of Settlement dated 11th November, 1954, but before turning to them their Lordships will set out the long history of disputes between the parties because they give the background.

In 1926 the plaintiff's predecessor Iguereghe Ajomatan established his title to the Idale land in a suit in the Provincial Court against one Yalaju. Yalaju was, it would seem, not one of the Elume people, but a representative of other tribes or communities. The Provincial Court held

that " Ajomatan was the original owner of this land and that he and his descendants have controlled and owned this land, further that defendants are entitled to use the land as descendants of Igonai and Umojakpe but must pay tribute according to Native Laws and customs to the present Head of the Ajomatan family or the man appointed by him to be in charge of the land." That judgment was upheld both by the Supreme Court and by the Full Court on Appeal.

It would appear that in order to establish his title against Yalaju, the plaintiff's predecessor appealed to the Elume people for assistance. Not all of the Elume people gave assistance but some did and in return received for a time a share of the rents or tributes which the plaintiff or his predecessor collected from the land. But after a time the plaintiff stopped sharing the rents or tributes with the people of Elume. Thereupon the people of Elume claimed that the Idale land belonged to them. They brought an action in the customary court against the plaintiff claiming title to it. They succeeded in the Okpe No. 2 Court and in the Western Urhobo Appeal Court but the plaintiff appealed to the Magistrates' Court and the judgments of the customary courts were set aside. So the people of Elume took nothing by their action.

Later on, in yet a further effort to assert a title to the Idale land, the people of Elume disputed the plaintiff's right to open and close the bush for the season. They entered on the land and cut palm fruits. Thereupon the plaintiff Chief Okro Orukumakpor, for himself and the Ajomatan family, brought an action against Itebu, Ideghele, Idoghale, Eghomitse and Awieni, for themselves and on behalf of the people of Elume. The plaintiff claimed £600 damages for trespass on the Idale land and an injunction to restrain the defendants from further entering on the land. The action was tried by Mr. Justice Mbanefo (as he then was) and he gave judgment on 3rd December, 1953. In the course of his judgment he considered closely the previous history (which their Lordships have summarised above) and went on to say:

" In short my findings are that Idale land belongs to the Ajomatan family, that other Elume people have since the Provincial Court case enjoyed a share of the rents of the land by virtue of the assistance they received during that case, and that the defendants by arrogating title to themselves and entering the bush in disregard of the right of the Ajomatan family to open and close the bush are liable in trespass, for damages which I assess at £20 with costs at 25 guineas . . .

For the guidance of the parties I strongly recommend that they should get together and reach a settlement on the division of the fruits of the land as I am satisfied that the Ajomatan family have not enjoyed the land alone since the Provincial Court case."

It is to be noticed that although the plaintiff claimed £600 damages, he was only awarded £20 damages: and he was not awarded an injunction. He was on this account dissatisfied with the result and he appealed to the West African Court of Appeal. No doubt he wished to get more damages and an injunction, if he could, to stop the people of Elume coming on to the land. The appeal was heard on 3rd November, 1954, but during the hearing of the appeal a settlement was reached. Terms of settlement were drawn up and signed on 11th November, 1954, by the solicitors for each side: and on 15th November, 1954, they were made an Order of Court. As the decision of this case turns upon these, their Lordships set them out in full:

“ Terms of Settlement ”

1. The parties to the above appeal agree to the undermentioned terms of settlement and pray that they be made an Order of this Honourable Court.
2. The Respondents agree that the Appellants are the owners of the land known as ‘ IDALE ’ the subject matter of this appeal.
3. The Appellants agree to permit the Respondents and their people of ELUME to enter at all times upon the said land to farm and during the season when the bush is declared open to collect palm fruits on payment of the customary tribute.
4. The Appellants further agree not to withhold their consent unreasonably or to unreasonably delay the opening of the said bush.
5. The Respondents’ people who continue to enter into the land to collect palm fruits agree to pay 4 tins of oil per season as tribute to the Appellants.
6. Those people of ELUME who are entering the said ‘ IDALE ’ land for the first time will have to pay the usual entrance fee of 14s.
7. The judgment of the lower Court is hereby confirmed.
8. Each party bears his own costs in the appeal.
9. The Appellants agree that the said tribute of 4 tins hereby reserved will not be subject to any further increase in the future.”

Those terms of settlement were agreed in November, 1954. But soon the parties were at variance again. Some of the Elume people entered the Idale land and collected palm fruits: and although some of them entered it for the first time, they did not pay the entrance fee of 14s.: nor did they pay the 4 tins of palm oil each. So the plaintiff charged them in the customary court (Okpe Court No. 2) with “ stealing by entering into the complainant’s palm bush known as ‘ Idale ’ and thereby collected palm fruits to the value of £91 16s., without the knowledge and consent of the complainant.” They were convicted and fined 10s. each or in default two weeks’ imprisonment. The customary appeal court confirmed this decision. But on 10th August, 1955, the Acting District Officer quashed the decision. He held that “ there is a genuine dispute concerning the interpretation of those terms of settlement. The case should never have been dealt with criminally . . . If complainant wishes to proceed in the case, he may do so, by civil action.”

So the plaintiff returned to the civil courts. His first step was taken on 19th October, 1955. He made an application to the West African Court of Appeal asking them to insert words into the terms of settlement so as to make it clear that *each member* of the Elume people who enters the land known as “ Idale ” is required to pay “ 4 tins of oil per season ”: whereas the defendants said these 4 tins covered the whole group of Elume people. The Court of Appeal refused to insert any such words, holding that they had no power to vary the terms of a settlement reached by the parties.

Finally, on 6th February, 1956, the plaintiff brought this action against 37 members of the Elume people for and on behalf of themselves and all the Elume people. He claimed against all 37 of them a *declaration* that he was entitled to collect 4 tins of palm oil per person per season: but he only claimed tangible relief from 33 of them because it was only those 33 who had actually entered the Idale land and collected palm fruits from them. The case was tried before Onyeama, J. He held that the terms of settlement were ambiguous and he admitted extrinsic evidence to help him interpret them. In the result, on 11th August, 1956, he gave judgment for the plaintiff against *each* of the 33 defendants for 4 tins of palm oil (being

tribute for the 1954-55 season) and declared against all the defendants that the plaintiff, as representing the Ajomatan family, was entitled to collect 4 tins of palm oil each season from each person entering on Idale land to collect palm fruits. The Judge added that a tin of oil is a tin containing 4 gallons of oil. The defendants appealed to the Federal Supreme Court who, on 3rd March, 1958, allowed the appeals. The Federal Supreme Court held that the terms of settlement were clear and unambiguous and that the judge had erred in hearing extrinsic evidence. They held that Clause 5 meant that the people of Elume must make a *collective* payment of 4 tins of oil per season.

Their Lordships take a different view of the Terms of Settlement from that taken by the Federal Supreme Court. If the terms are to be construed without the aid of extrinsic evidence, their Lordships would construe them differently from the Federal Supreme Court. The crucial issue is whether the payment provided by Clause 5 is individual or collective; and in this respect their Lordships cannot see any valid distinction between the wording of Clause 5 and the wording of Clause 6.

Clause 6 says that "Those people of Elume who are entering the said 'Idale' land for the first time will have to pay the usual entrance fee of 14s." That can only mean that *each individual* person who is entering the land for the first time has to pay 14s.: and this was admitted in the Courts of Nigeria. The whole group never enters the land for the first time. Only individuals do so. And accordingly each individual must pay 14s. when he enters for the first time. Clause 6, therefore, means that "*such of*" those people of Elume who are entering for the first time must pay 14s.

Clause 5 says that "The Respondents people who continue to enter into the land to collect palm fruits agree to pay 4 tins of oil per season as tribute to the Appellants." It seems to their Lordships that the phrase "who continue to enter" in Clause 5 has a similar bearing on the rest of the clause as the phrase "who are entering" has in Clause 6. It refers not to all the people of Elume but only to those *who continue* to enter. Just as Clause 6 must be taken to refer to *such of* the Elume people who are entering for the first time, so Clause 5 must be taken to refer to *such of* the Elume people who continue to enter. Their Lordships notice that the Federal Supreme Court do not mention the words "who continue to enter." The Federal Supreme Court says that the clause means that "the respondents' people must make a collective payment of 4 tins of oil per season"; thus missing out the words "who continue to enter" which seem to their Lordships to be of considerable significance.

Their Lordships find support for their interpretation of Clause 5 by reference to the other clauses of the Terms of Settlement. Clause 3, for instance, says "the appellants agree to permit the respondents and their people of Elume to enter at all times upon the said land to farm, and during the season when the bush is declared open, to collect palm fruits on payment of the customary tribute." What is the meaning of "customary tribute" in that clause? That is capable of being proved by evidence. It comes within what is known to English law as the "surrounding circumstances" or in the law of Nigeria as the "circumstance of the case." Section 132 (4) of the Evidence Ordinance says:

"In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are hereinafter called the circumstances of the case."

There was ample evidence before the trial judge to show what the customary tribute was. It was 4 tins of oil per person per season. The trial judge summarised it in this way: "The plaintiff gave evidence and called witnesses who all stated that it was customary for each tenant to pay 4 tins of oil a season." And although the defendants denied that this custom applied to them, they admitted that other people had to pay 4 tins of oil each. As the judge said: "From the defendants' own evidence it appears that 'strangers' entering on the land pay 4 tins of oil each. No distinction was drawn in the terms of settlement between the defendants and other people." It seems clear from this observation that the judge was prepared to hold and did hold that the customary tribute was 4 tins of oil per person per season. And accordingly clause 3 provides that the people of Elume are to pay it.

Such is the interpretation which their Lordships put upon the Terms of Settlement apart altogether from any evidence of the intention of the parties. But they wish to say that, if it were right to consider the document to be ambiguous, then they think that evidence would be admissible under the laws of Nigeria to explain it. There are two relevant sub-sections in the Evidence Ordinance on the point:

Section 132 (3) says that "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say." That sub-section has no application to this case. Clause 5 certainly has some meaning. The sole question is, what is its meaning?

Section 132 (8) says that "If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstance of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates." This sub-section does seem to fit this case: because, on the footing on which their Lordships are now proceeding, the language of Clause 5 must be considered to be ambiguous and to apply equally well both to the people of Elume taken collectively as a group, and to the people of Elume taken individually as separate persons. Accordingly, under section 132 (8), evidence is admissible both "of the circumstances of the case" (such as of the customary tribute): and also "of statements made by any party to the document as to his intentions." The trial judge admitted such evidence and their Lordships think that, on the footing that the document is ambiguous, he was entitled so to do. In particular he admitted the evidence of the plaintiff, who said:

"The Elume people come on Ajomatan land to collect palm fruits; I permitted them to come on the land on payment of tribute; it was agreed that on the first occasion each of the Elume people came on the land he would pay 14s.; at the beginning of each palm fruit collecting season, each person was to pay four tins of palm oil as tribute to me; anyone who had no oil to pay would pay £2 . . . When we were in Lagos Itebu came to me and told me they were prepared to pay the usual tribute. I agreed and terms of settlement were drawn up by our lawyers and after we had signed the settlement it was made an Order of Court."

The trial judge accepted this evidence. He said that he was "satisfied that the plaintiff's interpretation ought to be upheld for the reason that it is supported by the evidence before me." Their Lordships see no reason to

reject this finding: and, if the document is ambiguous it affords good reason for holding that the tribute payable by the people of Elume is 4 tins of oil per person per season.

The Federal Supreme Court were of opinion that the Elume people were entitled to special consideration because they had in the past helped the Ajomatan family to fight a case about the Idale land (the Provincial Court case) and had since been sharing in the fruits of that land. Their Lordships realise the force of this observation (which incidentally involves the use of extrinsic evidence). But they think it is met by the fact that the Elume people obtained substantial benefit from the Terms of Settlement. One particular benefit was that the plaintiff gave up his claim to an injunction and the people of Elume obtained the *right* to enter the Idale land to farm and to collect palm fruits. Another is that the tribute of 4 tins could not be increased at any time in the future.

In the result their Lordships are of opinion that the plaintiff's interpretation of the Terms of Settlement is correct. They will therefore humbly advise Her Majesty that this appeal should be allowed, the judgment of the Federal Supreme Court set aside and the judgment of the High Court of the Western Region restored. The respondents must pay the costs of the plaintiff here and below.

KOJO ASANTE APPELLANT

AND

COMPAGNIE FRANCAISE DE L'AFRIQUE
OCCIDENTALE RESPONDENTS

[ON APPEAL FROM THE GHANA COURT OF APPEAL]

(1961) G.L.R. 125

1961 Feb. 28

Lords Reid, Tucker and
 Morris of Borth-y-Gest.

Practice and Procedure: interim attachment of goods. Appeal turned on facts—No questions of law involved.

LORD MORRIS OF BORTH-Y-GEST. The substantial issue which arose in this litigation was whether the appellant proved that he was the owner of certain property which the respondents attached on the basis that the property belonged to a person whom they were suing. The respondents sold goods to one Kwabena Abire who may be referred to as Abire. He was a lessee of the respondents at a rental of £65 per month of premises known as Plots Nos. 21/22 on the Krobo District (Antoa Road) Kumasi. The sales took place during the year 1954. Towards the end of that year the respondents claimed that the sum of £1,739 was due to them from Abire as the balance due for the goods which they had sold to him. In December, 1954, they issued a writ against him claiming that amount (Suit No. D.C. 336/1954). They then decided to avail themselves of the procedure for the interim attachment of property made possible by the Civil Procedure provisions under the Courts Ordinance (Laws of the Gold Coast 1951 Chap. 4). In the result an interim attachment order relating to certain goods

alleged to be the goods of Abire was made by the Court. Thereupon the appellant claimed that the goods were his. As claimant he applied to the Court for a discharge of the order of interim attachment. His application was refused. He then issued a writ against the respondents alleging that the goods which had been attached belonged to him. He claimed an order releasing the attachment and he also claimed substantial damages.

Neither the documents relating to the application for an interim attachment order nor the order itself appear to have been amongst the documents in the action. It can be assumed however (having regard to the provisions of the Ordinance) that the respondents specified the actual goods which they sought to attach and asserted that those goods belonged to Abire. It cannot now be stated what the actual goods were.

At the premises which were leased to Abire there was a store or bar which was known as "Coronation Bar." The evidence in the case, which, so far as recorded, appears in many respects to have been meagre in detail, is inadequate to furnish an exact picture of the layout of the premises leased and of the "Coronation Bar." Certain documentary evidence suggests that Antoa Road 21/22 was the private address of Abire in the Gold Coast as well as his business address. Though a copy of the interim attachment order is not available it can be assumed that the goods specified in the order were the goods which were within the Coronation Bar. The evidence establishes that a bailiff went to the store or bar and took an inventory. The witness who was called by the respondents gave evidence that he was present at the time that the inventory was taken: he stated that the appellant came to the bar and was told the purpose of the bailiff's visit but said nothing. The appellant in his affidavit in support of his application, as claimant, to discharge the interim attachment order said: "That on Monday the 24th January, 1955, the goods in my store or bar popularly known as 'Coronation Bar' in the House No. 21/22 Kumasi were attached and the store or bar was sealed up." The result of the attachment and the sealing up of the store or bar was naturally that business could not be carried on there until the attachment was discharged and if, as the appellant alleged, the "Coronation Bar" and its contents belonged to him then manifestly he was caused loss and damage.

If it is assumed, as the appellant stated, that the goods in the store or bar were attached on the 24th January, 1955, and that the place was then sealed up the appellant acted with promptitude thereafter in making application to have the order discharged. He swore his affidavit on the 28th January. It contained the following paragraphs:

"4. That I am a Tenant of the Defendant and I do not owe any arrears or rent.

5. That on or about the 5th day of November, 1954, I bought from the Defendant and two others all the goods and utensils in the said Bar: and the said Store or Bar was transferred to me.

6. That I paid the sum of Eight hundred and thirty-seven pounds six shillings (£837 6/-) to the said three persons, namely D. K. AWUAH, YAW MANU and KWABINA ABIRE who were the owners of the goods utensils and other things in the Store or Bar.

7. That the receipt for the said payment was stamped by the Government Treasury on the 3rd January, 1955.

8. That on the 4th January, 1955, a formal application was made to the Licensing Authority, Kumasi Municipal Council for my name to be substituted for Kwabina Abire in respect of the Licence for the said Bar.

9. I swear to this Affidavit and say that the Defendant has no right title or interest whatsoever in the said goods so attached and I pray this Honourable Court to grant an order to release the attachment to enable me to carry on with my business.”

It will be seen that the appellant did not allege any earlier date than the 5th November, 1954, in respect of his ownership whereas, as will appear, he later asserted ownership as from June, 1954. The respondents opposed the appellant's application. It was perhaps not unnatural that they were not then prepared to accept the appellant's claim to ownership. The Coronation Bar formed part of premises which they had demised to Abire and there was a clause in the lease which precluded Abire from assigning, underletting or parting with the demised premises or any part thereof. They had not been asked by Abire to give permission for a sub-letting of the Coronation Bar to the appellant. Furthermore they asserted that Abire had in September, 1954, given them a cheque for £1,300 in part satisfaction of his indebtedness to them which cheque was returned unpaid by the bank when presented in October, 1954. They said further that they had intimated to Abire that they intended to sue him. They contended therefore that if following upon these events there had been in November, 1954, a sale by Abire to the appellant of the contents of the store or bar such sale was only effected in order to evade any decree that might be made against Abire if he were sued by the respondents. An affidavit setting out these various matters was sworn on the 3rd February, 1955, by an employee of the respondents. On the 5th February the application of the appellant was refused by the learned Judge (Quashie-Idun, J.). That was followed by the institution of the action now under appeal. The appellant, as plaintiff, issued his writ against the respondents on the 17th February, 1955. By his statement of claim he asserted his ownership of the Coronation Bar and its contents: he asserted such ownership at an earlier date than the date (5th November, 1954) which he had mentioned in his affidavit of the 28th January, 1955. He asserted that he had become owner on the 1st June, 1954. His claim was put forward on the basis of the facts alleged in the following paragraphs of his statement of claim:

“ 2. The goods in the said Bar were sold out to the Plaintiff by three partners for the sum of Eight hundred and thirty-seven pounds six shillings (£837 6/-) under an Agreement dated 1st June, 1954.

3. Under a receipt dated 5th November, 1954, the Plaintiff paid the whole of the purchase price of Eight hundred and thirty-seven pounds six shillings (£837 6/-) of the business to the partners, namely, Kwabena Abire, D. K. Awuah and Yaw Manu.

4. Since the 1st day of June, 1954, the Plaintiff has been the sole owner of the Bar and has been buying drinkables and other foodstuffs from the other stores for the purpose of the business and had been responsible for the payment of wages of all workmen attached to the business.

5. The Plaintiff is a sub-tenant of the store and has been paying monthly rentals of Ten pounds (£10) to Kwabena Abire, and the Plaintiff does not owe any arrears of rent.”

On the basis of those facts he claimed that as he did not owe anything to the defendants his goods had been wrongfully attached and his store wrongfully sealed up with consequent loss of profits to himself. The respondents by their defence denied the appellant's claims to ownership of

the Coronation Bar and its contents and denied any knowledge of a subletting to him. They allege that Abire owned the Coronation Bar and had bought drinkables, provisions and other lines from the respondents down to September, 1954. They further pleaded as follows:

“ 5. The defendants say that in November, 1954, the said Abire had already become indebted to the Defendants in the sum of over £1,800, the business transaction dating back as far as February, 1954, and that any purported sale of the Coronation Bar to the Plaintiff as alleged in his Statement of Claim was made to defraud Abire's creditors—the Defendants herein.

6. The Defendants will contend that there is some collusion between the said Kwabena Abire and the Plaintiff, and that the Plaintiff is not entitled to any relief at all.”

The trial took place before Quashie-Idun J., on the 16th June, 7th July, 5th September, 18th October, 19th October and 25th October, 1955. On the 11th October, on the application of the respondents, an order was made releasing the property from the interim attachment order pending the determination of the case.

The evidence adduced at the trial by the appellant was to the effect that the Coronation Bar and its contents had belonged to three people, viz., Abire, Manu, and Awuah: that he became a partner with them on the terms of an agreement (agreement A) of the 5th April, 1954: that he later bought them out (thereby becoming sole owner) on the terms of an agreement (agreement B) of the 1st June, 1954: and that he had paid all the purchase price as was acknowledged by a receipt dated the 5th November, 1954. Evidence was given at the trial by the appellant himself and on his behalf by Abire, by Ama Adade (the mother of Awuah), by Harrison Tuburu, a police corporal and by Awuah: on behalf of the respondents evidence was given by Robert Christian Yeboah their chief clerk.

The learned Judge gave judgment on the 25th October, 1955. He held that the appellant had bought the business and was an innocent purchaser for value. In the course of his judgment he said:

“ I have carefully considered the evidence of the Plaintiff and of the other witnesses he has called to prove that he had bought the business before it was attached. I have considered the conduct of Abire in the whole transaction and I have come to the conclusion that whatever the conduct of Abire has been towards the Defendants, I accept the evidence that the Plaintiff bought the business and was an innocent purchaser for value. I am satisfied that after buying the business he made an application for the licence to be transferred into his own name. The transfer was not made before the attachment.”

He awarded the appellant the sum of £669 for loss of profits in respect of the period during which the business was attached.

The respondents appealed to the West African Court of Appeal. Leave was given to the respondents to adduce as further evidence (a) the notice of motion of the appellant (of the 26th January, 1955) for the discharge of the interim attachment order and the affidavit in support of the 28th January, 1955, (b) the respondents' affidavit in opposition dated the 3rd February, 1955, and (c) the minutes of the Court dated the 5th February, 1955. It would seem that the respondents intended to advance and did advance some contention based upon the fact that the appellant's claim had before the trial of the action already been brought before the learned Judge (by way of

motion and affidavit) upon the same set of facts and had been dismissed. It is sufficient to say that the respondents did not raise before their Lordships' Board any point to the effect that the claim of the appellant in the action was adversely affected by his failure in the application which he made before he commenced his action. It is also to be recorded that no issue as to the measure or quantum of the damages awarded by the learned trial Judge has been raised before their Lordships.

The appeal was heard before Coussey P., Korsah C.J. and Verity Ag.J.A. The appeal succeeded and the judgment in favour of the appellant was set aside. The reasons for judgment, which were concurred in by the other members of the Court, were given by Coussey P. The learned President referred to the two agreements (A and B) which have been mentioned above and also to the receipt (C) of the 5th November. He also referred to an action of the 11th November, 1954, which now calls for mention. That was an action brought by Awuah and Manu against the appellant for the sum of £100. The alleged agreement of the 1st June, 1954 (agreement B) was one between Abire, Awuah and Manu of the first part and the appellant of the second part and was for the sale to the appellant of "all the properties in the first party's Coronation spirit and Chop Bar in house No. K.O. 21/22 Kumasi at £837 6s. (Eight hundred and thirty-seven pounds six shillings)." That agreement further recorded that the three persons had received £500 from the appellant "out of the said amount of £837 6s. Od." and that the balance of £337 6s. Od. was to be paid to the three persons by the appellant as to £100 at the end of July, 1954, and as to £237 6s. Od. at the end of November 1954. The writ issued by Awuah and Manu against the appellant claimed £100 from him "being all the properties in the Coronation Spirit Chop Bar belonging to the Plaintiffs and bought by Defendant and Defendant promised payment on instalment basis as per Agreement in hand." That action never went to trial. Awuah said, when giving evidence in the present case: "Plaintiff informed Manu and me that he had paid an amount of £100 to Abire. We sued him at the Native Court. Later Abire admitted that Plaintiff had paid £100 to him. We discontinued the action."

The alleged earlier agreement of the 5th April, 1954 (agreement A) certified that the four persons had "agreed to form a Company of making a chop bar and drinkables in the premises of No. K.O.21/22, Antoa Road, Kumasi as styled 'Coronation Bar.'" It recorded that the appellant has already paid £610 15s. Od. "as capital to the Company for the business" and it provided that any profit should be divided equally between the four persons and that "same shares shall be given to each person if there any deficit arise in the business."

Both agreements A and B as well as the receipt C purported to contain words showing that licensed letter writers, whose licence numbers were recorded, had been concerned with the documents and had been witnesses to the marks of Abire, Manu and the appellant and to the signature of Awuah. All four persons had been parties to agreements A and B. The receipt of the 5th November was that of Abire alone. That receipt had been stamped on the 3rd January, 1955, which was within two months of the date it bore. The alleged agreements A and B were produced by the appellant when he gave evidence on the 16th June, 1955. They had not then been stamped but they were admitted in evidence upon an undertaking to have them stamped and to pay the appropriate penalty: the markings on the documents of the Commissioner of Stamps dated the 28th December, 1955, show that the undertaking was honoured. Other documents which were

before the learned trial Judge and the Court of Appeal included alleged receipts for rent purporting to show that on the 16th June, 28th July, 30th August, 29th September, 30th October and the 31st November, 1954, Abire had received £10 from the appellant in respect of store rent for each one of the respective months named.

The conclusion reached by the Court of Appeal was that the appellant's claim to have purchased the contents of the Coronation Bar was a deliberately fictitious claim. There was also an alternative conclusion to the effect that if there was a transaction of purchase it was embarked upon with intent to delay and hinder the creditors of Abire and (pursuant to the Statute 13 Elizabeth Cap. 5) should be deemed to be void as against the respondents.

In the course of his Judgment the learned President said:

“ A careful examination of the documents referred to and of the receipts for rents produced by the plaintiff-respondent satisfied me without going into further details, that these are all fictitious documents and badges of the fraud designed to shield the debtor Abire who in fact owned the goods and to defeat his creditors of whom the defendant company were pressing their claim in December 1954, Abire being perfectly aware long before that date that proceedings against him were imminent.”

In reference to the conduct of the appellant the learned President further said:

“ In failing to stamp the Agreements, Exhibits ‘ A ’ and ‘ B,’ assuming that they were made on the dates they bear, which I do not believe, the plaintiff was keeping secret the purchase of the business. Exhibit ‘ C ’ was clearly prepared and was accepted by the plaintiff in anticipation of a claim against and seizure of Abire's goods, while the action in the Kumasi Municipal Court was designed to cloak the fraud with a semblance of circumstantial truth, and was badly timed.”

He also said:

“ I think the transaction set up by the plaintiff in support of his claim is entirely fictitious to his knowledge and, if it is not fictitious, that it was embarked upon with intent to delay and hinder the creditors of Abire and had that effect and that it is therefore clearly fraudulent and void under the Statute of Elizabeth and with the principle of *Twyne's case*, 3 Repts. 80b.”

It will be seen that whereas the learned trial Judge who saw and heard the appellant and the other witnesses came to the conclusion that the appellant did purchase as he alleged and was an innocent purchaser for value the Court of Appeal felt able to decide that he had fraudulently asserted an entirely fictitious transaction which he had sought to establish by a series of fictitious documents. Upon the appeal now brought to their Lordships' Board it becomes necessary to consider whether any critical testing of the validity of the alleged documents or any analysis of the evidence and the contentions of the parties warranted the conclusion of the Court of Appeal that the learned Judge ought not to have held that the appellant had made out his claim and ought not to have held that he was an innocent purchaser for value.

There is no doubt that Awuah and Manu did sue the appellant on the 11th November, 1954. They sued him for £100. They used the somewhat strange

language "being all the properties in the Coronation Spirit Chop Bar belonging to the plaintiffs and bought by defendant and defendant promised payment on instalment basis as per Agreement in hand." Awuah said in evidence that he, Abire, Manu and the appellant had entered into an agreement (B) in June, 1954. A provision of that agreement was that the appellant was to pay £100 at the end of July, 1954. As stated above Awuah gave evidence that after he and Manu had brought the action against the appellant Abire admitted that the appellant had paid the £100 to him and so the action was discontinued.

The view of the Court of Appeal was that the action "was designed to cloak the fraud with a semblance of circumstantial truth and was badly timed." This involved that Awuah and Manu were on the 11th November parties to a rather twisted move designed to lend verisimilitude to a fabricated story. If the suggestion is that Abire on that date was the sole owner of the Coronation Bar and its contents and that the concocted scheme was to seek to prove that the appellant had by purchase become the owners then the commencement of an action by which it was asserted that the appellant had not paid what as a purchaser he owed on an instalment basis seems a very inapt way of seeking to create evidence to support a firm title in the appellant. Furthermore it might be asked why Abire was not also made a plaintiff in that action if it was only begun as a move in a conspiracy to concoct some form of proof that he (Abire) was no longer the owner? If the plan in November was to invent a sale to the appellant and then to set about to produce spurious supporting documentary evidence it would seem probable that some reasonably clear and straightforward documents would be created. As it is the figures in agreements A and B and in receipt C are not easy to reconcile: they can only be understood if the oral testimony is accepted. If the purpose to be achieved was to bring documents into existence which would create the delusion that the appellant had bought the Coronation Bar and its contents it would seem to require a strange and almost perverted subtlety to suppose that agreements A and B and receipt C were the best instruments for the purpose.

If the suggestion is that those three documents (agreements A and B and receipt C) were not in existence on the 11th November, 1954, but were later concocted with the respective earlier dates of the 5th April, the 1st June and the 5th November ascribed to them, a measure of freakish inventiveness in the conspirators must be assumed. These suggestions involve possibilities which in the setting of this case do not appear to their Lordships to be probable. Furthermore it would be difficult to condemn any witnesses who were not questioned on these lines in cross-examination.

If as the Court of Appeal have held the goods belonged to Abire and if the purpose was to defeat his creditors it seems strangely elaborate and far-fetched to invent in the first place a partnership in four persons with a later buying-out by one of the interests of the other three.

Both the appellant and Abire gave evidence that agreements were made to the effect recorded in agreements A and B. Each of those agreements purports to record that a Letter-Writer of stated address and given Licence Number was a witness. That could have been a complete fabrication. If it was it was a somewhat daring one for the efforts of the alleged conspirators would have been destroyed if inquiry had revealed either that there were no such letter-writers and no such licence numbers or that such letter-writers existed but that their signatures had been forged. The possibility that there was some willing complicity of actual letter-writers in fraudulent conduct ought not to enter into the reckoning in the absence of evidence supporting

so serious a suggestion. It is to be observed that the decision of the Court of Appeal makes it necessary to consider the varying possible manifestations of fraud because though there has been a finding of fraud there is no reasonably precise finding as to what it was and as to when and in what way it was effected.

A study of the documents and in particular of agreements A and B shows that some technical and legal terms are employed. It is clear that the parties to the alleged agreements (most of whom could not write) could not have drafted the agreements. If they were concocted and were not made on the dates which they bear then some knowledgeable person must have been willing to help in concocting them.

The terms of the writ issued by the respondents against Abire are not recorded in the proceedings. It was stated that the claim was for £1,739 15s. 2d. and was for the balance due for goods supplied. The evidence did not however clearly establish what the goods were which were sold. The appellant said that after he bought the Coronation Bar he himself bought the drinkables for running the bar. Abire said that amongst the goods he bought from the respondents were iron sheets, cement and sugar, and he said that he did not sell in the Coronation Bar any of the goods he bought on credit from the respondents: he said that on the premises that he rented from the respondents he had what he called "a wholesale" where he kept goods. Awuah testified that Abire was trading on his own and consequently neglected the Coronation Bar: it was that circumstance which led to the sale to the appellant. The witness called for the respondents, their Chief Clerk, said that the goods which they sold to Abire were delivered by lorry, on Abire's instructions, to his customers. The witness did not assert that the goods which were the subject of the attachment order (which he valued at about £400) were goods which had been bought from the respondents.

The evidence last referred to above—in respect of which however there are no express findings—seems to show that Abire had trading activities which were unrelated to the business of running the Coronation Bar. The respondents undoubtedly thought, quite honestly, that Abire was the owner of the Coronation Bar and its contents and accordingly, when they could not get payment of money which Abire owed them, they decided to resort to interim attachment procedure. If, however, contrary to what they understood, the appellant had become the owner of the Coronation Bar and its contents and if his purchase did not offend against the Act of 13 Elizabeth Cap. 5, then the respondents had no right to attach his goods and to have the premises sealed up.

The respondents' witness said in his evidence that he used to go to the Coronation Bar to demand payments from Abire and he said that he often saw Abire, Awuah, Manu and the appellant at the bar. He believed that the last three were assistants to Abire. This may have made it reasonable for the respondents to think that Abire was or continued to be the owner. None of this evidence however was such as to refute the appellant's evidence that he had become owner or to make it unreasonable for the learned Judge at the trial to hold that the appellant was an innocent purchaser for value.

It was for the appellant to prove his ownership. In doing so to the satisfaction of the learned Judge at the trial he produced the various documents which have been referred to. For reasons which have been indicated their Lordships are not prepared to accept the theory—for such it is—that the action begun on the 11th November, 1954, was a collusive proceeding instituted for the purpose of bolstering a false claim. As an effort for such purpose it seems ill-designed and maladroit. The opinion of

the Court of Appeal was that the Receipt of the 5th November, 1954, " was clearly prepared and was accepted by the plaintiff in anticipation of a claim against and seizure of Abire's goods " and that the writ of the 11th November, 1954, " was designed to cloak the fraud with a semblance of circumstantial truth." If the writ of the 11th November was " designed to cloak the fraud with a semblance of circumstantial truth " then it is to be observed that what it purports to show is that the appellant owed £100 on that date. That does not seem to fit in with the view that the Receipt of the 5th November which purports to be a receipt in respect of " full payment of the cost " was prepared and was accepted by the appellant in anticipation of a claim against Abire which would result in a seizure of his goods.

The Court of Appeal were additionally influenced in forming a view unfavourable to the appellant by certain conclusions which they drew from the evidence. Some examples may be given. While not accepting that agreements A and B were made on the dates which they bore they considered that assuming that they were so made the appellant was keeping secret the purchase of the business. This matter requires consideration on the basis of the finding of the Court of Appeal which is alternative to their finding that the documents were not genuine but were fictitious. The alternative finding as their Lordships understand it is that there was an actual sale to the appellant but that it was embarked upon with intent to delay and hinder the creditors of Abire. As has been stated above, agreements A and B when produced in evidence were not stamped. Their view of the Court of Appeal was that the failure to stamp them was deliberate and that the reason for this was that the appellant wished to keep his purchase secret and presumably was willing to keep it secret in order to help Abire and in order to hinder and delay his creditors. Their Lordships do not feel able to assume from the mere fact of a failure to have documents stamped that there was the purpose of cloaking a transaction with secrecy. The appellant does not appear to have been cross-examined as to this matter or as to his knowledge at the relevant times of the stamping requirements.

The Court of Appeal were impressed adversely to the appellant by the circumstances that he had not taken out a spirit licence on the 1st July, 1954. It does not however appear that the appellant was invited in cross-examination to deal with this matter and it is to be noted that Abire in his evidence said: " After we had sold the business to the plaintiff we applied for a transfer of the business in the name of the plaintiff. We were told to come in January."

The Court of Appeal observed that the appellant claimed to have been a sub-tenant of Abire though the latter was not entitled to under-let or part with possession and they concluded that the receipts for rent given by Abire to the appellant were fictitious.

In regard to the receipts and to the documents A, B, and C, the learned President expressed his view (in the language set out above) that a careful examination of them satisfied him that they were all fictitious. As Abire had to pay £60 per month for the premises he rented and received £10 a month for the alleged sub-letting it would seem that the sub-letting, if there was one, was of part only of the premises. It does not appear that the appellant was cross-examined in regard to the receipts for rent nor as to the state of his knowledge as to the terms of Abire's tenancy. From the point of view of the respondents it can readily be appreciated that in the absence of some request for permission to sub-let they considered that the Coronation Bar and its contents belonged to Abire. But Abire's failure as their tenant cannot of themselves refute the testimony of the appellant.

Other matters were mentioned by the Court of Appeal and have been considered by their Lordships but on this part of the case it is to be remembered that the appellant not only gave evidence as to all the transactions but said that before he bought he did not know that Abire was indebted to the respondents. The learned Judge who tried the case and who had advantages possessed neither by the Court of Appeal nor by their Lordships came to the conclusion that the appellant owned the goods which the respondents had attached and was an innocent purchaser for value. Though it can be recognised that there were many circumstances in the case which justified a reluctance on the part of the respondents to accept the appellant's claims to ownership, the question which now arises is whether upon consideration of the documents and as the result of processes of reasoning or of drawing inferences from ascertained facts the Court of Appeal was warranted in replacing the learned Judge's acceptance of the appellant's case by findings of fraud. With every respect to the careful judgment of the learned President their Lordships have been unable, for the reasons indicated, to share the view that the decision of the learned Judge at the trial was shown to be erroneous.

Their Lordships will report to the President of Ghana as their opinion that the appeal should be allowed and that the Judgment of the Court of Appeal should be set aside and the Judgment of Quashie-Idun, J., in the Supreme Court restored and that the respondents should pay the appellant's costs in the Court of Appeal and before their Lordships' Board.

AUSTIN RICHTER COLEMAN APPELLANT
 AND
 EMMA KWALEY SHANG
 ALIAS EMMA KWALEY QUARTEY RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL, GHANA]

[1961] A.C. 481; (1961) 2 All E.R. 406

1961 Mar. 7

Lords Tucker, Hodson and
 the Rt. Hon. L. M. D. de Silva

Ghana—Administration—Grant of representation—Issue of Marriage Ordinance marriage—Widow of marriage by native customary law—Joint grant—Statutory application of English legislation—"Wife"—"Widow"—Meaning—Marriage Ordinance (Laws of the Gold Coast, 1951, c. 127), s. 48 (1)—Courts Ordinance (Laws of the Gold Coast, 1951, c. 4), s. 83—Interpretation Ordinance (Laws of the Gold Coast, 1951, c. 1), s. 3 (31), (45)—Statute of 21 Hen. 8 (1529), c. 5, s. 2—Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), s. 3.
Husband and Wife—Marriage—Polygamous marriage system—Succession to personal property—Marriage valid in locus domicilii—Death of first wife—Marriage to second wife under native law—Ghana.
Privy Council—Fact, question of—Statement in judgment that fact not in dispute—Whether challengeable.

By the Marriage Ordinance (Ghana), s. 48 (1): ". . . where any person who is subject to native law or custom contracts a marriage . . . in accordance with the provisions of this Ordinance . . . and such person dies intestate . . . the personal property of such intestate . . . shall be distributed or descend in manner following, viz.—Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates in

force on the 19th day of November, 1884, . . . and one-third in accordance with the provisions of the native customary law . . .”

By the Courts Ordinance (Ghana), s. 83: “. . . the statutes of general application which were in force in England on the 24th day of July, 1874, shall be in force within the jurisdiction of the courts.”

By the Interpretation Ordinance (Ghana), s. 3 (31): “ ‘ Ordinance ’ shall include . . . an Act of the Imperial Parliament applicable to the Gold Coast and in force . . . (45) Words in the singular include the plural and *vice versa*.”

The appellant, the sole surviving child of a marriage under the Marriage Ordinance between his mother and his father, an Osu man, who died intestate, claimed that he alone was entitled to the grant of letters of administration of the intestate's estate to the exclusion of the respondent, who, after the death of the appellant's mother, had married the intestate in accordance with native customary law:

Held, that there must be a joint grant to the appellant and the respondent.

The effect of the Courts Ordinance and the Interpretation Ordinance was that the Statute 21 Hen. 8, c. 5, which provided by section 2 that in the case of a person dying intestate administration should be granted to the widow of the intestate, and the Statute of Distribution 1670 which enacted that the wife of an intestate was entitled to one-third of the personal estate, were included in the definition of “ Ordinance ” and in force in Ghana. Those statutes were therefore to be construed in their application to Ghana so that words in the singular included the plural unless there was something in the subject or context repugnant to such construction, which was not so here, the subject and context being the distribution of the personal property of an intestate validly married by native law and custom of Ghana which recognised the existence of more than one wife or widow.

Cheang Thye Pin v. Tan Ah Loy [1920] A.C. 369, P.C.; *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529, P.C. and *Bangbose v. Daniel* [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C. considered.

Further, apart from the Interpretation Ordinance, in dealing with personal property in Ghana of an intestate domiciled and validly married in that country in accordance with its laws the courts of Ghana, in the application of the above-mentioned Imperial statutes to that country, would be entitled to apply the words “ wife ” and “ widow ” to all persons regarded as lawful wives or widows according to the law of Ghana.

In re Goodman's Trusts [1881] 17 Ch.D. 266, C.A.; the *Sinha Peerage Claim* [1946] 1 All E.R. 348 (Note) and *Baindail v. Baindail* [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 343, C.A. considered.

There would, accordingly, be a joint grant to the appellant and the respondent on the footing that the latter was the widow of the intestate. She was entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she might be entitled by the relevant native customary law.

While there might be cases in which special circumstances existed which necessitated a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage, there were no such special circumstances in the present case, and there was no valid reason for distinguishing in principle between the children and the widow of the marriage by native customary law.

When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before the Board would go behind such a statement in a judgment.

Judgment of the Court of Appeal, Ghana, affirmed.

APPEAL (No. 40 of 1960) from a judgment of the Court of Appeal of Ghana (Van Lare J.A. as C.J., Granville Sharp J.A. and Ollennu J.) (November 23, 1959) allowing an appeal from a judgment of the High Court, Eastern Judicial Division (D. E. Gwira, Commissioner of Assize and Civil Pleas) (March 23, 1959), in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant who was the

plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent, who was the defendant in the action. The appellant now sought to restore the judgment of the High Court.

The following statement of the relevant facts is taken from the judgment of the Court of Appeal. The deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the present appellant's mother, Wilhelmina, under the Marriage Ordinance and had five children by her, of whom the appellant was the sole survivor, Wilhelmina having died in 1940. During the lifetime of Wilhelmina the deceased lived and cohabited with the present respondent and had 10 children by her. After the death of Wilhelmina the deceased married the respondent in accordance with customary law.

The above recital of facts could be accepted for the purpose of deciding the important question which arose in this appeal, namely, whether the respondent was entitled either solely or jointly to a grant of letters of administration. They were described in the judgment as facts which were not in dispute. The accuracy of this statement was challenged on this appeal by counsel for the appellant, but, as already stated, the Board accepted them for the purpose of construing the relevant Acts and Ordinances which require to be considered.

The issue for determination at the trial was settled on the summons for directions as follows: "Whether the plaintiff or the defendant is the proper person entitled to the grant of letters to administer the estate of the above named deceased." The contest was therefore between the sole survivor of the deceased's marriage under the Marriage Ordinance and the woman whom he had married under customary native law on the death of his former wife.

Section 48 of the Marriage Ordinance, c. 127, was as follows:

"(1) Subject to the provisions of the succeeding sub-section where any person who is subject to native law or custom contracts a marriage, whether within or without (Ghana), in accordance with the provisions of this Ordinance or of any other enactment 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 on or after the 15th day of February, 1909, leaving a widow or husband or any issue of such marriage, (Amended by 13 of 1951, s. 2).

And also where any person who is issue of any such marriage dies intestate on or after the said 15th day of February, 1909, the personal property of such intestate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in manner following, viz.—

Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th day of November, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance: Provided—

(i) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a

portion of the said casual hereditary revenues;

(ii) That real property, the succession to which cannot by the native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.”

1961. Jan. 26, 30, 31; Feb. 1. *Ralph Millner* for the appellant. The Court of Appeal proceeded on the footing—as the court of first instance had done—that the issue depended primarily on the question which of the parties was entitled to the greater share on the distribution of the assets. To begin to put her case upon its feet the respondent must not only allege but must prove that she was married according to native law and custom: *Engman v. Engman* (1911-16) (Gold Coast Divl. Ct. Judgms. 1). It would be within judicial knowledge that such a marriage would require a ceremony of some kind. The respondent has not established that there was a valid marriage according to native law and custom after the death of Wilhelmina, and the Court of Appeal erred in proceeding on the assumption that the marriage was not in dispute.

Secondly, even if a marriage by native customary law is taken to be proved the respondent is not a “wife of the intestate” within the meaning of section 3 of the Statute of Distribution, 1670. It follows that she is not entitled to any share in the two-thirds of the estate under the provisions of section 48 of the Marriage Ordinance. In the Statute of Distribution the wife is for present purposes the widow of a marriage under the Marriage Ordinance, and that would exclude a wife under a marriage by native law and custom. The main case in this connection is *Bamgbose v. Daniel* [1952] 14 W.A.C.A. 111, a Nigeria case which came before the Board on appeal ([1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.) from the West African Court of Appeal, and in which it was held that the children of valid polygamous marriages were legitimate children entitled to claim under the Statute of Distribution. In the Straits Settlements there appears to be no statutory provision equivalent to section 48 here in issue, and for that reason *Cheang Thye Phin v. Tan Ah Loy* [1920] A.C. 369, P.C. is rather out of the range of the present appeal.

The instant case comes down to a question of construction of section 48 of the Marriage Ordinance and it is not necessary to consider whether a person who contracts a marriage under the Ordinance ceases entirely to be covered by customary law. *In re Otto* (1926-29) Gold Coast Divl. Ct. Judgms. 84, which the Court of Appeal held was wrongly decided, turned on the question whether the deceased could make a will; that does not take the matter any further. The comment on *In re Adadevoh* [1951] A.C. 107 is the same as is made in the present appeal—that the Court of Appeal just assumed that whether a woman is a widow or not is, as in the case of legitimacy of offspring, decided by the law of the domicile. It is here a question of the construction of section 48 of the Ordinance which has not been considered in any case before; it is plain that the Board were not in fact invited to consider this question of construction in the *Bamgbose* case ([1955] A.C. 107). (Reference was also made to *Cole v. Cole* [1898] 1 N.L.R. 15.)

Next, the Court of Appeal say that on the authorities the question of legitimacy is decided by English law according to the law of the domicile, and they have then, without reason, assumed that because that is so, the question whether a woman is a widow or not must also be decided by the law of the domicile. It does not necessarily follow, however, that the same

law should apply. In asking what the English law is, the Court of Appeal was wrong in assuming that any question of status was to be decided by the law of the domicile. In *In re Goodman's Trusts* [1881] 17 Ch.D. 266, C.A. it was only necessary to determine how the question of legitimacy was decided. English law looks with disfavour on polygamous marriages irrespective of whether they are valid according to the law of the domicile, though for some purposes of English law it does recognise them. There is no authority on the particular point whether a polygamous marriage will be recognised by the courts for the purpose of determining whether a wife of a polygamous marriage is a wife within the meaning of the Statute of Distribution. *Baindail v. Baindail* [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A. shows that for some purposes English law does recognise polygamous marriages—it is cited in *In re Adedevoh*, 13 W.A.C.A. 304. There is no general principle on the question of status and the law of domicile and it is open to the Board to decide the matter *de novo*. (Reference was also made to *Mortimer on Probate Law and Practice*, 2nd ed., p. 294, and to *Belshah v. Majid*, *The Times*, Dec. 16, 18, 1926; Jan. 14, 1927.)

Lastly, even if the Court of Appeal is right in principle, and the respondent is taken to be a wife within the meaning of the Statute of Distribution, the court was wrong in its application of the principle to the facts of this case. There is no evidence that the deceased was an Osu man—merely an allegation, and the court has made an assumption. Also, it cannot be said to be undisputed that the three children of Adeline Johnson survived the deceased, and the Court of Appeal have arrived at a figure on the basis that they are alive. Those children should have been ignored in considering the appellant's interest. The respondent is not a widow entitled to share in any part of the two-thirds.

Joseph Dean and Miss E. Aryee for the respondent. The only issue is whether or not the respondent is a proper person to be granted letters of administration; she raises no objection to the grant to the appellant; it is only he who objects to the joint grant. So far as this case is concerned, the English law up to 1925 is governed by the Statute of 21 Henry 8, c. 5, and the Statute of Distribution; the English Law after 1925 is governed by the 1925 legislation and the rules made by that legislation. It makes no difference here which principles are applied, pre- or post-1925. The first submission is that irrespective of the Statute of Distribution, under the Statute of Henry 8 the order made in this case was correct.

There is a general principle that administration follows the interest of the property. Here the Ghana court is considering the law in relation to parties who are domiciled in Ghana, are resident there and whose estates are there, and under the law which they have to apply—the Statute of Henry 8—there is a discretion to grant letters of administration to the widow and such one or more of the next-of-kin as may apply. It is inconceivable that the Ghana court should be obliged merely because of the Marriage Ordinance to say in this case that the respondent has rights as a widow in their law, but in the law of England 400 years ago she would not have been a widow and therefore she is not to be accounted a widow so far as their law is concerned. That is part of the proposition advanced for the appellant, and if it is right of the widow it also applies to the next-of-kin. One is construing here Ghana law, not English law, and in that context the English statutes must be construed against the background of Ghana and in relation to the general body of Ghana law. It is true that “widow” is in the singular in section 2 of the Statute of Henry 8, but there is no essential repugnance or

inconvenience in applying that to a case where there might be more than one widow. Henry VIII had his own technique of polygamy. (*Bamgbose v. Daniel* [1955] A.C. 107 was referred to.)

In English law the principle of domicile as determining status applies just as much to a widow as it does to a child: see the article on "The Recognition of Polygamous Marriages under English Law," by W. E. Beckett, in 48 *Law Quarterly Review* 341, in regard to what it says about this matter. It is only in South Africa that this proposition has been rejected. *Baindail v. Baindail* [1946] 1 All E.R. 348m. shows that English law recognises the validity of a polygamous marriage valid in the place of the domicile of the parties. It has been expressly decided that the child of a polygamous marriage is legitimate, but Mr. Millner said it has not yet been decided that the wife of a polygamous marriage must be treated as a valid wife. It is submitted that every argument that has been advanced for and against the legitimacy of the child applies to the situation of a wife of a polygamous marriage: what is sauce for the gosling must be sauce for the goose. What was said in *In re Goodman's Trusts*, 17 Ch.D. 266 applies equally to the status of a wife as it does to that of a child. If Mr. Millner is right, it might mean that the parties would be married in one country, unmarried in another, and married in a third. For all purposes so far as Ghana is concerned the respondent was the wife of the deceased; there is no authority for the startling proposition that so far as English law is concerned she is not to be treated as his wife.

If that is right as a general principle, it must equally be right in relation to the interpretation of the relevant statutes; it applies equally to the Statute of Henry 8, to the Statute of Distribution, and to the construction of the Marriage Ordinance. Here the respondent is a widow for the purposes of the Statute of Distribution. In *Bamgbose's* case [1955] A.C. 107 the judgment assumes without deciding, that they were wives, and it was there said (17 *ibid.* 120): "It would be a strange result that in the converse case where a marriage of the parents was recognised as valid the children should be deprived of their rights of succession because of a difficulty in working out the rights of the wife." See also the *Bamgbose* case in the court below ([1952] 14 W.A.C.A. 111) and *In re Adedevoh* [1951] 13 W.A.C.A. 304. *Belshah v. Majid*, *The Times*, Dec. 17, 18, 1926, is no authority either way—the judge did not commit himself. *Choo Eng Chon Choo Ang Chee v. Neo Chan Neo* (the *Six Widows* case) [1908] 12 Str. Settlements. Rep. 120—the main case referred to in the three relevant appeals to this Board (*Cheang Thye Phin v. Tan Ah Loy* [1920] A.C. 369), *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529 and *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346—recognises the practice in the Straits Settlements of accepting polygamous marriages as valid and as entitling the widows, where there are two or more, to their share under the Statute of Distribution. The dissenting judgment in that case has never been followed. *Khoo Hooi Leong's* case is relied on as showing that the law has upheld the recognition of polygamous marriages and, following from that, the application, with such modifications as may be necessary, of the English law of distribution on intestacy. *Cheang Thye Phin's* case and *Khoo Hooi Leong* show that the Board did inferentially uphold the *Six Widows* case.

(Counsel was not required to deal with the question whether the respondent was in fact married under native customary law.)

The part of the Court of Appeal's judgment relating to the children of Adeline Johnson cannot be criticised at all. On any view of this case the order made for joint administration was a perfectly valid exercise of their

discretion for the reasons given by the Court of Appeal—the respondent was the appointed representative of the family.

Millner in reply. On the construction of the Marriage Ordinance, and in particular of section 48, the wife and children of the Ordinance Marriage would take two-thirds, and the other one-third would go to the people of the family; the intention of the section as regards the one-third is to provide any such rights or benefit as the respondent and her children may have by native customary law. The Ordinance is dividing it up into two-thirds to the Marriage Ordinance group and one-third to the others. As to the respondent's marriage there must be evidence of what the native customary law is. (*The Six Widows* case, 12 Str. Settlmts. Rep. 120 and *Cheang Thye Phin's* case [1920] A.C. 369 were referred to.)

March 7. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: The first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law are relegated to such share of the remaining one-third as they can establish under that law.

This is the construction which appears to have been put upon the section in some decisions of the courts in Ghana from time to time and would seem to have been adopted by the trial judge towards the end of his judgment where, referring to the present respondent, he said: "her status being that of a wife married according to native custom cannot override the claim of the plaintiff."

Their Lordships are unable to accept this construction of the section. In the case of intestacy of a person married in accordance with the Ordinance there are two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on November 19, 1884. They are (1) a valid marriage under the Ordinance, (2) the survival of a widow or husband or any issue of such marriage. Once these conditions are satisfied it remains only to see how the two-thirds portion was distributable under English law in 1884. In the present case there was a valid Ordinance marriage between the deceased and Wilhelmina and there is surviving issue of that marriage, viz., the appellant. Wilhelmina had died during the lifetime of the deceased. We find, therefore, both conditions precedent satisfied and it remains only to apply the provisions of the Statute of Distribution (1670), which provides that if a man dies intestate leaving a wife and issue the wife is entitled to one-third of the personal estate and the children to two-thirds. The question then arises whether on the facts in this case the respondent, who was married under customary native law, qualifies as "a wife" within the meaning of that word in the Statute of Distribution as applied to Marriages in Ghana which are lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and are potentially polygamous. This leads to the second submission by counsel for the appellant to the effect that the words "wife" and "widow" in an English statute cannot be construed as including the plural as this would be repugnant to the legal conception of marriage in England which does not recognise a potentially polygamous union as a marriage.

Before proceeding to consider this submission it will be convenient to set out parts of the relevant statutes and Ordinances, and it may be observed at

this stage that the most immediately relevant statute is 21 Henry 8, c. 5, as this is the statute which provides for the proper person to whom administration should be granted, as distinct from the persons entitled to share in the distribution, but it raises precisely the same question, namely, whether the "widow" referred to in the Statute of Henry 8 or the "wife" mentioned in the Statute of Distribution in the application of these statutes to Ghana includes a "widow" or "wife" of a potentially polygamous marriage.

Section 2 of 21 Hen. 8, c. 5 provides: "In case any person die intestate . . . then the said ordinary . . . shall grant the administration of the goods of the . . . person deceased, to kin, or to both, as by the discretion of the same ordinary shall be thought good." In England prior to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next-of-kin or heir-at-law, except for good cause shown. (See *Mortimer on Probate Law and Practice*, 2nd ed., p. 293.)

The Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10, s. 3), enacts that "All Ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate."

The Courts Ordinance (Chap. 4 of the Laws of the Gold Coast) provides:

Section 83. "Subject to the terms of this or any other Ordinance, the common law, the doctrines of equity, and the statutes of general application which were in force in England on the 24th day of July, 1874 shall be in force within the jurisdiction of the Courts."

Section 85. "All Imperial laws declared to extend or apply to the jurisdiction of the Courts shall be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future ordinances of the Colonial Legislature; and for the purpose of facilitating the application of the said Imperial laws, it shall be lawful for the said Courts to construe the same with such verbal alterations, not affecting the substance, as may be necessary to render the same applicable to the matter before the Court; . . ."

The Interpretation Ordinance (Cap. 1 of the Laws of the Gold Coast) provides:

Section 3. "The following words and expressions shall, if inserted in any ordinance, order, proclamation, rule, regulation, or bye-law, be understood as hereinafter defined or explained, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such definition or explanation, that is to say:

(31) 'Ordinance' shall include . . . an Order of Her Majesty in Council or an Act of the Imperial Parliament, applicable to the Gold Coast and in force . . .

(45) Words in the singular include the plural and vice versa."

It is no doubt true that Lord Brougham's Act (13 & 14 Vict. c. 21) applied only to enactments after 1850 and so did not include the Statute of Distribution and that the English Interpretation Act, 1889, was not in force in 1874, so that for the purpose of construing the Act of Henry 8 and the Statute of Distribution in an English court prior to 1889 it would not have

been permissible as a matter of construction or in accordance with the common law as applied to the distribution of property within the jurisdiction of the English court to read "wife" or "widow" as including "wives" and "widows." But it seems to their Lordships that entirely different considerations arise by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance referred to above, the effect of which is that the Act of Henry 8 and the Statute of Distribution are included in the definition of "Ordinance" as being "Acts of the Imperial Parliament applicable to the Gold Coast and in force. Those statutes, therefore, are to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction, which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one wife or widow.

Their Lordships would not, however, desire to rest their decision solely upon the language of the Interpretation Ordinance, more especially as this was not referred to in the judgment of the Court of Appeal in Ghana, who decided the case in favour of the present respondent on broader grounds with which their Lordships are in general agreement. They do not think, however that the Privy Council judgments referred to in the Court of Appeal, *i.e.* *Cheang Thye Phin v. Tan Ah Loy* [1920] A.C. 369, P.C.; *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529, P.C. and *Bamgbose v. Daniel* [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C., can be regarded as authorities conclusive in favour of the respondent. In the last-mentioned case the Board was dealing only with the position of children and in their judgment it was expressly stated that they proposed to say nothing as to what rights, if any, widows would have in the event of a claim being made in a case such as that with which they were then concerned, and the following observations of Lord Phillimore in *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] A.C. 529, 543 were quoted:

"In deciding upon a case where the customs and the laws are so different from British ideas a court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married. This principle was admitted by the canon law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America."

In the case of *Cheang Thye Phin v. Tan Ah Loy* [1920] A.C. 369 the position of secondary wives (called *t'sips*) as contrasted with principal wives (called *t'pais*) was the only issue and at the outset of the judgment delivered by Viscount Finlay, he said (*ibid.* p. 372):

"With regard to Chinese settled in Penang, the Supreme Court recognises and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local Ordinance the Statute of Distribution has been applied to Chinese successions, and the courts have treated all the widows of the deceased as entitled among them to the widows' share under the Statute. No question has been raised on the present appeal as to the propriety of this practice; the only question is whether Tan Ah Loy was one of the widows."

Nonetheless, having regard to the attitude of the courts of this country to the status of parties validly married by the laws of the country of the

domicile as exemplified by such cases as *In re Goodman's Trusts* [1881] 17 Ch.D. 266, C.A.; *The Sinha Peerage Claim* [1946] 1 All E.R. 348n. and *Baindail v. Baindail* [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A., their Lordships are of opinion that in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws, the courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance their Lordships would hold that in the application of those statutes to Ghana the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. In this connection reference may be made to the following observations by Lord Greene M.R. in *Baindail v. Baindail* [1946] P. 122 at p. 127. Referring to a man married by Hindu law in India he said:

"What was his status on May 5, 1939? Unquestionably, . . . it was that of a married man. Will that status be recognised in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here."

Later on he said (*ibid.* p. 129):

"The practical question in this case appears to be: will the courts of this country, in deciding upon the validity of this English marriage, give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy . . . I think it is certainly a matter to bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when very little more than a mile away the Privy Council might be sitting and coming to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal."

Their Lordships recognise that there may be cases in which special circumstances exist which necessitate a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage as indicated in the passage referred to above in the judgment of the Board delivered by Lord Phillimore, as well as in the passage towards the end of the judgment delivered by Lord Keith of Avonholm in *Bamgbose v. Daniel* [1955] A.C. 107, P.C. There are no such special circumstances in the present case, and their Lordships can find no valid reason for distinguishing in principle between the children and the widow of the marriage which is in question in the present appeal. Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow, both in dealing with distribution of the estate, but they can be dealt with as and when they arise. Their

Lordships are, for the reasons indicated above, in agreement with the decision arrived at by the Court of Appeal in making a joint grant to the appellant and the respondent upon the footing that the latter is the widow of the deceased. They would, however, observe that the Court of Appeal appears to have gone rather further than was necessary for the decision of the application for a grant of letters of administration in setting out in some detail the shares of those who will be entitled in the distribution. Such matters are more appropriate to administration proceedings, and the appellant contends that there was no evidence or admission that the children of the deceased's first marriage to Adeline are now surviving. Their Lordships do not think that any persons entitled in the distribution should be precluded by the judgment of the Court of Appeal from contending in the appropriate proceedings that their shares of the personal estate are larger than those indicated in the judgment provided that it must be accepted that the respondent is entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she may be entitled by the relevant native customary law.

Their Lordships made reference earlier in this opinion to the challenge by the appellant to some of the facts which were stated as being "not in dispute." It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before their Lordships would be disposed to go behind such a statement in a judgment, or to judge of its accuracy merely from a perusal of the notes taken in the courts of the country from which the appeal comes. There is nothing in the present case to justify their Lordships questioning the accuracy of this statement, subject only to the reservation referred to above as to the effect, if any, of such findings on the shares of those proved to be entitled to participate in the distribution.

For these reasons their Lordships will report to the President of Ghana as their opinion that this appeal should be dismissed, and that the appellant should pay the costs thereof.

Solicitors: *T. L. Wilson & Co.; A. L. Bryden & Williams.*

NANA ADJEI III, OHENE OF OKADJAKROM FOR AND
ON BEHALF OF THE STOOL AND PEOPLE OF OKADJAKROM APPELLANTS
AND

NANA ADJEDU II, OHENE OF ATONKOR FOR AND
ON BEHALF OF THE STOOL AND PEOPLE OF ATONKOR
AND OTHERS RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]
(1961) G.L.R. 178

1961 Mar. 21

Lords Tucker, Keith of Avonholm and Hodson

Land: competing claims to same piece of land—Res judicata.

Where a judgment has been given in a dispute between two parties on a question of ownership, the party in whose favour the judgment was given is

entitled to stand on his judgment. Estoppel operates against the party who has lost if he seeks to dispute the *rem judicatam*.

LORD KEITH OF AVONHOLM. This appeal relates to a land dispute between the Ohenes of two Stools in what was formerly Togoland, now included in the republic of Ghana. It will be convenient to refer to the parties as the Okadjakrom Stool (plaintiff and appellant) and the Atonkor Stool (defendant and respondent). Certain persons were added to the proceedings as co-defendants, but nothing turns on this in the present appeal. For present purposes the issue lies between the two Stools. The same observation applies to an action taken by one Asofoatse Kwadjo Nkansa of Atonkor against Nana Adjei III, Ohene of Okadjakrom, which has been consolidated with the action between the two Stools. The parties in this action are also before the Board as respondent and appellant respectively, but no separate notice need be taken of this action.

The main action started in the Native Court of the Omanhene of Buem on 5th December, 1951. It was transferred to the Land Division of the Supreme Court of the Gold Coast at Accra. On 16th July, 1954, the Supreme Court gave judgment in favour of the Okadjakrom Stool, holding that the Atonkor Stool were estopped by a judgment in an earlier litigation (to which their Lordships will refer later) from denying the title of the Okadjakrom Stool to the land in dispute. On 25th February, 1956, the West African Court of Appeal allowed an appeal from this judgment, set aside the order and ruling of the Court below, and ordered that the hearing of the consolidated suits should proceed in the Land Court on the merits. From this judgment the case comes before their Lordships' Board, by final leave of the West African Court of Appeal.

The dispute between the two Stools relates to a certain area of land known as Kafetonku Land. Each party seeks a declaration of title to this land, the Okadjakrom Stool by claim in the original proceedings, the Atonkor Stool by counter-claim in its Statement of Defence. There may be a question whether the claim by the Atonkor Stool is to the land as family land, or as Stool land, but this matter is immaterial to the issue raised by the appeal. It is unnecessary to describe the land further than by saying that it lies between the river Konsu to the north and a road called Motor Road to the south-west. The dispute relates to the ownership of the land so far as it lies within certain limits on the east and west respectively, shown by lines marked on Plan Exhibit J. The Okadjakrom Stool claims that it owns the land up to the western boundary, marked green on the Plan, while the Atonkor Stool claims that it owns the land up to the eastern boundary, marked purple on the Plan. There are thus competing claims to the same area of land.

The dispute is one of long standing. It emerges first in the early twenties of this century when a Captain Lilley, District Commissioner, gave directions for the fixing of a boundary in claims of the contending Stools. It may well be that he thought a boundary had been fixed. Two terminal boundary marks seem to have been set. The precise location of these marks is a large part of the trouble that still exists. On 16th April, 1940, a suit, No. 6/40, was started before the Buem State Council by the Atonkor Stool against the Okadjakrom Stool for damages for trespass, claiming that there was a recognised land boundary demarcated by order of the District Commissioner between the lands of the two Stools. After evidence and a view of the land, the Buem State Council found that, though Captain Lilley gave orders for the cutting of a boundary path, there was no proof that a

boundary was cut. The judgment concludes: "Judgment is for Defendant with costs to be taxed. Defendant to retain his farms. No order as to the fixing of boundary is made until one or both of the parties move this Court for it." The date of the judgment was 2nd July, 1940. An appeal to the Provincial Commissioner was dismissed and a further appeal to the Provincial Commissioner was dismissed and a further appeal to the West African Court of Appeal was also dismissed. In the course of his judgment the Provincial Commissioner said:

"It has been proved beyond doubt that on the 23rd January, 1922, Captain C. C. Lilly, the then Political Officer stationed in the Ho District, did determine the boundary between the Plaintiff and Defendant in this case but unfortunately the finding of Captain C. C. Lilly cannot be interpreted owing to mutilation. This is therefore valueless and must be ignored. . . . If it were possible to interpret Lilly's Judgment I would have ordered the boundary be surveyed and cut, but unfortunately this is impossible."

Thereafter application was made by the Okadjakrom Stool to the Buem State Council for an order to cut and demarcate the boundary between the two Stools. This application was dismissed for procedural reasons. A similar application was made, after a lapse of many years, on 19th July, 1949, and with the consent of both parties the Court proceeded with a view of the area for the demarcation of the boundary. After viewing the ground and hearing parties the Court, proceeding apparently on the view that the application was an independent one, divorced from the previous judgment of 2nd July, 1940, decided that, as they could not rely on the boundary marks pointed out by the contesting parties, the disputed land should be divided equally between them. This they proceeded to do by an order of demarcation on 1st August, 1950. After some further procedure this order was set aside by the Magistrate's Court of the Gold Coast, Eastern Province, on 22nd March, 1951, on the ground that the original order of 2nd July, 1940, gave the area in dispute to the Okadjakrom Stool. With reference to the equal division between the parties carried through by the Court below he said: "This may be a sensible solution but it is in face of the original judgment giving the area in dispute to the defendant."

Upon this judgment the present proceedings were initiated by the Ohene of the Okadjakrom Stool against the Ohene of the Atonkor Stool for (1) declaration of title to the said land; (2) damages for trespass; and (3) injunction. He relied on the judgment of 2nd July, 1940, and the subsequent interlocutory proceedings as constituting an estoppel *per rem judicatam* against the Atonkor Stool. In the statement of defence the Atonkor Stool contended that the judgment of 2nd July, 1940, was not complete and did not constitute an estoppel *per rem judicatam*. It in turn claimed a declaration of title and an injunction. The Supreme Court (Korsah Ag. C.J.) held that by virtue of the previous proceedings the Atonkor Stool was estopped from denying the plaintiff's title and granted perpetual injunction as craved. On appeal to the West African Court of Appeal (Ames Ag. J.A., Coussey P. and Jackson Ag. J.A.) this judgment was set aside and it was ordered that the hearing of the two consolidated suits be continued.

Ames Ag. J.A., with whom Coussey P. and Jackson Ag. J.A. concurred, held, in their Lordships' view rightly, that the judgment of 2nd July, 1940, could not be read as a declaration of title in favour of the Okadjakrom Stool. The Provincial Commissioner, part of whose judgment has been

quoted above, did not, he said, so regard it. "Otherwise," he said, "what need to regret not being able to find out where Lilley intended his line to run." His view is summarised in the penultimate paragraph of his judgment as follows:

"Since the argument in Court my attention has been drawn to a case which was before this Court in 1947, *Abutia Kwadjo II and another v. Addai Kwasi*. The judgment of this Court, dated 17th February, 1947, approved and applied an observation of this Court made in an earlier case about the same land between the same parties but the other way round, in which the earlier plaintiff had sued the earlier defendant for a declaration of title to the land in dispute without there being any counterclaim by the earlier defendant for a declaration of title. The observation was this: 'in such cases' (meaning those in which a plaintiff claims a declaration of title but fails) 'the proper course is merely to dismiss the plaintiff's claim. This, of course, does not mean that the matter is any the less *res judicata* in favour of the defendant'.

In applying that observation in the 1947 case this Court said:

'... It is clear that the learned Judges in that case were endeavouring to make it clear that although a declaration of ownership and possession could not be given in the particular case before the Court because of the omission on the part of Counsel for the defendant to enter a counterclaim to this effect nevertheless the judgment would be a bar to any further proceedings between the parties.'

That case, which at first sight seems similar to this one, is nevertheless distinguishable. I have not the pleadings in the case, but from the judgment one must presume that it was the ownership of the land which had been in issue in the earlier case and which had been adjudicated upon.

In this 1940 case of *Atonkor v. Okadjakrom* the Buem Court did not adjudicate upon the ownership of the land although the appellant had claimed a declaration to the land behind his alleged boundary line. The Court adjudicated only upon the issue 'Is there an established boundary?' and omitted to consider where the boundary ought to be and how much, if any, of the land in dispute was owned by the appellant. There has been no adjudication upon these latter questions."

The argument for the appellant before their Lordships' Board turned wholly upon the plea that the Atonkor Stool was estopped by the 1940 decision from seeking a declaration of title to the land in dispute. Conversely it might be put that the Atonkor Stool was estopped by the previous decision from challenging the right of the Okadjakrom Stool to a declaration of title. No question of estoppel, in their Lordships' opinion, arises at all. It is clear in their view that the 1940 decision decided nothing as to the ownership of the land. It may be that part of the land belongs to one Stool and part to the other, or that the whole belongs to one Stool or to the other. Nothing on this point was ever decided, for no boundary was ever fixed. No question of ownership can be determined until this is done. The decision of 1940 must be taken as an interim decision leaving matters *in statu quo* pending the fixing of the boundary. It is not for their Lordships to say how this must be done, or to consider the evidence in the matter of the boundary. That matter is not before the Board and has been reserved by the order of the West African Court of Appeal.

Block I was taken up again by Commissioner Riley on 25th October, 1956, after the decision of the Privy Council had been given. He was satisfied from the plans produced that the Aperade were claiming all the Reserve as part of their whole claim, while Achiasi only claimed a part. The boundaries of the Achiasi claim were not clear and Achiasi were ordered to have their boundary cleared and cut.

After this had been done the Commissioner gave judgment on 12th February, 1957. He found it unnecessary for the Aperade to produce any plans "since the land they had claimed before the Privy Council and Lower Courts included all Block I." He also had before him a plan which the Board saw (Exhibit "F") showing the land claimed by Achiasi. The Commissioner held that Aperade by the Privy Council decision had lost all the area they claimed which is shown on Exhibit "H," the plan produced to define the land claimed by Aperade in 1951: that Block I lay within this area: "that as no other stool had yet contested the ownership of Block I indicated that it belonged to either Aperade or Achiasi; that as Achiasi were already occupying portion of the land it is assumed the area they claim in Block I belongs to them." He then decided that the land claimed by Achiasi on Exhibit "F" belonged to them.

The West African Court of Appeal by a majority, Ollennu J. dissenting, allowed the appeal, set aside the decision of the Commissioner and remitted the case for a hearing. Before the Court of Appeal it was argued that the Commissioner was wrong in holding that Aperade were by the judgment of the Privy Council estopped for laying claim to any land in Block I. The ground of the judgment of Granville Sharp J.A., was that the plea of *res judicata* failed because the subject matter of the decision in the Privy Council was not identical with the subject matter of the decision of the Commissioner. He declined to accept the axiomatic mathematical truth that the part is included in the whole as applicable to the doctrine of *res judicata*. The opinion of Van Lare Ag. C.J. proceeded on the same grounds. In his dissenting judgment Ollennu J. held that Aperade were estopped *per rem judicatam* by the judgment of the Privy Council from asserting a claim to the land in Block I and he was in favour of dismissing the appeal.

In considering the arguments for Achiasi before the Board it is unnecessary to consider in detail the judgment of the majority of the Court of Appeal, because counsel for the respondent, Aperade, did not support the grounds upon which Granville Sharp J.A. and Van Lare Ag. C.J. proceeded. He conceded that where a claimant to a portion of land has failed after an inquiry into the merits of his claim and his claim has been dismissed, he is estopped *per rem judicatam* from asserting in future proceedings a claim to a part of the larger whole in respect of which his claim has failed. This concession was inevitable, as it would otherwise lead to the absurd results referred to in the dissenting judgment of Ollennu J. The effect of the plea of *res judicata* does not by itself substantiate the claim of Achiasi, but it operates so as to defeat Aperade's claim.

Counsel for the respondent also conceded what is implicit in all the judgments of the Courts below, that Block I is part of the larger area claimed by Aperade in the previous proceedings. From the logical result of these two concessions his counsel sought to escape by two highly technical arguments with which it is necessary to deal. First, it was said that the boundaries of the land claimed by Aperade in the previous proceedings were not sufficiently clearly defined so as to provide a decision upon the area of land to which estoppel could operate. This argument comes strangely from a party who was seeking a declaration of title in relation to an area of

ground, the boundaries of which were set out in the writ of summons and the extent of which was shown on a plan produced for the purposes of the action. When it is admitted that Block I lies within the area which was subject of the decision of the Privy Council, it is immaterial whether or not the outer boundaries of that area are sufficiently clearly defined. But the boundaries were in any case described in the previous proceedings. There is in the opinion of their Lordships no substance in this argument. Secondly, it was argued that it was not clear from the previous proceedings which was the area of ground ownership of which was being disputed by the Achiasi, and accordingly estoppel could not operate in regard to Block I. But the defendants Achiasi joined issue with the plaintiffs in regard to the whole area and it was this plea which was upheld by the Privy Council. They were entitled to put Aperade to the proof of their claim and it was on this proof that they failed.

In the opinion of their Lordships the plea of *res judicata* operates so as to estop Aperade from claiming the land in Block I in any contest with Achiasi.

It only remains to consider whether the Commissioner was correct in proceeding further and holding that land in Block I belonged to the Achiasi. If this had been a litigation for a declaration of title, such a result could not have followed, because estoppel by itself can never set up the title of the party pleading estoppel. But this is not an ordinary litigation; it arises out of proceedings instituted under the Forests Ordinance. The provisions of the Ordinance have already been referred to. The Commissioner receives claims in respect of the lands proposed to be constituted as a Forest Reserve. He must inquire into these claims and if there is a dispute as to ownership, he must follow the judgment of the appropriate civil court. In giving judgment the Commissioner must adjudicate upon the claims which he has received. The Aperade and Achiasi were both claimants to the land contained in Block I. The Aperade are estopped by the judgment of the Privy Council from claiming the land and as Achiasi were the only other claimants, it follows in their Lordships' opinion that the Commissioner was right in holding that this land belonged to them.

Their Lordships will accordingly report to the President of Ghana as their opinion that the appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of the Reserve Settlement Commissioner restored and that the respondent should pay the appellant's costs in the Court of Appeal and before their Lordships' Board.

THE ATTORNEY-GENERAL OF THE GAMBIA . . . APPELLANT
AND
PIERRE SARR N'JIE . . . RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1961] 2 W.L.R. 845; [1961] 2 All E.R. 504; [1961] A.C. 617

1961 May 3

Lords Radcliffe, Denning
and Guest

*Legal Practitioner—Professional misconduct—Disciplinary power of
Judge—Exercise by deputy—Whether judicial power.*

The name of the respondent, a member of the English Bar who had been admitted to practice as a barrister and solicitor of the Supreme Court of the Gambia, was, after due inquiry into allegations of misconduct by a deputy judge appointed under section 1 of the Supreme Court Ordinance, ordered by him to be struck off the roll of the Supreme Court of the Gambia. On his appeal the West African Court of Appeal set aside the deputy judge's order on the ground that he had only jurisdiction to represent the Chief Justice "in the exercise of his judicial powers" and that the power to strike a legal practitioner off the roll was not a judicial power. On appeal by the Attorney-General of the Gambia by special leave:

Held: 1. that the power of a judge sitting as a disciplinary authority, to suspend or strike off a legal practitioner was a judicial power of the judge which it was competent for a deputy judge to exercise. (Order IX27 was simply a restatement of the inherent power of the judge at common law and was *intra vires*.)

2. that the Attorney-General, representing the Crown as guardian of the public interest was a "person aggrieved"—words of wide import—by the decision of the West African Court of Appeal within the meaning of section 31 of the West African (Appeal to Privy Council) Order in Council 1949, and accordingly had a *locus standi* to petition for special leave to appeal.

LORD DENNING. Mr. Pierre Sarr N'Jie is a member of the English Bar who was admitted a few years ago to practise as a barrister and solicitor of the Supreme Court of the Gambia. On 22nd September, 1958, the Deputy Judge (Abbott J.) made an order striking his name off the Roll of that Court and directing that it be reported to the Masters of the Bench of his Inn. On 5th June, 1959, the West African Court of Appeal (Bairamian Actg. P., Hurley Actg. J.A. and Ames Actg. J.A.) set aside the order on the ground that the Deputy Judge had no jurisdiction in the matter. The Attorney-General of the Gambia sought leave to appeal to Her Majesty in Council but on 6th July, 1959, the West African Court of Appeal (Bairamian Actg. P., Benka-Coker J., Marke J.) refused him leave to appeal on the ground that notice had not been given in due time to Mr. Pierre Sarr N'Jie. Thereupon the Attorney-General made a petition to Her Majesty for special leave to appeal from the judgments of the West African Court of Appeal, both of 5th June, 1959, and 6th July, 1959. This petition was granted but liberty was expressly reserved to Mr. Pierre Sarr N'Jie to raise the preliminary point that no appeal lies at the instance of the Attorney-General. Their Lordships rejected this preliminary point and their reasons will appear later in this judgment.

The history starts with a civil suit tried in 1958 in the Supreme Court of the Gambia before the Chief Justice of the Gambia (Wisham C.J.). On 27th June, 1958, in the course of giving judgment, Wisham C.J. criticised severely certain conduct of Mr. Pierre Sarr N'Jie which had come to his notice during the trial, and he sent a copy of his judgment to the Attorney-General of the Gambia. On 16th July, 1958, the Attorney-General served a notice of motion on Mr. Pierre Sarr N'Jie asking for an inquiry to be made by the Chief Justice into allegations of professional misconduct against Mr. Pierre Sarr N'Jie and for his name to be struck off the Roll of Court. The allegations were set out in an affidavit and were to the effect that he had received several sums of money on behalf of others, to wit, £350, £150, £50, £203 9s. 0d., £1,360, and £200, and had utilised them for his own purposes; and further that he had, with intent to deceive, been guilty of false representation and concealment.

On 19th July, 1958, the motion came on for hearing before Wisham C.J. Mr. Pierre Sarr N'Jie was then represented by his brother Mr. S. A. N'Jie. He consented to an inquiry being held but asked that it should be held by someone other than Wisham C.J. The Chief Justice said that, in view of

his findings in the civil suit, this was reasonable. He said that he would recommend that someone other than himself should be appointed as a deputy judge to hold the inquiry and to exercise all the powers vested in the Chief Justice. Mr. S. A. N'Jie asked for time until November but this the Chief Justice refused to grant. A day or two later Mr. Pierre Sarr N'Jie left the Gambia for England and on 25th July, 1958, he wrote from London to the Attorney-General of the Gambia asking the date of the inquiry. He said: "I should like it held as early as possible, say, first week of September next."

Steps were duly taken to appoint a deputy judge to hold the inquiry instead of the Chief Justice. The Governor appointed Abbott J. (at that time a Justice of the Federal Supreme Court of Nigeria) to be a deputy judge of the Gambia. The hearing was fixed for 15th September, 1958, at Bathurst in the Gambia. Notice was given to Mr. Pierre Sarr N'Jie, who wrote on 17th August, 1958: "I have noted that the hearing of the matter before the Court will take place (at Bathurst) on 15th September, 1958, and I shall be present, God being willing."

Notwithstanding this apparent concurrence in the date of 15th September, 1958, Mr. Pierre Sarr N'Jie afterwards sought by various means to get the hearing adjourned. At one time he objected to a hearing during the vacation. At another time he said it was impossible for him to attend. Eventually he said he was ill and that a medical certificate was available, but none ever came. All his objections were overruled: and Abbott J. held the inquiry on 15th, 16th, 17th and 18th September, 1958. The Attorney-General appeared but Mr. Pierre Sarr N'Jie did not appear nor was he represented, save for a fleeting moment when his brother Mr. E. D. N'Jie asked for an adjournment and, on its being refused, withdrew. Their Lordships see no reason to suppose that Abbott J. was wrong in refusing to grant an adjournment. It was a matter for his discretion, and there is no ground for saying that he exercised his discretion improperly. If Mr. Pierre Sarr N'Jie had any defence on the merits, he ought to have returned to the Gambia to put it forward: and no good reason was shown for his not doing so.

On 22nd September, 1958, Abbott, J. gave his decision. He found that eight out of the nine allegations against Mr. Pierre Sarr N'Jie had been established. He summarised his conclusions in these words:

"Of the respondent's behaviour as disclosed by the documentary and oral evidence before me, I find it difficult to speak with anything approaching moderation. He is undoubtedly guilty of the most disgraceful professional misconduct that I have come across in 35 years legal experience. He is totally unfitted, in my view, to be entrusted with the interests and affairs of any member of the public, still less with any money belonging to anyone else, and he is a disgrace to the profession to which he belongs."

Abbott J. ordered that his name be struck off the Roll of Barristers and Solicitors of the Supreme Court of the Gambia and directed that the making of the order be reported by the Attorney-General to the Master of the Bench of the Inn of Court by which he was called to the Bar.

On the 5th June, 1959, the West African Court of Appeal set aside this order on the ground that a deputy judge has only jurisdiction to represent the Chief Justice "in the exercise of his judicial powers": and they held that the power to strike a legal practitioner off the Roll is not a judicial power.

In order to consider the validity of this decision, their Lordships must draw attention to the fact that there is only one Judge of the Supreme Court of the Gambia: for by section 4 of the Supreme Court Ordinance it is provided that: "The Supreme Court shall consist of and shall be held by and before a Judge to be appointed by the Governor." This single Judge is the Chief Justice. There is provision for an Acting Judge to be appointed to act if the Chief Justice is ill or absent from duty, but that was not the case here. There is also provision for a deputy judge to be appointed, and that is what was done. Abbott J. was appointed a deputy judge under section 7 of the Supreme Court Ordinance which provides that:

" 7 (1). Notwithstanding anything in this Ordinance contained, it shall be lawful for the Governor to appoint a Deputy Judge to represent the Judge of the Supreme Court of the Colony of the Gambia *in the exercise of his judicial powers*, although he be present in the Colony or the Protectorate.

(2) Such Deputy Judge *shall exercise all the judicial powers* of the Judge of the Supreme Court and all acts done by such Deputy Judge, in the execution of his powers, shall be as valid and effectual, to all intents and purposes, as if they had been done by the Judge of the Supreme Court, and all judgments orders or decrees made by such Deputy Judge shall be subject to the same right of appeal in all respects as if they had been made by the Judge of the Supreme Court.

(3) The Judge of the Supreme Court may direct at what time and place such Deputy Judge shall sit and what causes shall be heard before him, and generally make such arrangements as to him shall seem proper for the division and despatch of the business of the Supreme Court."

It is quite apparent from that section that the Deputy Judge can only represent the Chief Justice in the exercise of his judicial powers. He cannot represent the Chief Justice in the exercise of his administrative powers. Some of the powers of the Chief Justice are clearly judicial powers, as when he sits in Court to decide civil or criminal cases. Others are equally clearly administrative powers, as when he directs the times at which the offices of the Courts shall be open, or appoints notaries public, or makes rules of court. Into which of these categories are we to place the power of the Chief Justice to suspend legal practitioners or to strike them off the Roll of Court? Is this a judicial power? or an administrative power? This necessitates an analysis of the nature of the power.

By the Common Law of England the judges have the right to determine who shall be admitted to practise as barristers and solicitors: and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court: and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the Colonies the judges have retained the power in their own hands, at any rate, in those Colonies where the profession is "fused." The principle upon which this rests was well stated by Lord Wynford in 1830 in *In Re The Justices of the Court of Common Pleas at Antigua*, 1 Knapp 267 at p. 268: "In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine who are fit persons to practise as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from

practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attornies. In Antigua the characters of advocates and attornies are given to one person; the Court therefore that confers both characters may for just cause take both away." In the Gambia these powers of the Judges have been embodied in Rules of the Supreme Court, 1928. Order IX Rule 2 says that the Judge may, in his discretion, approve, admit and enrol to practise as a barrister and solicitor of the Court (inter alios) any person who is entitled to practise as a barrister in England and who produces testimonials of good character. Order IX Rule 7 says that "the Judge shall have power, for reasonable cause, to suspend any barrister or solicitor from practising within the jurisdiction of the Court for any specified period or order his name to be struck off the Roll of Court." Their Lordships notice that a majority of the West African Court of Appeal (Bairamian Actg. P. and Ames Actg. J.A. with Hurley Actg. J.A. dissenting) thought that Order IX Rule 7 was *ultra vires*. But it seems to their Lordships that it is simply a restatement of the inherent power of the Judge at Common Law and is *intra vires*. And this was conceded by Mr. Gratiaen before their Lordships.

When the Judges exercise this power to suspend or expel, they do not decide a suit between parties. There is no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The Judges usually act on their own initiative, *ex mero motu*, on information which has come to their notice, or to the notice of one or other of them in the course of their duties; as in *R. v. Southerton* (1805) 6 East at p. 143 and *Har Prasad Singh v. Judges of Allahabad High Court* (1931) L.R. 58 Ind. App. 152, 154. But sometimes they have acted on the complaint of the Attorney-General of the Colony, as in the *Petition from Antigua* (1830) 1 Knapp 267 and *W. A. Macauley v. Judges of the Supreme Court of Sierra Leone* [1928] A.C. 344 (see the printed book). Or even on the complaint of a third person, as in *Anandalvan v. Judges of the High Court at Madras* (1930) L.R. 58 Ind. App. 156 *in notis* (see the printed Record of the Proceedings pages 1 and 284). Whoever makes the complaint, the Judges are, of course, under a duty to act judicially, see *Har Prasad Singh v. Judges of Allahabad High Court* (*supra*) at p. 156.

When a legal practitioner is suspended or struck off by the Judges of a Colony, he has always been at liberty to petition Her Majesty in Council to restore him. But he should give notice of his application to the Judges so as to enable them to justify their order, see *Magnus Smith v. Justices of Sierra Leone* (1848) 7 Moore at p. 175 by Lord Brougham: and in all the cases since 1848 the Judges themselves have been made respondents to the appeal, see for instance, *Har Prasad Singh v. Judges of the High Court of Allahabad* (*supra*): though in one of the cases the Attorney-General was also made a respondent, *Macauley's case* [1928] A.C. 344.

This fact—that the Judges are themselves always made respondents to the petition to Her Majesty—is an implicit recognition that, when exercising this jurisdiction, they do not sit as a Court of Law but as a disciplinary authority. And it has been expressly decided in West Africa that the Judges in this regard do not sit as a Court. In *Macauley's case* [1928] A.C. 344 the Chief Justice of Sierra Leone struck Mr. Macauley off the Roll of Court. Mr. Macauley sought to appeal to the Full Court under a provision which gave an appeal from a decision of the "Supreme Court" to the Full Court. It was held by Petrides and Sawrey-Cookson J.J., with Aitkin J. dissenting, that no appeal lay to the Full Court because the order of the Chief Justice striking him off was not a decision of the "Supreme Court," and that Mr.

Macauley's only remedy was to go to the Privy Council for special leave. (The judgment is contained in the printed Record in *Macauley's Case*, pages 30 to 33 and 44 to 49.) The Legislature seems to have had its attention drawn to this decision, for it soon afterwards made special provision for an appeal. When setting up the West African Court of Appeal, it made provision for appeals to it from the decisions of the "Supreme Court" in civil and criminal cases, and then went on by a special Section 14 to provide that "An appeal shall lie to the Court of Appeal from any order of the Judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the Roll and for the purposes of any such appeal any such order shall be deemed to be an order of the Supreme Court." That section is still in force. It was the very section under which Mr. Pierre Sarr N'Jie appealed to the Court of Appeal. And it shows clearly enough that the Legislature did not regard the decision of the Judge in such a case as a decision of the Supreme Court but as a decision of the Judge as a disciplinary authority.

It was on this account—that the Judge, when exercising disciplinary powers, does not sit as a Court—that the West African Court of Appeal concluded that it was not part of his "judicial powers" within Section 7 of the Supreme Court Ordinance, and it was therefore not within the competence of a deputy Judge. Bairamian Actg. P. said: "A deputy Judge cannot in my opinion deal with any matter which is not a proceeding in the Court": and Ames Actg. J.A. said: "By 'judicial powers' is meant powers which he exercises when constituting the Supreme Court under Section 4, to the exclusion of any other of his powers." Their Lordships recognise that in some contexts the words "judicial powers" do signify the powers of a Court which sits to decide controversies between parties: as, for instance, in the phrase "The judicial powers of the Commonwealth," see *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] A.C. at p. 295. But in this Ordinance the phrase is "The judicial powers of the Judge." And it appears to their Lordships that in this context a Judge exercises judicial powers, not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a Judge. Suppose, for instance, that a Judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see *Myers v. Elman* [1940] A.C. at p. 318 by Lord Wright). That would be an exercise of the judicial powers of the Judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off. And suppose that the Judges of a Colony do suspend a practitioner or strike him off. It is undoubtedly open to the practitioner to appeal to Her Majesty in Council: and this necessarily imports that it is the exercise by the Judges of a judicial power. For there is no right of appeal to their Lordships' Board from the exercise of an administrative power.

Their Lordships are therefore of opinion that the power of a Judge to suspend or strike off a legal practitioner is a judicial power of the Judge which it is competent for a deputy Judge to exercise.

Their Lordships will now revert to the preliminary point: for the foregoing discussion is pertinent to it. The preliminary objection raised by Mr. Gratiaen was simply this: The Attorney-General has no *locus standi* to petition for special leave to appeal, because he is not a "person aggrieved." Section 31 of the West African (Appeal to Privy Council) Order in Council,

1949 (under which the Attorney-General made his petition) says that: "Nothing in this Order contained shall be deemed to interfere with the right of His Majesty upon the humble petition of *any person aggrieved* by any judgment of the Court to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

In support of this preliminary objection Mr. Gratiaen referred to the judgment of James L.J. in *Ex parte Sidebotham* (1880) 14 Ch.D. at p. 465 where he said: "a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." If this definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a *lis*, a controversy *inter partes*, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the Judge, *ex mero motu* or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

But the definition of James L.J. is not to be regarded as exhaustive. Lord Esher M.R. pointed that out in *Ex parte Official Receiver. In re Reed Bowen & Co.* (1887) 19 Q.B.D. at p. 178. The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a Colony represents the Crown as the guardian of the public interest. It is his duty to bring before the Judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that if the Judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the Judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the Judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a "person aggrieved" by the decision and can properly petition Her Majesty for special leave to appeal. It was for these reasons that their Lordships rejected the preliminary objection and held that the Attorney-General was a "person aggrieved" by the decision of the West African Court of Appeal.

There is one last point to consider. It relates to the order made on 6th July, 1959, by the West African Court of Appeal when they refused the Attorney-General leave to appeal to Her Majesty in Council. The point arises on Section 5 of the West African (Appeal to Privy Council) Order in Council, 1949, which says that: "Applications to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application." In the present case the decision of the West African Court of Appeal (by which they set aside the order of the Deputy Judge) was given on 5th June, 1959. The Attorney-General sought leave from that Court to appeal to Her Majesty in Council. He lodged his notice of motion within 21 days, namely, on 23rd June, 1959, but he did not serve it on Mr. Pierre Sarr N'Jie within 21 days, because Mr. N'Jie was not

in the Gambia but in England. On 6th July, 1959, the West African Court of Appeal refused the Attorney-General's application. They said: "We cannot in face of Section 5 of the Order in Council entertain an application for leave to appeal unless the notice to the opposite party of the intended application is given before the 21 days have expired." This ruling is of no practical significance in the present case because their Lordships afterwards gave special leave to appeal: but as the ruling is said to affect many colonies with similar Orders in Council, their Lordships gave special leave to appeal from it.

Their Lordships think that, if Section 5 is construed literally, it does seem to lead to the result reached by the West African Court of Appeal: for an application remains an "intended application" until it is heard in Court. But this would mean that the application itself would have to be heard within 21 days. That cannot have been intended. No Court could bind itself to give a date for the hearing within that time. All that was intended was that notice should be lodged with the Court within 21 days: and a copy served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing. This result is reached by reading the section in this way: "Applications for leave to appeal shall be made by motion or petition (notice of which shall be lodged with the Court within 21 days from the date of the judgment to be appealed from), and the applicant shall give the opposite party notice of his intended application." Their Lordships think the section should be so read.

Their Lordships will humbly advise Her Majesty that the appeals should be allowed and the order of the Deputy Judge of the Gambia restored. They make no order as to costs.

SARAH QUAGRAINE APPELLANT

AND

B. CROSBY DAVIES
(SUBSTITUTED FOR SAM FERGUSON, DECEASED) RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL, GHANA]

[1961] G.L.R. 291

1961 May 31

Viscount Simonds, Lords Radcliffe
and Guest

Civil Appeal: procedure—Review: discretion of Judge: Order 39, Rules of the High Court of Ghana.

The Judge was plainly entitled to limit the rehearing having regard to the terms of Order 39 Rule 6. There is clear authority in India that under section 630 of the Civil Procedure Code, which is in substantially similar terms to Order 39 Rule 6 it is in the discretion of the Court to rehear the whole case or only a particular point on which review has been granted. (*Hurbans Sahye v. Thakoor Purshad* (1882) 9 Calcutta 209; *Bhainram Rathi v. Ambica Charan Hazra* (1926) 53 Calcutta 856).

LORD GUEST. The question raised in this appeal is a purely procedural point, whether an appeal by the appellants to the Court of Appeal, Ghana was timeous. But in order to appreciate the point it is necessary to rehearse briefly the circumstances under which it arises.

The history starts with a Privy Council judgment in 1929 in a litigation between a caretaker on behalf of the present appellant and a predecessor of the present respondent in regard to the title to Agissu land. The Board decided in favour of the appellant but no declaration of title was made. On 14th October, 1948, the appellant issued a summons for a claim in trespass for recovery of possession of the Agissu land relying on the judgment of the Privy Council. In 1956 the case was still pending in the Native Court and it was thereafter transferred to the Land Court. In the Statement of Claim the plaintiff claimed recovery of possession of the Agissu land relying on the Privy Council judgment and alleging that the respondent was estopped from claiming ownership of the Agissu land. The respondent in his defence denied that he was occupying Agissu land. The land which he occupied consisted of three parcels of land known as Nanado, Abberzaboasie and Abiswa. A dispute was thus disclosed as to the boundaries of the Agissu land and the respondent's land.

After evidence Acolatse J. on 21st December, 1957, gave judgment in favour of the respondent. The appellant on 4th January, 1958, gave notice of motion under Order 39 of the Rules of the High Court of Ghana for review of the judgment of Acolatse J. Affidavits were lodged in support of this motion and on 8th March, 1958, the Judge made an order which concluded with these words: " This motion is allowed to the extent of the Order above." The Order will be more fully referred to later. Thereafter evidence was taken by the Judge and on 31st October, 1959, the Judge gave a ruling dismissing the review. An appeal was tabled on 3rd November, 1959, and on 13th June, 1960, the Court of Appeal dismissed the appeal on the ground that it had not been timeously taken. By Rule 9 of the Supreme Court (Court of Appeal) Rules, 1957 an appeal against a final decision must be taken within three months.

When a case is reheard on review, the order on the rehearing is a new decree and the time for appealing runs from the date of the order. The question which sharply arises is thus whether the " Ruling " of 31st October, 1959, is an order on the rehearing. If it is, then the appeal was brought timeously. If it is not, the appeal is incompetent, as no appeal lies against a refusal to grant a motion for review. In these circumstances the final judgment would be that of 21st December, 1957, in which case the time for appealing had long expired.

Order 39 of the Rules of the High Court of Ghana is in the following terms:

" 1. (1) Any person considering himself aggrieved—

(a) by a judgment or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a judgment or order from which no appeal is allowed;

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgment was given or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the judgment given or order made against him, may apply for a review of the judgment or order to the Judge who gave judgment or made the order.

(2) A party who is not appealing from a judgment or order may apply for a review of the judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is

common to the applicant and the appellant, or when, being respondent, he can present to the Appeal Court the case on which he applies for the review.

2. An application for review of a Judgment or order of a Court or Judge shall be made only to the Judge who gave the Judgment or made the order sought to be reviewed.

3. (1) Where it appears to the Judge that there is not sufficient ground for a review, he shall dismiss the application. (2) Where the Judge is of opinion that the application for review should be granted, he shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the Judgment or order was given or made, without strict proof of such allegation.

6. When an application for review is granted, a note thereof shall be made in the register and the Court or Judge may at once rehear the case or make such order in regard to the rehearing as it thinks fit, and upon such rehearing the Court or Judge may reduce, vary or confirm its previous judgment or order.

7. No application to review an order made on an application for a review of a judgment or order passed or made on a review shall be entertained."

It is not altogether clear whether the proceedings took a consistent course after the application for review was made and the headings of the various stages in the proceedings are in some cases misleading. The affidavits in support of the notice for review made it clear that the ground upon which review was sought was a patent error on the face of the Record. (See Order 39, Rule 1 (1).) The essential question being what was the effect of the orders of Acolatse J. on 8th March, 1958, and 31st October, 1959, their Lordships prefer to take what the Judge said when he gave judgment. In his Order dated 8th March, 1958, the Judge stated that it was evident that the issue involved was the physical identity and situation of the Agissu land and the three plots belonging to the respondent. He ordered the boundaries of the respondent's land and the Agissu land to be delineated on a plan to be prepared by the surveyor. The concluding sentence of his Order is in the following terms: "This motion is allowed to the extent of the Order above." Their Lordships' view is that the Judge was then granting the application for review, but was limiting the review to the extent mentioned in the Order. The Judge was plainly entitled to limit the rehearing having regard to the terms of Order 39, Rule 6. There is clear authority in India that under section 630 of the Civil Procedure Code, which is in substantially similar terms to Order 39, Rule 6, it is in the discretion of the Court to rehear the whole case or only the particular point on which review has been granted (*Hurbans Sahye v. Thakoor Purshad* (1882) 9 Calcutta 209; *Bhainram Rathi v. Ambica Charan Hazra* (1926) 53 Calcutta 856).

It is necessary to consider whether the subsequent steps in the procedure bear out this interpretation of the Order of 8th March, 1958. Two surveyors then gave evidence at length in regard to the boundaries of the respective properties of the appellant and respondent in an endeavour to clear up the confusion in the identity of the lands. But on 10th October, 1959, there occurred a development which has to some extent obscured the issue. Plaintiff's counsel asked to call fresh evidence. Defendant's counsel objected on the ground that the Order of 8th March, 1958, did not entitle

the plaintiff to adduce evidence which was within his knowledge at the date of the original hearing. The Judge refused to allow the plaintiff to adduce fresh evidence presumably in reliance on the proviso to Order 39, Rule 3. It was suggested that if the Judge had on 8th March, 1958, granted the application for review, he would not have been entitled to refuse to hear such evidence. There may have been some confusion, but one possible explanation is that the plaintiff was seeking to support the review by appealing to new evidence and that this really was an application to call fresh evidence within the hearing of a review. But in any event the review had only been granted for a limited purpose.

If this had been, as the respondent suggested, an application for review on the ground of the discovery of new evidence, it might have been expected that the proceedings would terminate at this point with a refusal of the application for review. But counsel for parties thereafter made submissions, the terms of which clearly indicate that in their view the Judge was conducting a review of his original judgment.

The ruling of 31st October, 1959, in their Lordships' opinion also demonstrates that the Judge was entering into the merits of the case and was in fact reviewing his original judgment. It is sufficient to quote this passage from his judgment:

“ In my opinion the Plaintiff failed to satisfy this Court, upon the Record upon which the Court based its Judgment, to justify a review of that Judgment. The Counsel for Plaintiff had every opportunity of raising points taken by him in this Review in the trial and in truth some of the points taken in this Review are the same facts and submission made in the trial.

“ I think this Review does not justify me to vary the Judgment I had given and there is no foundation whatever to say that the Plaintiff was prevented from calling his witnesses. The Review is dismissed.”

The word “ vary ” in the last paragraph could not have been justified unless the Judge had already granted the application for review and a “ dismissal ” of the review can only be explained upon the basis that he had in fact been conducting a review.

Their Lordships are always reluctant to differ from the opinion of the Court of Appeal upon a matter of procedure with which they are very familiar. But they are not satisfied that the Chief Justice has given the correct interpretation of the words used by the Judge in his ruling. The Chief Justice nowhere refers to the Order of 8th March, 1958, or explains the statement of the Judge “ This motion is allowed to the extent of the Order above.” He appears to think that the ruling of 31st October, 1959, dealt only with the applicability of the proviso to Rule 3 (2) of Order 39, failing to notice that this matter was dealt with by the Judge on 10th October, 1959. He also relies on the fact that the Judge did not alter his judgment in any way. But the Judge may under Order 39, Rule 6 confirm his judgment and he could only do this, if he had been conducting a review of his previous judgment.

Their Lordships are of opinion that the appeal to the Court of Appeal was not time barred and that the Court of Appeal ought to have heard the appeal.

Their Lordships will report to the President of Ghana as their opinion that this appeal ought to be allowed, the judgment of the Court of Appeal, Ghana, set aside and the case remitted to that Court for hearing and that the respondent ought to pay the appellant's costs of this appeal.

YAW DUEDU APPELLANT
AND
EVI YIBOE RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL, GHANA]

[1961] 1 W.L.R. 1040

1961 June 20

Lords Denning, Morris of Borth-y-Gest
and Hodson

Estoppel—Per rem judicatam—Issue, whether previously decided—Action for trespass on land—Judgment for defendant—No counterclaim for declaration of title—Subsequent action by defendant for declaration of title founded entirely on earlier judgment—Whether ownership decided in earlier action.

In an action in 1944 the appellant claimed damages from the respondent for trespass on certain land which, the appellant alleged, the respondent had falsely claimed as his property: there was no counterclaim by the respondent for a declaration of title. That suit was decided throughout up to the West African Court of Appeal in the respondent's favour; that court dealt with the case on the basis that the issue was as to possession not as to ownership but, since there had been no counterclaim for a declaration of title by the respondent, deleted from the trial magistrate's judgment a paragraph which purported to declare that the land belonged to the respondent. Having succeeded in the appeal, but having no declaration of title, the respondent began the present proceedings claiming a declaration of title to the land, calling no evidence, and relying on the decisions of the courts in the appellant's action of 1944. The Ghana Court of Appeal, who gave judgment for the respondent, said that the issue of ownership had been in issue in the previous proceedings, that that was the matter for decision in the present proceedings, and the doctrine of *res judicata* was applicable:

Held, that absolute ownership was in issue and that that was what was decided as a necessary issue in favour of the respondent by the magistrate's judgment in the 1944 action, and the appeal from his decision having been finally dismissed by the West African Court of Appeal in the manner in which the latter court expressed itself in its judgment did not vitiate the proposition that the real issue had been finally adjudicated upon. The ownership of the land was decided in favour of the respondent in the 1944 action and should have settled his title to the land, and if he had counterclaimed he should have obtained a declaration of title. In the present proceedings founded upon the judgment he had earlier obtained he was entitled to the relief claimed.

Dicta of Romer J. in *Shoe Machinery Co. v. Cutlan* (1896) 1 Ch. 667, at p. 671, and of Lord Romer in delivering the judgment of the Board in *New Brunswick Railway Co. v. British and French Trust Corporation Ltd.* [1939] A.C. 1 at p. 43; 55 T.L.R. 260; [1938] 4 All E.R. 747, H.L. considered.

Judgment of the Ghana Court of Appeal affirmed.

The following cases were cited in argument:

- Hoystead v. Commissioner of Taxation* [1926] A.C. 155; 42 T.L.R. 207, P.C.
Caffoor v. Income Tax Commissioners [1961] 2 W.L.R. 794; [1961] 2 All E.R. 436, P.C.;
Society of Medical Officers of Health v. Hope [1960] A.C. 551; [1960] W.L.R. 404; [1060] 1 All E.R. 317, H.L.;
Mackenzie-Kennedy v. Air Council [1927] 2 K.B. 517; 43 T.L.R. 733, C.A.;
Stool Of Abinabina v. Chief Kojo Enyimadu [1953] A.C. 207; [1953] 2 W.L. 261 P.C.;
Owiredu v. Moshie [1952] 14 W.A.C.A. 11;
Frempong v. Brempon II, Ibid. 11, 13;
Long v. Gowlett [1923] 2 Ch. 177;
Nana Adjei III v. Nana Adjedu II, P.C. App. No. 24 of 1958 (Judgt. Mar. 21, 1961) (Unreported);

Nana Darko Frempong II v. Mankrado Kwanu Effeah, P.C. App. No. 34 1959 (Judgt. April 20, 1961) (Unreported).
Kuma v. Kuma [1938] 5 W.A.C.A. 4.

APPEAL (No. 46 of 1959) by the defendant from a judgment of the Ghana Court of Appeal (Van Lare Ag. C.J., Sharp J.A. and Adumua-Bossmann J.) (November 4, 1957) allowing an appeal by the plaintiff from a judgment of the Land Division of the High Court of Ghana (Ollenu J.) (March 22, 1957) which affirmed the decision of the Buem-Krachi Native Appeal Court (September 18, 1956) which also affirmed the decision of the Nkonya Native Court " B " (May 22, 1956).

The dispute between the parties concerned a piece of land on the eastern bank of the Volta river called " Logloto-Sakada." The plaintiff claimed a declaration of title to the land, he being the head of the Amadja clan of Akloba, and the defendant counterclaimed that the land was communal land for the town of Akloba, and that, he being the overlord of Akloba, the land was under his control and administration.

By his formal claim the plaintiff sought a declaration of title to the land and " for that matter " the title of the Amadja clan. In the Ghana Court of Appeal his claim was upheld as for himself and on behalf of the clan.

The question raised by the appeal was whether the appellant was estopped from claiming title to the land in dispute against the respondent by a judgment of the West African Court of Appeal, dated March 7, 1952, given in earlier proceedings between the same parties relating to the same land.

The facts are stated in the judgment of the Judicial Committee.

1961. May, 11, 15, 16. *Phineas Quass Q.C.*, *Gilbert Dold* and *J. A. Barker* for the appellant.

Dingle Foot Q.C. and *J. G. Le Quesne* for the respondent.

June 20. The judgment of their Lordships was delivered by LORD HODSON who, after stating the nature of the appeal, continued: The dispute concerning the ownership of the land has a long history. In January, 1941, the defendant, in his capacity as subchief, issued an order forbidding cultivation, sale or pledge of any portion of the land without his permission according to custom. The plaintiff refused to carry out the order as he claimed the land as his *bona fide* property. The defendant then claimed £50 damages from the plaintiff in the Provincial Commissioner's Court for entering the land, cultivating it, selling, pledging and giving under " Abusa " and " Abunu " without his knowledge and consent as subchief of Akloba and overseer of the land. In the same proceedings the plaintiff counterclaimed on behalf of the Amadja family £50 damages from the defendant for issuing his order seeing that the land was property founded by his family's great grandfather over 100 years ago (naming the great grandfather and his successors) without interference by the Akloba Stool, and that the family had over 12 villages on the land some of which were over 50 years old. The magistrate who heard the case dismissed the defendant's claim on the footing that disobedience of the order which the defendant had made would be a criminal offence and would not found any civil claim for damages. The counterclaim was not mentioned in the judgment which was upheld in the Provincial Commissioner's Court, Eastern Province, on April 17, 1943. This judgment did not settle the dispute between the parties as to the ownership of the land.

The next step was taken in 1944, again by the defendant. He claimed damages from the plaintiff for trespass on the land, the acts complained of being making plans of the land and fixing on it cement pillars with his

inscriptions thereon thereby falsely claiming it as his property without the knowledge and consent of the defendant. He also applied for and, on July 26, 1944, obtained an interim injunction against the plaintiff ordering him to plant no more permanent crops on the land nor to make clearings for such purpose nor to cut down timber until the determination of the suit. The suit came before the magistrate on September 10, 1946. He viewed the land but did not conclude the case until November 26, 1948, when, having again visited the land, he gave judgment in favour of the plaintiff, dismissing the defendant's claim for trespass and revoking the interim injunction previously made. There was no counterclaim and the substantial question arising on this appeal is whether the plaintiff is now entitled to a declaration of title to the land on the footing that his ownership was adjudicated upon by the magistrate who decided the trespass suit in his favour. It is necessary in order to ascertain whether the ownership of the land was decided as a separate issue to set out the material part of the magistrate's judgment. This reads as follows:

“ The most significant features of the parole evidence led before the court are firstly that the plaintiff in his cross-examination did not attempt to question the testimony of the first defendant's witness that that defendant has people, who pay rent to him, working on the land for him; that they had (in 1946) occupied the land for 15 years; that defendant had more than 14 villages on the land but that plaintiff has no farm and no village on it; secondly, that defendant's fourth witness states that defendant is the successor of the persons whom he has regarded as his landlords and to whom he had paid rent and that plaintiff has never claimed rent from him; thirdly, that defendant's fifth witness states that Evi Yiboe is his landlord and is the successor of the people whom he had (in 1946) for 15 years regarded as his landlord and to whom he has paid rent and that plaintiff has never claimed rent from him.

When I visited the land on November 24, 1948, I was able to confirm that one of the farms made by defendant's fourth witness was situate within the land claimed by plaintiff and that it contained a permanent crop, namely mature cocoa which is in my opinion approximately 20 years old. It is admitted by plaintiff that the farm of defendant's fifth witness which is also situate within the land claimed by plaintiff contains cocoa of similar age and maturity. Finally defendant's fourth witness stated that he had for 7-8 years paid market tolls in respect of Sakada market to defendant, whose clan opened the market about 12 years ago. It is completely contrary to all my experience of customs in these parts that a person who had a valid claim to ownership of land should allow another person to grant permission to third parties to plant permanent crops or erect a market on such lands and to receive annual rents of market tolls from these third parties. Now although the cocoa trees must have been planted not later than the period 1928-30 the plaintiff did not initiate legal action against the defendant until 1941.

I can therefore only conclude that the land specified by plaintiff in his claim is not Akloba Stool land but belongs to the defendant either in his personal capacity or as head of his family or of the Amandja clan.”

In this extract it will be remembered that the position of the parties was reversed, the present plaintiff being defendant.

The decision of the magistrate given in 1944 was appealed by the defendant to the Land Court upon the grounds that the magistrate's decision was against the weight of the evidence and, secondly, was bad in law for vagueness and uncertainty. The judge of the Land Court dismissed the appeal on May 19, 1950, and in so doing interpreted the magistrate's decision in their Lordships' opinion correctly saying: "He (the magistrate) found that the land did not belong to the plaintiff Stool but that it did belong to the defendant." He continued: "The magistrate's inability to say whether defendant held the land as his own property or as head of his family or clan may leave the defendant in an unsatisfactory position but this is no concern of the plaintiff." Again, in reading this extract it is to be noticed that the position of the parties is reversed.

In the West African Court of Appeal to which the defendant took the case the same result followed when, on March 7, 1952, his appeal was dismissed and the magistrate's order confirmed but, since the plaintiff had not counterclaimed for a declaration of title, that paragraph of the magistrate's judgment which purported to declare that the land belonged to the plaintiff either in his personal capacity or as head of his family or of the Amandja clan was deleted.

In the Court of Appeal the case took a different course from that previously followed in that counsel for the defendant submitted that his client had at no time questioned the plaintiff's right to occupy the land. The plaintiff's counsel pointed out that this was a complete change of front and referred to the nature of the claim which was for trespass and to the injunction which the defendant had obtained. He did, however, in his turn submit that the real issue between the parties was "who is entitled to possession of the Stool."

The Court of Appeal proceeded to deal with the case, as appears from the judgment of Foster-Sutton P., with whom the other members of the court agreed, on the basis that the issue was as to possession not as to ownership.

This judgment is strongly relied upon by the defendant since if the interpretation of the case adopted by the Court of Appeal in 1952 is correct, the ownership as opposed to the possession of the land was never decided.

Having succeeded on his appeal but having no declaration of title the plaintiff instituted the present proceedings by a summons issued on January 10, 1956. He relied upon the finding of the magistrate in the trespass suit and the record of the appeals culminating in the decision of the West African Court of Appeal in 1952. He called no parole evidence. In the native courts he lost, the view being taken that this was a new claim to be proved by fresh evidence. Judgment was given, for the defendant after hearing the evidence called on his behalf. In the Land Court to which the plaintiff appealed judgment was delivered by Ollenu J. on March 22, 1957. The judge dismissed the appeal. While recognising that in a claim for trespass a plea of ownership by the defendant usually put the title of the plaintiff in issue, he distinguished the 1944 case as one where the claim being by the head of a Stool against a subject "the ownership of the defendant in possession could only be the usufruct while absolute title may be vested in the Stool or family." He concluded that the issue whether the land is the plaintiff's absolute property in which the defendant's Stool or the Akloba community has no interest was not then in issue nor necessarily decided for the determination of the issue of trespass.

The plaintiff appealed to the Ghana Court of Appeal which reversed the decision of Ollenu J. Van Lare Ag. C.J. stated the issue, in their Lordships' opinion correctly, when he said: "The real matter for a decision

in this case must therefore be whether absolute ownership of the ' Logloto-Sakada ' land is vested exclusively in the appellant representing the Amandja clan of Akloba or in the respondent representing the Stool of Akloba as a communal land for all the inhabitants of that town."

It is clear from the extracts set out above from the magistrate's judgment given in 1948 that this issue was truly decided as a necessary issue in favour of the present plaintiff. No question of any usufructuary right or other determinable interest arose and neither conceded that the other was the owner of the land so as to give rise to consideration of such a question.

It would appear, as Adumua-Bossman J. pointed out in the Ghana Court of Appeal, that the prominence given in the arguments and in the judgment of the West African Court of Appeal in 1952 to the question of occupation and user misled the judge of the Land Court into a misunderstanding of what had actually been decided by the magistrate.

There being no question in their Lordships' opinion that the issue of ownership was raised and decided in the earlier proceedings, and that the appeal from the magistrate was dismissed finally in the West African Court of Appeal, the manner in which that court dealt with the submissions of counsel and expressed itself in its judgment does not vitiate the proposition that the real issue has been finally adjudicated upon.

As Romer J. pointed out in *Shoe Machinery Co. v. Cutlan* (1896) 1 Ch. 667, at pp. 670-671 in a passage cited by Van Lare Ag. C.J.: " It is not necessary, in considering the question of *res judicata*, that there should be an express finding in terms, if, when you look at the judgment and examine the issues raised before the court, you see that the point came to be decided as a separate issue for decision, and was decided between the parties."

Lord Romer, in delivering the judgment of the Privy Council in *New Brunswick Railway Co. v. British and French Trust Corporation Ltd.* [1939] A.C. 1, 43 said: " It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter."

The ownership of the land was decided in favour of the plaintiff and should have settled his title to the land. If he had counterclaimed he should have obtained a declaration of his title. Not having counterclaimed he was forced to get over his procedural difficulty by instituting fresh proceedings founded upon the judgment he had earlier obtained in order to obtain the relief which he seeks, that is to say, a declaration of his title to the land. To this relief he is plainly entitled.

As to the form of the declaration, comment on the uncertainty of the declaration sought was made by counsel for the defendant. Whether it should be in the form contained in the statement of claim or as put by Van Lare Ag. C.J. in his judgment, or in some other form, may require consideration by the appropriate Ghana court but, as Smith J. pointed out, this is no concern of the defendant.

Their Lordships will, accordingly, report to the President of Ghana as their opinion that the appeal ought to be dismissed, and that the appellant ought to pay the respondent's costs of the appeal.

Solicitors: *A. L. Bryden & Williams; Herbert Oppenheimer, Nathan & Vandyk.*

JOHN KWESI TAYLOR APPELLANT
AND
JOSHUA FANYE DAVIS RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 387

1961 June 26 Lords Denning, Morris of Borth-y-Gest and Hodson

Agency—Account—Referee: terms of reference.

After the trial of the action had begun the Judge made an order referring accounts to a referee. The main issue which is raised in this appeal is whether the referee who was appointed to go into accounts and report his findings to the Court exceeded his terms of reference by deciding certain questions of law and fact and whether the Courts below should have accepted his findings although no evidence was called before the trial Judge.

Held: When the reference was made "to go into accounts" it became an essential part of the referee's inquiry to investigate all the business transactions between the parties and to consider the period of time covered by the accounts: that inevitably involved inquiring as to the period of time during which the respondent carried on timber business as the agent of the appellant. . . . The referee did no more than was necessary and essential in the discharge of the duty imposed upon him "to go into accounts" so as then to report his "findings" to the Court.

LORD MORRIS OF BORTH-Y-GEST. The appellant brought an action in the Supreme Court of the Gold Coast in which he claimed to have an account taken of a timber business carried on by the respondent as his agent, and payment of the amounts found due to him on the taking of the account. By his judgment dated the 30th December, 1954, Acolatse J. dismissed the claim and allowed the respondent's counter-claim in the sum of £1,351 6s. 3d. The appellant appealed to the West African Court of Appeal. By judgment dated the 28th June, 1956, the appeal was dismissed. From this judgment the appellant now appeals.

After the trial of the action had begun before Acolatse J. an order was made referring accounts to a referee. The main issue which is raised in this appeal is whether the referee who was appointed to go into accounts and report his findings to the Court exceeded his terms of reference by deciding certain questions of law and fact and whether the Courts below should have accepted his findings although no evidence was called before the trial Judge.

On the 31st August, 1945 (by an agreement of that date) the respondent was granted a timber concession by the Omanhene of Assin-Apimanim State. The respondent was to be permitted to fell timber for a period of ten years in an area of land measuring twenty miles square and to make such timber into logs to be hauled away. The respondent paid £200 as an advance in respect of the payments which at agreed rates were to be made in respect of the trees that were felled. That amount of £200 was paid to the respondent by the appellant at whose instance and on whose instructions the respondent had entered into the concession agreement. This was recited in an agreement made between the appellant (who was called the principal) and the respondent (who was called the contractor) on the 31st January, 1946. By that agreement it was further recited that it was the intention of the parties to carry on timber business in the area covered by the concession and it was agreed that:

“ in consideration of the premises and of the advance in money already made and to be made in the future by the principal towards the performance of the duties and obligations on the part of the contractor to be discharged in respect of the contract with the Asin Apimanim Stool the said contractor doth hereby COVENANT with the principal that he will faithfully carry out the said duties and obligations during the currency of the agreement with the Assin Apimanim Stool with the help advice and assistance of the principal and that in return therefor he will after deduction of all working expenses and other out-goings either weekly or otherwise as may be agreed upon pay to the principal one half of the amount of profits realised on the sale and disposition of all timber and timberlike trees, boards, etc. obtained from the said Basofi Land by virtue of the said agreement with the Assin Apimanim Stool AND the contractor doth hereby assign all his claims rights interests and benefits arising under and by virtue of the said agreement to the principal as a disclosed principal under that agreement AND THE PRINCIPAL doth hereby covenant with the contractor that he will continue as heretofore in giving all necessary assistance to the contractor towards the due performance of the said contract.”

The agreement also provided that so long as he carried out his part of the contract the respondent was to be entitled to retain one half of the nett profits.

There was an addendum to the agreement which was signed by both parties and which was in the following terms:

“ AND it is hereby further agreed between the parties hereto that the foregoing agreement shall be preparatory to the creation of a partnership under the law for timber and other kinds of ventures and that out of the nett profits accruing from the aforesaid business to which each party is entitled to 50 per cent, the principal shall deposit in an account to be opened at the Bank of British West Africa Ltd., Cape Coast in their joint names one-third of the said 50 per cent. and that deposits shall be made at the close of every timber deal until the sum of five hundred pounds is deposited from the joint savings whereupon the foregoing agreement shall determine and the parties shall enter into a partnership with the said £500 as capital.”

In his action, which was begun by writ of summons dated the 21st January, 1953, the appellant alleged that he had performed his part of the agreement by advancing the sums required by the respondent from time to time for the timber business, but claimed that the respondent had failed to pay to him his share of the nett profits or to furnish him with any accounts. The appellant claimed:

- “(a) To have a full and true account of the said timber business carried on by the defendant as the plaintiff's agent.
- (b) Payment to the plaintiff of his share or interest under the said agreement by the defendant.
- (c) Fifty thousand pounds (£50,000) damages for breach of the said agreement by the defendant.”

In the alternative the appellant claimed that:

- “(a) the plaintiff and the defendant were and are partners under the said agreement;

- (b) an account to be taken of the said partnership transaction or business and for payment by the defendant to the plaintiff what is due to the plaintiff under the said agreement.
- (c) the dissolution and winding up of the said partnership business."

In his defence the respondent pleaded that it was a condition precedent to any liability on his part that the appellant should from time to time pay sums of money to him when and as required for carrying out the contract but that the appellant had not made such advances with the result that he, the respondent, had been obliged to carry on the contract with his own money. The respondent further pleaded that in the latter part of 1948 at the appellant's request accounts were taken between the parties by a Mr. Ayornoo with the result that it was shown that the appellant was indebted to the respondent and that after those accounts were taken all business relations under the agreement were terminated by mutual agreement and that the respondent thereafter carried on his own business. The respondent counterclaimed for the sum of £1,351 6s. 3d. as follows:

"The defendant at the request of the plaintiff supplied to the plaintiff from 31st January, 1949 to 22nd June, 1951 timber logs and mahogany curls, and also advanced to the plaintiff sums of money on loan to the plaintiff within the said period all to the aggregate amount of £1,351 6s. 3d. which is now outstanding and unpaid, particulars of which are as under:

		£	s.	d.
31. 1.49	Mahogany Curls	173	0	0
15. 2.50	Wawa Logs	228	6	3
31. 5.49	Loan	100	0	0
22. 6.51	Loan	850	0	0
		<hr/>		
		£1,351	6	3 "
		<hr/>		

In the course of his reply the appellant claimed that under the agreement he had from time to time advanced sums of money to the respondent to an amount of £1,980 6s. 5d. "against which" the respondent had supplied timber and curls and had repaid moneys to the extent of £1,351 6s. 3d. The appellant therefore claimed that there was a balance of £629 0s. 2d. in his favour. The appellant denied that accounts were taken by Mr. Ayornoo in 1948 or that business relations between the parties had thereafter ceased.

An issue was also raised on the pleadings as to whether in 1952 the appellant had unsuccessfully tried, by an arbitration, to effect a reconciliation with a view to renewing business relations.

The action came on for hearing before Acolatse J. on the 23rd June, 1953. The appellant was in the course of giving evidence when by consent an order was made referring accounts to a referee. In the record it was stated: "At this stage question of accounts involved to be referred to E. J. Blankson, Court Clerk, to go into accounts and report his findings to the Court." The record also contains the words: "By Court: Usual Order." No actual order appears to have been drawn up but it would seem to be clear that the reference was under the provisions of Order 38 of the Rules of the Courts (see The Courts Ordinance, Laws of the Gold Coast 1951, Vol. I, page 138). The provisions of Order 38 include the following rules:

"1. In any case or matter in which all parties interested, who are under no disability, consent thereto, and also without such consent in

any cause or matter requiring any prolonged examination of documents or accounts or any scientific or local examination, which cannot in the opinion of the Court, having regard to the other business before it, conveniently be made by the Court in the usual manner, the Court may at any time, for reasons stated on the minutes, on such terms as it may think proper, order any question or issue of fact, or any question of account arising therein, to be investigated or tried before a referee, who shall be a Magistrate or other competent person, to be agreed on between the parties or appointed by the Court.

2. In all such cases the Court shall furnish the referee with such part of the proceedings and such information and detailed instructions as may appear necessary for his guidance, and shall direct the parties, if necessary, to attend upon the referee during the inquiry. The instructions shall specify whether the referee is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred to his investigation.

3. The Court may at any stage of the proceedings direct any such necessary inquiries or accounts to be made or taken notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

9. The proceedings and report in writing of the referee shall be received in evidence in the case unless the Court may have reason to be dissatisfied with them, and the Court shall have power to draw such inferences from the proceedings or report as shall be just.

10. The Court shall have power to require any explanations or reasons from the referee, and to remit the cause or matter or any part thereof for further inquiry or consideration to the same or any other referee, as often as may be necessary, and shall pass such ultimate judgment or order as may appear to be right and proper in the circumstances of the case."

It was contended on behalf of the appellant that the reference was limited in that it was to be concerned only with the accounts whereas, so it was contended, the referee had proceeded to do much more than to "go into the accounts" and had virtually decided the issues in the action. It becomes necessary therefore to consider the proceedings that followed the making of the consent order of the 23rd June, 1953. It must however be apparent that in view of the claims presented by both parties as set out in their pleadings any investigation as to the accounts which was to result in reporting "findings" to the Court would inevitably involve a consideration of and a determination of many disputed issues of fact. An inquiry that resulted in a mere recording of evidence given without setting out any "findings" as to how matters stood finally as between the parties would have been valueless. This seems to have been the view of both parties for they appeared before the referee on over twenty occasions (some of which were concerned with adjournments) on various dates between the 30th June, 1953, and the 25th May, 1954. They presented their cases fully and called numerous witnesses. One of the witnesses was Mr. Ayornoo. It is significant also to note that during that part of the hearing before the referee which took place on the 17th September, 1953, a point arose as to whether the respondent could give evidence that he had paid moneys to the appellant in respect of the business and made loans to the appellant apart from the amounts for which he, the respondent, had counter-claimed. Counsel for the appellant objected to the

giving of such evidence. The referee was requested to refer the point to the Court for its ruling. The referee did so. He set out the position in a report to the Court dated the 8th October, 1953. That report concluded with the words:

“ In my opinion as this case is one involving accounts for which this reference was appointed, I think all admissible evidence should be produced to enable the referee to arrive at a definite conclusion, particularly in view of the fact that all the account books are not available. It is a matter of credibility and I recommend that the defendant should have the opportunity to lead whatever evidence he desires in proof of his case.”

The learned Judge made an order in the following terms:

“ *REFEREE*

Take all available evidence of parties to assist you in the taking of accounts in this matter to arrive at your conclusion of facts.

(Intd.) C.S.A.J.”

There were very many further appearances thereafter before the referee. When they terminated the referee prepared a careful and lengthy report for the Court. In regard to the appellant's allegation that he had made advances under the agreement to a total of £1,980 6s. 3d. the finding of the referee was that the correct total was £1,390 6s. 3d. He held that the appellant had withdrawn a total of £740 from the business with the result that the appellant had a balance to his credit of £650 6s. 3d. as money invested in the business by him. He found that the respondent had invested in the business a total of £701 11s. 3d. and he said that in his opinion the respondent was entitled to recover any sums of money paid by him into the business, subject to whatever interpretation was placed on his obligations under the agreement. As to the counterclaim he recommended that judgment be entered for the respondent for the amount he had claimed *viz.* £1,351 6s. 3d. in respect of timber supplied and money lent between 1949 and 1951.

Further the referee held that accounts were taken by Mr. Ayornoo in 1948 and that the respondent produced all the books for him. The referee also held that the business under the agreement ceased when the accounts were taken and that the books were then removed by the appellant.

The report was received in evidence by Acolatse, J. on the 8th December, 1954, and counsel for the appellant submitted that the referee had been wrong in concluding that the business relationship had ceased and that it was for the Court alone and not for the referee to decide that matter. Further argument took place before the learned Judge on the 10th and 13th December, 1954, and he gave judgment on the 30th December, 1954. He stated that one question to be determined was whether the relationship between the parties under the agreement “ was to be considered as principal and agent or partners carrying on partnership business.” He had no hesitation in holding that the parties were not partners and were not carrying on partnership business but that the respondent undertook the duty of a contractor for the appellant and that the relationship between the parties under the agreement was “ one of a ‘disclosed principal’ and a contractor and each entitled to ½ share in the net profit of the operation of the ‘concession’ as long as the principal, as plaintiff, advanced moneys for the working of the concession.” As to the balance in favour of the respondent on Capital Account (*i.e.* the difference between the £701 11s. 3d. advanced by the respondent and the £650 6s. 3d. standing to the

appellant's credit) the learned Judge held that such balance ought to be regarded as a bad investment by the respondent who was not obliged to provide money for the business and who had not been requested to do so by the appellant. Furthermore he held that the concession itself was invalid and that it did not come "within the ambit of the Concessions Ordinance." He held that the referee's report was full and comprehensive on all material facts and he accepted and adopted it and dismissed the appellant's claim and allowed the counterclaim.

The appellant appealed to the West African Court of Appeal. The appeal failed and in giving his judgment K. A. Korsah C.J. (with whom Coussey P. and Baker Ag. J.A. concurred) said:

"Counsel for plaintiff-appellant, objected to the admission, of the referee's report and proceedings in evidence, on grounds briefly summarised as follows: (1) Referee exceeded his powers and decided questions of law which he is not entitled to do, therefore the proceedings before the referee should be declared null and void. (2) That the order to the referee was vague and that the Court before referring the accounts to a referee should have decided certain matters, such as whether partnership had been dissolved, and the rights of parties in Basofi Concession.

"In my opinion this proposition cannot be supported. Certainly the referee's opinion on questions of law should in no way influence the Court, which alone decides finally the issues of law and fact arising as to the accounts. It is open to the Court to agree or disagree with the findings of the referee so that, in every respect, it is incumbent on the trial Judge to come to his own conclusions on questions both of law and fact irrespective of what the findings of the referee may be."

The main contentions advanced before their Lordships' Board on behalf of the appellant were that the referee had dealt with questions of fact and law which were outside his terms of reference and that the learned Judge had erred in that he did not himself hear the witnesses but accepted the findings of the referee. It was also contended that the learned Judge erred in holding that the concession itself was invalid. As to this latter contention their Lordships find it unnecessary to consider or to express any opinion as to whether the concession itself was or was not invalid. The parties proceeded on the basis that there was a good existing concession and even if there had been any invalidity affecting it, that circumstances would be immaterial so far as concerned the taking of accounts between the parties. On the major contention advanced on behalf of the appellant their Lordships cannot accept that the referee exceeded his terms of reference. One claim which was put forward by the appellant in his statement of claim in his action was "to have a full and true account of the said timber business carried on by the defendant as the plaintiff's agent": another (alternative) claim was for "an account to be taken of the said partnership transaction or business and for payment by the defendant to the plaintiff what is due to the plaintiff under the said agreement." When the reference was made "to go into accounts" it became an essential part of the referee's inquiry to investigate all the business transactions between the parties and to consider the period of time covered by the accounts: that inevitably involved inquiring as to the period of time during which the respondent carried on the timber business as the agent of the appellant. Furthermore at the stage of the original hearing before Acolatse J. when the order referring accounts was made the appellant had stated that the

books in connection with the business had been and were then still in the possession of the respondent. The respondent had pleaded in his defence that the books had been taken away by the appellant and had been kept by him after Mr. Ayornoo had taken accounts in 1948. The facts in regard to those matters became inevitably in issue before the referee and both parties concurred in investigating them before the referee. The lengthy hearings before the referee were conducted on the footing that it was essential when having a reference "to go into accounts" to come to a conclusion as to the length of time for which the activities were conducted which were the occasion for having accounts between the parties. If the effective relationship between the parties came to an end at some particular date then that date was a vital date from an accounting point of view.

It is to be observed that in regard to the question whether the respondent was entitled to recover any sums of money paid by him into the business the referee only expressed his view subject to whatever interpretation should be placed upon his obligations under the agreement.

Their Lordships are quite unable to accept the submission that the referee exceeded his terms of reference. He did no more than was necessary and essential in the discharge of the duty imposed upon him "to go into accounts" so as then to report his "findings" to the Court.

Their Lordships will report to the President of Ghana as their opinion that the appeal should be dismissed and that the appellant should pay the respondent's costs of the appeal.

CHIEF FAGBAYI OLOTO (FOR HIMSELF AND ON BEHALF
OF THE OTHER MEMBERS OF THE OLOTO
CHIEFTAINCY FAMILY) PLAINTIFF

AND

THE ATTORNEY-GENERAL DEFENDANT

And, by Order of Substitution:

CHIEF IMMAN ASHAFI TIJANI (FOR HIMSELF
AND ON BEHALF OF THE OTHER MEMBERS OF
THE OLOTO CHIEFTAINCY FAMILY) PLAINTIFF/APPELLANT

AND

THE ATTORNEY-GENERAL DEFENDANT/RESPONDENT

[ON APPEAL FROM THE FEDERAL APPEAL COURT OF NIGERIA]

(1961) All N.L.R. 893

1961 June 26

Lords Denning, Morris
and Hobson

Petition of Right—Petitions of Rights Ordinance, Cap. 167 (1948 Ed.)—User of Lands by Government—Compensation.
Compulsory Acquisition of Lands—Public Lands Ordinance 1876 (No. 8 of the Colony of Lagos) s. 3, 7, 10 (1)—Compensation claims statutory.
Practice and Procedure—Pleading—Amendment—Departure—Pleading of new claim generally not allowable before Appellate Court.

Appeal from judgment of the Federal Supreme Court (Nigeria) Dismissing Claim Against the Crown.

The appellant, Chief of the Olotos, was substituted for the late Chief Oloto, who, in 1948, after obtaining the *fiat* of the Governor in pursuance of the Petition of Right Ordinance, instituted these proceedings on behalf of himself and the other members of the Oloto Chieftaincy Family. The claim originally was for £630,000 claimed as compensation to the Oloto family for the user by the Government of Nigeria of lands said to have been owned by the Olotos from time immemorial and compulsorily taken by the Government many years before the action was brought.

In the trial Court, appellant was unable to establish the claim for user; since the only user by the Government, which he pleaded and could prove, was that which commenced when, and has continued since, the Government acquired title and went into possession under the Public Lands Ordinance, 1876; and no evidence of any prior user was adduced in support of the claim. The trial court gave judgment in favour of the respondent, the Attorney-General, and the appellant appealed to the Federal Supreme Court (1957) 2 F.S.C. 74.

In the Federal Supreme Court it was pointed out to the appellant that the claim, as pleaded, could not succeed once it was admitted that the lands had been acquired by the Government.

Counsel then sought and obtained leave to amend the claim. The material part of the amended claim then read:

"(3) That the landed properties hereinafter described form part of the land owned by the family from time immemorial.

(4) That the Government of Nigeria are now using, having acquired the same under the Public Lands Ordinance, the said landed properties and no compensation has been paid to the family either for the said acquisition or for the usage of the said properties by the same Government of Nigeria.

(5) (a) In the circumstances set forth in paragraphs 1 to 4 and in the circumstances that the defendants failed or neglected to provide compensation for the plaintiff pursuant to the Public Lands Ordinance, 1876, at or within a reasonable time after the acquisition of the several properties mentioned in paragraph 6 below, an implied contract arose to pay the plaintiff compensation for the deprivation of the use of the said lands."

The Federal Supreme Court held that no contract as pleaded could be implied, and that the claim was still one for user after acquisition and was not tenable. The appeal was dismissed.

The Appellant then appealed to the Privy Council.

In addressing their Lordships counsel for the appellant, at the outset, discarded the claim as it had hitherto been pleaded and limited it to a claim for compensation under section 3 of the Public Lands Ordinance, 1876.

This claim had not been made previously, and no application for further leave to amend was sought. However, on behalf of the Appellant it was contended that the Statement of Claim stated sufficient facts to support this new claim, in that it was alleged that the Government had acquired the lands without compensation having been paid to the Oloto family.

On this footing no attempt was made to seek compensation on any other basis than the value of the lands at the date of acquisition, i.e. £1,890.

On behalf of the Respondent it was contended (1) that this was a new case which raised for the first time the question of how and within what time a claim for compensation could be made under the Ordinance; (2) that this matter had not been considered by the Government or by the courts below; (3) that it was contrary to established practice to permit such a departure at this stage and (4) that it is not to be supposed that if the matter had been presented to the Governor in this way in 1948 he would necessarily have given the *fiat* which enabled the proceedings to be commenced; especially having regard to the long interval which elapsed between the acquisition and the application for the *fiat*.

Held: (1) Where land is acquired for public purposes under a statute, the Government takes as of right and no implied contract by the Government to pay compensation can be inferred from the taking.

(2) Claims for compensation for lands acquired by the Government for public purposes under a statute are statutory; and no owner of lands, so expropriated by statute, is entitled to compensation unless he can establish a statutory right to such compensation.

(3) A departure whereby a plaintiff, having pleaded an implied contract, seeks to establish a claim based upon a statutory right will not be allowed by an Appellate Court, unless there are good and sufficient reasons for permitting him to put forward such fresh claim.

Obiter: There is a presumption, made the stronger by the lapse of forty years between the dates of acquisition and the institution of proceedings, that everything was done regularly in pursuance of the statute; that is to say that upon acquisition of the lands, reasonable compensation was paid to the persons entitled thereto.

Appeal dismissed.

Cases referred to:

Attorney-General and De Keyser's Royal Hotel Ltd. [1920] A.C. 507; 89

L.J.Ch. 417; 122 L.T. 691; 36 T.L.R. 600; 64 Sol.Jo. 513; (1919) 2 Ch. 197.

Sisters of Charity of Rockingham v. The King [1922] A.C. 315.

Delarue v. Church, [1851] 20 L.J.Ch. 183; 17 L.T.O.S. 102; 15 Jur. 455.

Acts and Ordinances referred to:

Petitions of Right Ordinance, Cap. 167. (1948 ed.)

Public Lands Ordinance 1876, (No. 8 of the Colony of Lagos).

Limitation Act 1623 (21 Jac. 1 c. 26).

APPEAL from Federal Supreme Court (Nigeria).

Gratien, Q.C. (with him *Traverne*) for the appellant.

Foster, Q.C. (with him *Walter*) for the respondent.

LORD HODSON (delivering the Judgment of the Lords of the Judicial Committee). This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 16th December, 1957, dismissing the appellant's appeal from a judgment of the Supreme Court of Nigeria whereby the appellant's claim against the Government of Nigeria was dismissed.

The appellant is chief of the Olotos having succeeded the late chief who instituted these proceedings on behalf of himself and the other members of the Chieftaincy.

The proceedings began by a statement of claim (analogous to a petition of right) delivered on the 14th September, 1948, the Governor having given his *fiat* unconditionally, pursuant to the Petitions of Right Ordinance (Cap. 167 of the Laws of Nigeria).

The claim as originally presented was for £630,000 claimed as compensation to the Oloto family for the user by the Government of the Nigeria of lands said to have been owned by the Olotos from time immemorial.

The claim in its entirety has never been formally abandoned although the evidence called on behalf of the appellant was insufficient to support it on any view of the case. In the case placed before their Lordships it was submitted that compensation for user of the lands should be based on their present value meaning their value at the date of the institution of proceedings. This was according to the evidence of a witness called by the appellant something of the order of £227,000 the lands now being used for public purposes having upon them law courts, barracks, botanical gardens training schools and railway tracks. According to the evidence of a surveyor called on behalf of the Government of Nigeria the value of the lands at the date of acquisition was about £1,890.

The lands are ten in number and described in paragraph 6 of the statement of claim, one being on the island of Iddo and the other nine on the mainland nearby at Ebute-Metta. All the lands were acquired by the Government of Nigeria under the Public Lands Ordinance of 1876 (No. 8 of the Colony of Lagos). Notices of acquisition were given between 1891 and

1903 and certificates of title were received by the Colonial Secretary between 1910 and 1927.

Section 10 (1) of the ordinance provided: "The Certificate shall not be questioned or defeasible by reason of any irregularity or error or defect in the notice, or the want of notice, or of any other irregularity error, or defect in the proceedings previous to the obtaining of such Certificate."

Section 3 of the ordinance provided for the payment of reasonable compensation in respect of land acquired by the Government and section 7 gave jurisdiction to the competent courts to adjudicate on questions of compensation or of disputed ownership.

The claim for user was never sustainable for no evidence was ever put forward to show that the Government had ever used the lands before acquisition. After acquisition no user by the Government who had become owners of the property could give rise to any claim by anyone else for payment by the Government for the use of their own land.

When the case reached the Federal Supreme Court it was pointed out to counsel for the appellant that the claim could not succeed once it was admitted, as it was, that the lands had been acquired by the Government who held certificates of title thereto.

Counsel had already expressly stated that the action was not for compensation under the Public Lands Acquisition Ordinance, and had gone on to point out that his claim rested on user since the date of acquisition.

When this impasse was reached in the Federal Supreme Court Counsel sought and obtained leave to amend the claim in order to try and show cause of action where none had existed before.

The material parts of the statement of claim then read as follows:

"(3) That the landed properties hereinafter described form part of the land owned by the family from time immemorial.

(4) That the Government of Nigeria are now using, having acquired the same under the Public Lands Ordinance, the said landed properties and no compensation has been paid to the family either for the said acquisitions or for the use of the said properties by the same Government of Nigeria.

(5) (a) In the circumstances set forth in paragraphs 1 to 4 and in the circumstance that the defendants failed or neglected to provide compensation for the plaintiff pursuant to the Public Lands Ordinance, 1876, at or within a reasonable time after the acquisition of the several properties mentioned in paragraph 6 below, an implied contract arose to pay the plaintiff compensation for the deprivation of the use of the said lands."

After this amendment had been made the latter state of the appellant's case was no better than its earlier condition. His claim was still for user and no contract could be implied.

Compulsory acquisition as Nageon de Lestang F.J. pointed out is the antithesis of agreement and compensation can only arise by virtue of the Public Lands Ordinance. The learned Federal Justice cited the language of Lord Dunedin in the case of the *Attorney-General and de Keyser's Royal Hotel Ltd.* [1920] A.C. 508 at p. 522 which as he said puts the position very clearly in these words:

"It (one argument) was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract . . . The simple answer to this argument is that the

facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as a right, basing that right specially on the Defence of the Realm Act. The Receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained that the Crown was wrong in its contention, and that no case for taking under the Defence of the Realm Act had arisen: in other words, that the Crown had, under the circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on their side an implied contract is to my mind a sheer impossibility."

Their Lordships concur in the view expressed by Federal Justice Lestang that this was the end of the case as it had been presented to the Court of First Instance and to the Court of Appeal.

As is shown by the case of the *Sisters of Charity of Rockingham v. The King* [1922] 2 A.C. 315 the appellants are entitled to their statutory right to compensation or nothing. In the words of Lord Parmoor, who delivered the judgment of the Privy Council,

"Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on [the] ground that his land is 'injuriously affected,' unless he can establish a statutory right."

The appellant in addressing their Lordships through his counsel recognised this position at the outset and discarded the claim as it had hitherto been presented limiting himself to a claim for compensation under section 3 of the Public Lands Ordinance 1876.

This claim has never previously been made and no application for further leave to amend was sought but an argument was put forward on the basis that the statement of claim stated sufficient facts in that it was alleged that the Government had acquired the lands without compensation having been paid to the family for their acquisition.

On this footing no attempt was made to seek compensation on any other basis than the value at the date of acquisition that is to say £1,890.

Counsel for the respondent rightly pointed out that this was an entirely new case which raised for the first time the question of how and within what time a claim for compensation should be dealt with under the ordinance and further that this matter had never been considered by the Government of Nigeria or by the courts for such a departure to be permitted at this stage. He also pointed out again rightly that it is not to be supposed that if the matter had been presented to the Governor in this way in 1948 he would necessarily have given the *fiat* which enabled the proceedings to be launched, especially having regard to the long interval which had elapsed between the acquisition of the lands and the application for the necessary *fiat*.

It appears to their Lordships that this submission is sound and that there is no sufficient reason for the appellant now to be permitted to put forward an entirely fresh claim.

Notwithstanding this opinion their Lordships have considered the evidence and the judgments appealed from on the basis that the appellant's claim is a claim for compensation under paragraph 3 of the ordinance of 1876.

There is a presumption made the stronger by the lapse of forty years between the dates of acquisition and the institution of proceedings that everything was done regularly in pursuance of the statute that is to say that upon acquisition of the lands reasonable compensation was paid to the persons entitled thereto.

In order to make good his claim to compensation he has to show that the Olotos were the owners of the lands at the time of their acquisition, that no reasonable compensation was paid in respect of the acquisitions and that the lands acquired were occupied; for, if they were unoccupied, no compensation was payable. In the case of several of the lands the Crown was able to prove that compensation had been paid.

In respect of the acquisition of the piece of land on the island of Iddo the Chief of the Olotos received £70. This is land 6 (a) in the statement of claim. In respect of the acquisition of lands 6 (e), (f), (g) and (k) compensation was proved to have been paid to other persons. It appeared from the evidence that much of the land previously owned by the Olotos had been sold to others long ago. In the case of the five lands 6 (b), (c), (d), (h) and (i) there was no evidence of compensation having been paid to anyone for their acquisition. In case of lands 6 (c), (d), (h) and (i) the appellant failed to prove ownership at the dates of acquisition.

As to land (b) it is true that the trial Judge accepted the evidence of the appellant that the Olotos were owners of the land at the time of acquisition and it may be inferred that he accepted that no compensation had been paid and that the land was occupied by the family. In the Appeal Court this finding was not accepted since there was a palpable error in dates but in any event the evidence in support of this finding was tenuous in the extreme. It was the evidence of one witness only, the present appellant, who was 66 years of age at the time of the hearing of the case in 1953 and was thus a child of tender age at the time of the acquisition and relied mainly on the traditions of his family and not to any extent on his own personal recollection.

Their Lordships see no reason to dissent from the judgment of the Court of Appeal in so far as it reversed the finding of fact made by the trial Judge in favour of the appellant as to land (b).

In their Lordships' opinion the presumption of regularity is strong as to all the lands. They would adopt the language of Knight Bruce V.C. in *Delarue v. Church* (1851) Law F.Rep. (N.S.) Equity 183 at p. 185 when speaking of a grant of annuity made in 1817 under an Act of Parliament passed in 1816.

“ It is sufficient to say that almost anything ought to be presumed, after such a length of enjoyment, capable of supporting the grant. ”

It was contended on behalf of the appellant that this authority was distinguishable since although the acquisitions here were regularly made in each case such acquisitions would take place independently of and before compensation had been agreed or assessed. It was said accordingly that there was no ground for presuming that reasonable compensation had been paid in accordance with the ordinance. Their Lordships are not prepared to accept this argument and regard the presumption that the acquisitions were followed by compensation as of strong force and effect. There was a paucity of evidence adduced by the appellant to rebut the presumption and support even the restricted claim he now seeks to establish.

It is thus unnecessary to consider the further question which occupied much time in the Courts of Nigeria whether or not the claim of the appellant is time barred by the Limitation Act 1623 (21 Jac. 1. C. 26) or whether if the

Limitation Act does not apply the claim is in any event barred by laches.

Their Lordships will humbly advise Her Majesty that the Appeal be dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Messrs. Hatchett Jones & Co.*

Solicitors for the respondents: *Messrs. Charles Russell & Co.*

OLATUNJI OMOTAYO APPELLANT
AND
A. Y. OJIKUTU RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1961) All N.L.R. 901

1961 July 17

Lords Tucker, Denning and
Morris of Borth-y-Gest

Agency—Negligence—Measure of skill and knowledge—Degree of diligence required of Agent—Liability of Agent to Principal.

The Appellant and the respondent were both general traders, the appellant's business being concerned with timber and produce, and both were members of a syndicate in Lagos. In September, 1952, the appellant paid a visit to London on general trading business on behalf of the syndicate where he met a Mr. Frankel who offered to sell him 25 Bedford 5-ton trucks. The appellant, by letter accepted the offer. Shortly thereafter Frankel asked the appellant for a deposit of £5,000 and he undertook to ship the lorries when the deposit would be paid; the balance due on each lorry was to be paid on arrival thereof in Nigeria. Frankel showed the appellant a letter from Vauxhall Motors which contained an offer to supply 50 Bedford trucks at more than £35,000 cost. The appellant made certain inquiries through his bank which satisfied him as to Frankel's financial standing and integrity. He then returned to Nigeria and reported the matter to the respondent and other members of the syndicate. The respondent personally agreed to proceed further with the project to buying the Bedford lorries and the appellant returned to England as the agent of, and with instructions from, the respondent. Upon his arrival in England, Frankel again asked for the £5,000 deposit but the appellant asked to be shown the lorries first. Frankel then took the appellant in his car to a factory where Vauxhall cars were manufactured. The appellant was not shown the lorries but he was told by a person introduced by Frankel to the appellant as the Sales Manager of the Company that 25 lorries arranged for by Frankel were ready for shipment. The appellant also saw lorries being driven out from the factory, and was handed a pamphlet which depicted and described the type of lorry.

The appellant forwarded the pamphlet to the respondent in Nigeria who wrote back to say that the lorry described met with his "expectation and satisfaction."

The Appellant thereafter went with Frankel to the office of a shipping agent, and gathered that Frankel had arranged shipping space for 25 lorries to Nigeria in two separate and different consignments; one being for 12 lorries and the later one being for 13 lorries. He then sent a cablegram to the respondent stating that 12 vehicles were ready for shipment and also asked for the £5,000 deposit to be remitted. The respondent remitted the sum to the appellant, who paid over the same to Frankel.

Although no lorries were shipped, Frankel demanded a further advance of £18,000 (which he later reduced to £15,000) from the appellant, who told him that he neither had the money nor the authority to pay such sum. The appellant then returned to Lagos. Frankel later visited Lagos where he met the respondent on the 13th November. He demanded the sum of £15,000 from the respondent.

On the 15th November Frankel wrote confirming his acceptance of the order for the Bedford lorries and also stated the names of his bankers to whom inquiries could be made. The respondent, without making such inquiries, paid the sum of £15,000 to Frankel; and when the lorries failed to arrive, brought this action against the appellant claiming damages for breach of contract of agency.

The trial court held (a) that the appellant had acted with lack of care, and that the respondent had in consequence suffered a loss of £5,000; (b) that the loss of the sum of £15,000 could not be attributed to the negligence of the appellant; that amount having been paid to Frankel without the agency of the appellant.

On Appeal, the Federal Supreme Court took a different view, and held that the respondent was entitled to recover both the £5,000 and £15,000. The appellant appealed to the Privy Council.

On Appeal:

Held: (1) A principal, who appoints an agent knowing his skill and experience is not entitled to expect or require from that agent a higher measure of skill or knowledge than one of his position and experience could reasonably be expected to possess.

(2) An agent does not guarantee the successful outcome of transactions undertaken by him on behalf of his principal; and, provided he acts honestly no more can be demanded of him than that he should show the measure of skill and diligence which could be expected of one of his position and experience.

Appeal allowed

APPEAL from the Federal Supreme Court (Nigeria).

Glyn Blackledge, Q.C. (with him *Narayan*) for the appellant.

Chapman, Q.C. (with him *Baker*) for the respondent.

LORD MORRIS OF BORTH-Y-GEST (delivering the Judgment of the Lords of the Judicial Committee). This is an appeal from a judgment of the Federal Supreme Court of Nigeria (Jibowu, Nageon de Lestang and Hubbard F.J.J.) of the 23rd February, 1957, allowing an appeal by the respondent (who was the plaintiff in the original proceedings) and dismissing a cross-appeal by the appellant (who was the defendant in the original proceedings) from a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) (Johnston J.) of the 26th November, 1954. By the judgment last referred to the respondent was awarded £5,000 special damages and £500 general damages. Both parties appealed. The respondent claimed that the award in his favour should have been for the respective sums of £20,000 and £5,000. The appellant complained of that part of the judgment of Johnston J. which awarded the sum of £5,000: the further award of £500 was not the subject of appeal. The Federal Supreme Court allowed the respondent's appeal in part and entered judgment in his favour for £20,000 and dismissed the appellant's appeal. The Court held that the learned Judge had been wrong in awarding the respondent £500 general damages but noted that this matter had not been raised by or on behalf of the appellant. Judgment was entered for the respondent for £20,000 with £500 costs in the Court below and £128 costs of the appeal and the appellant's appeal was dismissed with 25 guineas costs to the respondent. Appeal is now brought from this judgment and the effective issues are whether the respondent was entitled to be awarded £20,000 or alternatively to be awarded £5,000 or whether he should not have been awarded either of these sums.

It will be convenient to refer to the appellant as the defendant and to the respondent as the plaintiff. The plaintiff and the defendant were both general traders and they were members (with three others) of a syndicate in Lagos. The business of the syndicate was concerned with general trading and the events which resulted in this litigation followed upon a visit to

London which was paid by the defendant as far back as 1952. The litigation began by writ of summons dated the 7th January, 1954. After the judgment in the Federal Supreme Court final leave to appeal was granted. That was on the 22nd May, 1957. The record was agreed by the parties on both sides on the 27th December, 1957, but was not received in the Privy Council office until the 2nd July, 1959. The record was bespoken on the 1st October, 1959: duplicating was concluded in May, 1960, and the respective cases were lodged in October, 1960.

The defendant who was a general trader and produce merchant paid his visit to London on behalf of the syndicate in September, 1952. He came in the hope of finding buyers for Nigerian produce which the syndicate might sell. He was furnished with certain samples of produce which included Nigerian cedar. He became acquainted by introduction with a man named Frankel. In the course of an interview with Frankel, in which the interest of Frankel as a possible purchaser of produce was sought, the defendant was asked by Frankel whether he (the defendant) would be interested in a purchase of Bedford motor trucks. Frankel claimed to be friendly with the manufacturers of them. By a letter dated the 4th September, 1952, Frankel made an offer to sell fifty Bedford 5-ton trucks at the price of £707 each f.o.b. The defendant by letter accepted the offer and being agreeable to paying Frankel a 5 per cent. buying commission at sight in Lagos looked forward to receiving his confirmation. Shortly thereafter Frankel asked the defendant for a deposit of £5,000 saying that the manufacturers (Vauxhall Motors) wanted him to deposit money and saying also that it was their first transaction together. After making certain inquiries through his bank the defendant returned to Nigeria and reported to the plaintiff and to the members of the syndicate. It seems clear that a delivery of the lorries in Lagos might result in profitable dealings in regard to them. The plaintiff was undoubtedly interested. A question arose at the trial as to whether the events that followed were any concern of the syndicate or whether they alone involved the plaintiff and the defendant.

It was held by the learned Judge that the later events did not concern the syndicate and this finding has remained unchallenged. The plaintiff agreed to proceed further with the project of buying Bedford lorries and the defendant returned by air to England as the agent of and with instructions from the plaintiff. The plaintiff agreed to pay to the defendant a sum of £300 for his expenses and further agreed to give him 35 per cent. of the net profit that resulted from the anticipated dealings with the lorries. Summarising the main events that followed, the defendant after his return to England reported to the plaintiff in such a way that the plaintiff remitted the sum of £5,000 which was paid to Frankel. Frankel then wished to have a further advance before the lorries were sent: he asked the defendant first for £18,000 but altered that sum to £15,000. Later Frankel paid a visit to Lagos and saw the plaintiff and the plaintiff gave Frankel a cheque (dated the 18th November, 1952) for £15,000. Frankel therefore received a total of £20,000. At a later date he asked for a further advance which was not made. Time went on but no lorries were ever delivered. Recourse against Frankel has been impossible. Eventually by writ of summons dated the 7th January, 1954, the plaintiff brought an action against the defendant claiming damages for breach of the contract of agency. The issue raised in the litigation is whether the defendant was negligent in his conduct when acting on behalf of the plaintiff and whether the plaintiff suffered loss in consequence. The learned Judge at the trial held that the defendant had acted with a lack of care and that the plaintiff had in consequence suffered

On the 15th November Frankel wrote confirming his acceptance of the order for the Bedford lorries and also stated the names of his bankers to whom inquiries could be made. The respondent, without making such inquiries, paid the sum of £15,000 to Frankel; and when the lorries failed to arrive, brought this action against the appellant claiming damages for breach of contract of agency.

The trial court held (a) that the appellant had acted with lack of care, and that the respondent had in consequence suffered a loss of £5,000; (b) that the loss of the sum of £15,000 could not be attributed to the negligence of the appellant; that amount having been paid to Frankel without the agency of the appellant.

On Appeal, the Federal Supreme Court took a different view, and held that the respondent was entitled to recover both the £5,000 and £15,000. The appellant appealed to the Privy Council.

On Appeal:

Held: (1) A principal, who appoints an agent knowing his skill and experience is not entitled to expect or require from that agent a higher measure of skill or knowledge than one of his position and experience could reasonably be expected to possess.

(2) An agent does not guarantee the successful outcome of transactions undertaken by him on behalf of his principal; and, provided he acts honestly no more can be demanded of him than that he should show the measure of skill and diligence which could be expected of one of his position and experience.

Appeal allowed

APPEAL from the Federal Supreme Court (Nigeria).

Glyn Blackledge, Q.C. (with him *Narayan*) for the appellant.

Chapman, Q.C. (with him *Baker*) for the respondent.

LORD MORRIS OF BORTH-Y-GEST (delivering the Judgment of the Lords of the Judicial Committee). This is an appeal from a judgment of the Federal Supreme Court of Nigeria (Jibowu, Nageon de Lestang and Hubbard F.J.J.) of the 23rd February, 1957, allowing an appeal by the respondent (who was the plaintiff in the original proceedings) and dismissing a cross-appeal by the appellant (who was the defendant in the original proceedings) from a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) (Johnston J.) of the 26th November, 1954. By the judgment last referred to the respondent was awarded £5,000 special damages and £500 general damages. Both parties appealed. The respondent claimed that the award in his favour should have been for the respective sums of £20,000 and £5,000. The appellant complained of that part of the judgment of Johnston J. which awarded the sum of £5,000: the further award of £500 was not the subject of appeal. The Federal Supreme Court allowed the respondent's appeal in part and entered judgment in his favour for £20,000 and dismissed the appellant's appeal. The Court held that the learned Judge had been wrong in awarding the respondent £500 general damages but noted that this matter had not been raised by or on behalf of the appellant. Judgment was entered for the respondent for £20,000 with £500 costs in the Court below and £128 costs of the appeal and the appellant's appeal was dismissed with 25 guineas costs to the respondent. Appeal is now brought from this judgment and the effective issues are whether the respondent was entitled to be awarded £20,000 or alternatively to be awarded £5,000 or whether he should not have been awarded either of these sums.

It will be convenient to refer to the appellant as the defendant and to the respondent as the plaintiff. The plaintiff and the defendant were both general traders and they were members (with three others) of a syndicate in Lagos. The business of the syndicate was concerned with general trading and the events which resulted in this litigation followed upon a visit to

London which was paid by the defendant as far back as 1952. The litigation began by writ of summons dated the 7th January, 1954. After the judgment in the Federal Supreme Court final leave to appeal was granted. That was on the 22nd May, 1957. The record was agreed by the parties on both sides on the 27th December, 1957, but was not received in the Privy Council office until the 2nd July, 1959. The record was bespoken on the 1st October, 1959; duplicating was concluded in May, 1960, and the respective cases were lodged in October, 1960.

The defendant who was a general trader and produce merchant paid his visit to London on behalf of the syndicate in September, 1952. He came in the hope of finding buyers for Nigerian produce which the syndicate might sell. He was furnished with certain samples of produce which included Nigerian cedar. He became acquainted by introduction with a man named Frankel. In the course of an interview with Frankel, in which the interest of Frankel as a possible purchaser of produce was sought, the defendant was asked by Frankel whether he (the defendant) would be interested in a purchase of Bedford motor trucks. Frankel claimed to be friendly with the manufacturers of them. By a letter dated the 4th September, 1952, Frankel made an offer to sell fifty Bedford 5-ton trucks at the price of £707 each f.o.b. The defendant by letter accepted the offer and being agreeable to paying Frankel a 5 per cent. buying commission at sight in Lagos looked forward to receiving his confirmation. Shortly thereafter Frankel asked the defendant for a deposit of £5,000 saying that the manufacturers (Vauxhall Motors) wanted him to deposit money and saying also that it was their first transaction together. After making certain inquiries through his bank the defendant returned to Nigeria and reported to the plaintiff and to the members of the syndicate. It seems clear that a delivery of the lorries in Lagos might result in profitable dealings in regard to them. The plaintiff was undoubtedly interested. A question arose at the trial as to whether the events that followed were any concern of the syndicate or whether they alone involved the plaintiff and the defendant.

It was held by the learned Judge that the later events did not concern the syndicate and this finding has remained unchallenged. The plaintiff agreed to proceed further with the project of buying Bedford lorries and the defendant returned by air to England as the agent of and with instructions from the plaintiff. The plaintiff agreed to pay to the defendant a sum of £300 for his expenses and further agreed to give him 35 per cent. of the net profit that resulted from the anticipated dealings with the lorries. Summarising the main events that followed, the defendant after his return to England reported to the plaintiff in such a way that the plaintiff remitted the sum of £5,000 which was paid to Frankel. Frankel then wished to have a further advance before the lorries were sent: he asked the defendant first for £18,000 but altered that sum to £15,000. Later Frankel paid a visit to Lagos and saw the plaintiff and the plaintiff gave Frankel a cheque (dated the 18th November, 1952) for £15,000. Frankel therefore received a total of £20,000. At a later date he asked for a further advance which was not made. Time went on but no lorries were ever delivered. Recourse against Frankel has been impossible. Eventually by writ of summons dated the 7th January, 1954, the plaintiff brought an action against the defendant claiming damages for breach of the contract of agency. The issue raised in the litigation is whether the defendant was negligent in his conduct when acting on behalf of the plaintiff and whether the plaintiff suffered loss in consequence. The learned Judge at the trial held that the defendant had acted with a lack of care and that the plaintiff had in consequence suffered

the loss of the sum of £5,000. He held that the loss of the £15,000 did not result. He held that in the circumstances such sum was paid to Frankel without the agency of the defendant and that the payment of it was uninfluenced by the defendant's previous conduct in words or writing. The Federal Supreme Court took a different view in regard to this latter point and held that the plaintiff was entitled to recover both the £5,000 and the £15,000.

The hearing of the action involved the taking of evidence on some fourteen days in October and November, 1954, and the consideration of a large number of documents. On the hearing of the appeal their Lordships have been fully referred to the notes of the evidence and to the documents. It is submitted on behalf of the defendant that a consideration of the findings and of the documents should lead to the view that the defendant was not shown to have been negligent.

In approaching the issue as to whether the defendant failed to exercise the measure of care which in all the circumstances was demanded of him it is relevant to bear in mind that he was not one who possessed or claimed to possess the expert skill or the experience or the special training of a broker or business agent. The plaintiff knew the defendant as a general trader in Lagos and as a fellow member of the syndicate which has been mentioned. The plaintiff was not entitled to expect or to require a higher measure of skill or knowledge than one in the position of the defendant could reasonably be expected to possess. The plaintiff knew that the defendant was a produce dealer and had no special qualification as a motor dealer. The defendant said in his evidence that in his own business (dealing in timber and produce) he shipped through agents and that he had no personal experience of shipping procedure. It is further important to note the circumstances under which the defendant was introduced to Frankel and under which they met and the steps which the defendant took to inquire as to Frankel's financial standing.

When the defendant first travelled to London he was given by a Mr. McVicker in Lagos a letter of introduction to Mr. McVicker's brother in London. Mr. McVicker in Lagos had been sent out there in 1952 as an agent for one Gourewitz with a view to rubber purchases; he had a letter of introduction to the defendant: he had met Frankel and the learned Judge held that it was Frankel who had paid his passage money. Mr. McVicker in Lagos did not then know the plaintiff but came to know him later and at the time of the trial was his partner.

When the defendant reached London he first met Mr. McVicker's London brother (who was a director of a timber company who were potential importers of rubber) and then, in his company, met Frankel. Mr. McVicker in Lagos had in fact spoken to the defendant about Frankel and had said that he was a wealthy man. The defendant's meetings with Frankel were such as confirmed that Frankel was in a substantial way. The defendant learned that Frankel was a furrier and was in the rubber business. The defendant went to Frankel's office, travelling in an expensive car, and all the indications in regard to Frankel seemed satisfactory. It was in this setting that the plan for the sale of the motor lorries arose. Had all gone according to expectations there seems little doubt that the transaction was one from which the plaintiff would have been able to make an agreeable profit.

During his first visit to London and after making the arrangements about the lorries with Frankel the defendant made inquiries as to Frankel's financial position. The learned Judge held that the result of the inquiries

was such as to satisfy him. In his judgment the learned Judge said:

“ It is clear that the defendant on his first trip was much impressed by Frankel’s ostentatious mode of living and his show of apparent business prosperity. It is a safe assumption that defendant’s Bank Manager in London made an inquiry into Frankel’s business and financial position which if not as thorough an investigation as it might have been, satisfied the defendant already so favourably impressed by what he had seen of Frankel. The defendant, in other words, had developed that degree of confidence in Frankel which Frankel had worked to instill in the defendant.”

The defendant’s account of these inquiries was that having had Frankel’s offer to sell the lorries of the 4th September and having sent his acceptance of the 5th September he wrote to Lagos to inform the plaintiff and told Frankel that he would like to meet him at the Farmers and Commercial Bank of London. The meeting took place and Mr. McVicker also attended. The defendant said in his evidence:

“ Frankel and McVicker showed me a letter from Vauxhall Motors and showed it to the Manager, Mr. Coker: Mr. Coker went through the letter. I had taken them to my bank so that my Bank could investigate Mr. Frankel’s financial position.

The Manager promised to investigate Frankel’s financial position. He asked Frankel who were his bankers. Later what he told me satisfied me as to Frankel’s financial position. Then I met again with Frankel and Frankel confirmed his offer.”

The bank manager, Mr. Coker, who is now a legal practitioner in Lagos, gave evidence at the trial. He confirmed that the defendant had sought his assistance by making inquiries about Frankel’s credit. His evidence is of considerable importance when considering whether the defendant was guilty, as the plaintiff contended, of a lack of reasonable care. He said:

“ I invited Frankel to my office. He came with his secretary a Mr. McVicker—defendant and Mr. Abudu were also present. I asked Frankel if it was true that he was going to supply trucks. He showed me an offer from Vauxhall Ltd. for supply of 50 Bedford trucks. More than £35,000 in cost.

I asked Mr. Frankel how soon he could ship. He said within 30 to 60 days. He said that Mr. Omotayo would have to pay cash. I told him it would be impossible for any African to pay such a lump sum. Then he said that we should have to make a deposit against the order. And payment on a Sight Draft basis.

He agreed to a deposit of £5,000, to ship the lorries and to payment of the balance on arrival of each lorry in Nigeria.

Frankel asked for the deposit. The defendant accepted this suggestion. I asked Frankel the name of his Bankers. He told me it was Barclays Bank of Bishopsgate. I asked him how long he had been in business. He said over 25 years. I obtained his consent to make inquiry of his bank and he agreed. I told him I would report to defendant and then go further into the matter. I telephoned the Manager of the Bank, Frankel’s Bank, whether Frankel was a customer, and that one of our customers wanted to do business with Frankel. I discussed the value of the business. That it involved a lot of money.

I was satisfied with the result of my investigation. I invited Frankel

and his secretary to call and I reached final arrangements with them. That if defendant paid £5,000 deposit Frankel must ship 12 lorries within 60 days. Frankel agreed to do this. After this interview I went to Frankel's office. He introduced me to his staff and showed me round when I was leaving I told Frankel that I would see Mr. Omotayo.

I wanted to know what his business office was like. That he had one and had a good one.

I was favourably impressed by all I saw. A dealer in furs, a city office and staff. Rental value of premises not less than £1,500."

As to the letter from Vauxhall Motors spoken of by Mr. Coker the defendant said that he had previously seen it in Frankel's office. The lorries were apparently to have left hand drives. Mr. Coker further said that he found that Frankel was in a position to open a letter of credit for £35,000 and that Frankel's bank manager had informed him that Frankel had been a good customer and had a good turnover and was in a position to do the business.

This evidence amply warrants the conclusion of the learned Judge that the defendant was satisfied as to Frankel's business and financial position and indeed there does not seem to be ground for the criticism that the bank manager's investigation was not as thorough as it might have been.

When the defendant returned to Lagos the position was that there was a prospect of being able to have lorries shipped to Lagos by Frankel, that if £5,000 were paid as a deposit a number of lorries would be shipped, that Frankel appeared to be a man doing substantial business and that there was a very favourable and adequate report from his bankers as to his financial standing. The plaintiff had to decide whether he would take up the venture. The syndicate did not. In considering the matter it must have been apparent to the plaintiff that the course of business that was proposed involved trusting Frankel. Instead of having an arrangement pursuant to which the plaintiff opened a letter of credit upon which Frankel could draw upon presentation of documents there was to be a payment of £5,000 to Frankel many days before any lorries were to be shipped. The plaintiff's private secretary Mr. D. O. S. Ajayi made the suggestion to the plaintiff that instead of his making a payment of £5,000, he should open a letter of credit. The plaintiff decided otherwise and having agreed to give the defendant 35 per cent. of the eventual net profit from the anticipated deal he agreed that the defendant should return to England. The defendant was asked to carry out certain instructions. The plaintiff agreed to pay the defendant £300 for his expenses.

It is necessary to consider what were the instructions which the defendant received from the plaintiff. Because of their importance in connection with the issue as to whether the defendant failed in his duty their precise terms as recorded may be noted:

" I told him to see that the chassis are assembled and not to be in cases. Also that he should find out to his satisfaction the financial position of Frankel before he parted with the money which I was going to send to him. Also I gave him this instruction and explained to him that I agreed to send him the money direct as, against the advice of my secretary, because I was satisfied that he was a business man and owned property free from encumbrances over the value of this money.

Defendant even suggested that he would obtain Bank references of Frankel or a guarantee before he parted with any money to him. I agreed to that suggestion."

The defendant returned to England. It was during this visit that as a result of a communication from him to the plaintiff remitted the sum of £5,000 so that it should be paid over to Frankel. The first vital issue in the appeal is whether the conclusion was warranted that the defendant failed to carry out his instructions and whether he failed to exercise due and reasonable care.

Upon his arrival in England, which was towards the end of September, the defendant saw Frankel. Frankel asked for the £5,000 deposit and the defendant said that the sum would be available but that he would like to see the trucks. Frankel then took the defendant in his car to Luton and to a factory where Vauxhall cars were manufactured. The defendant's evidence was:

“ Frankel came out with a European who was introduced to us as Sales Manager. He said that the 25 trucks arranged by Frankel were ready for shipment. I saw trucks being driven out of the factory, from where we stood.

They appeared to be undergoing a test. It seemed to be a very busy factory. More of the factory was elsewhere.

Next this man who was introduced by Frankel as a Sales Manager went back into the factory, having given me Exhibit ‘ K.’

Then we drove back to London. I had been told by the Sales Manager that 25 trucks were ready for Mr. Frankel:

To Court: The Sales Manager did not point out the trucks to me in the factory.”

The defendant learned that the price of the lorries would be £667 instead of £707. Exhibit K was a pamphlet which depicted and described the type of lorry. It was clear that the chassis were assembled. (The leaflet (Exhibit K) was at a later date sent by the defendant to the plaintiff. It was sent with a letter of the 9th October. In a letter of a later date (27th October) the plaintiff wrote to the defendant: “ The photograph of the Bedford lorry in your first letter meet my expectation and satisfaction, you could not have done better.”)

After the visit to Luton the defendant went with Frankel to the office of a shipping agent and he gathered that Frankel had arranged shipping space for 25 trucks for Nigeria in two separate and different consignments one being for 12 trucks and the later one being for 13 trucks. Then the defendant saw Mr. Coker the bank manager and reported to him all that he had seen. He then sent a cablegram to the plaintiff. That was on the 29th September. It was in the following terms:

“ TWELVE VEHICLES ASSEMBLED ALREADY FOR IMMEDIATE SHIPMENT PRICE SIX HUNDRED AND SIXTY-SEVEN POUNDS FREIGHT INCLUDING ALL CHARGES ONE HUNDRED AND FIFTY POUNDS REMIT IMMEDIATELY FIVE THOUSAND AND THREE HUNDRED POUNDS DEPOSIT DELAY DANGEROUS SELLER UNSATISFIED MY INABILITY TO DEPOSIT NOW - OMOTAYO ”

It should here be mentioned that the defendant had made what the learned Judge described as a “ collateral arrangement ” to negotiate for the trucks in England as agent for Messrs. Brandler & Rylke Ltd. There was a letter of agreement dated the 26th September. The conclusion of the learned Judge was that the defendant became the plaintiff's agent “ and then enlisted Brandler and Rylke as an interested party as a safety measure against default by the plaintiff on his commitments.” The learned Judge

added: " I do not think that the defendant and the plaintiff trusted each other very far." On the same date as the defendant sent his cablegram to the plaintiff in the terms above set out he sent one to Mr. McVicker in Lagos for the benefit of Brandler and Rylke Ltd. in which he stated that 13 lorries were available for immediate shipment. It can readily be assumed that the 12 and the 13 referred together to the 25 which the defendant said he was told at Luton were ready for shipment.

After the plaintiff received the cablegram set out above dated the 29th September he remitted the sum of £5,300 to London. The amount of £5,000 was to be paid to Frankel as the deposit which he required: the amount of £300 was for the defendant's expenses as had been agreed. Frankel received the sum of £5,000.

The plaintiff has lost the £5,000 which he paid and the question arises whether this loss was the result of and should be attributed to some negligence on the part of the defendant. The learned judge so held. His reasons were contained in the following passage:

" The critical day on defendant's return to England was September 29th. On this occasion the defendant acted with a childlike lack of care. The train of events established by lengthy cross-examination has made it clear that at the end of the day the defendant had seen nothing and had investigated not at all. He saw no truck of the sort required by him or promised to him. It should have been clear to him that he was being deceived in every direction. In the face of a clear demonstration on the 29th September that there was nothing ready for shipment, and nothing likely to be shipped the defendant, disregarding a double need for caution, paid the £5,000 deposit. He had failed to check Frankel's representations. He still pinned his faith on Frankel's words."

This view was upheld on appeal by the Federal Supreme Court. They pointed out that on his second trip the defendant made no further inquiries as to Frankel's financial position and further that he had not seen any vehicles assembled and ready for shipment by Frankel and had seen no signed agreements between Frankel and Vauxhall Motors. They concluded that he had " been fooled by Frankel and his associates " and that he " failed to show care, diligence and skill which his position as an agent demanded before involving his principal in a financial loss which due care and diligence could have averted."

Their Lordships are unable to share these conclusions. The conclusions cannot be regarded as being concurrent findings of fact. The determination of the case involves considering the measure of the duty owed by the defendant and in the light of the ascertained facts considering whether there was a failure to perform such duty. In the light of the facts and circumstances which existed at the time their Lordships do not consider that the defendant is shown to have failed to have displayed the measure of skill and care that could reasonably be demanded of him. It is clear now that different procedures might have been adopted. Business might have been transacted in such a way that money would only pass in exchange for documents which would give entitlement to receive goods. The defendant was not however guaranteeing the successful outcome of the transactions and provided that he acted honestly no more could be demanded of him that he should show that measure of skill and diligence which could be expected of one in his position. Nor must the events of the time be judged in the light of knowledge and experience gained at later dates. It can hardly be correct that the defendant had seen nothing and had not made any

investigations before he sent the cablegram of the 29th September, to the plaintiff. On his first visit to England the defendant had seen much of Frankel. Frankel appeared to be a man of affluence and there were all the indications that he was well placed in business. The bank manager saw Frankel and went to his office. The bank manager was satisfied. A report from Frankel's bank was obtained and the report was eminently reassuring. There is evidence that even at later times Frankel was trusted by those who had dealings with him. On the defendant's second visit to England there was no reason at all to suppose that the favourable reports of Frankel's financial standing were not still operative. The defendant went to Luton and saw the kind of truck that Frankel was promising to send. The chassis were assembled and they were of a type that would be suitable for Nigeria. It is said that the defendant did not see particular trucks in the sense that he did not see the actual trucks which Frankel was to despatch. The defendant was asked in cross-examination whether he saw "any vehicles intended from Frankel to the plaintiff" before he sent the cablegram of the 29th September: the defendant said that he had not but that he was told of them by the sales manager and that the cablegram represented the information given to him by the sales manager. If the sales manager at Luton told the defendant that 25 trucks were ready for Frankel and were ready for shipment then it was not negligent for the defendant to have asked the plaintiff to remit the sum of £5,000 on the basis that 12 vehicles were assembled and were ready for immediate shipment. While it may be that any such documents passing between Vauxhall Motors and Frankel as were sent by the defendant or by Mr. Coker may not have bound Vauxhall Motors to deliver the position was that Frankel had promised to ship the trucks if he had a deposit of £5,000 and the sales manager had told the defendant that there were 25 trucks which were available for Frankel.

Viewing the position in the light of the circumstances as at the end of September and without grafting upon the situation the wisdom which later events inspired, their Lordships conclude that the defendant was not shown to have been negligent or to have failed to show that measure of care or skill which the plaintiff was entitled to expect.

The correspondence shows that there was a company who were the sole distributors of Bedford trucks for the area which included Nigeria. Normally therefore there could not be straight supplies and any purchases of such trucks could only take place through the sole distributors. The opportunity which gave rise to the present litigation owed its origin to the circumstance that there was an export allocation of trucks for Israel. The position was stated by the defendant in a letter of the 9th October to the plaintiff which contained the following passage:

"The position of the Trucks order is that Messrs. Frankel got authority to buy the quantity allocated for Israel which country is unable to pay in sterling. This order has been confirmed by Messrs. Vauxhall Motors the makers of Bedford Trucks to Messrs. Frankel who is buying on my behalf on a commission of 5 per cent. They (Frankel) have bargained with the shipping company who promised shipping space for November. We are still pressing other shipping companies as I urged that shipment should be made immediately as I have promised many of my buyers that shipment will be made in October. At the moment I can only confirm that shipping space is available for November. If we succeed earlier than that, I shall let you know.

There is another one important point which I ought to make you aware of, as you are aware, we cannot at any time get straight supply for West Africa as the U.A.C. have the monopoly to import Bedford that way. The buying of Israel allocation makes it imperative that we must take the exact goods reserved for that country. Hence the trucks are all left hand drive and with cabs. We are at the moment trying to persuade Vauxhall to supply those without cabs, although the price is the same as I quoted you. I hope they will agree to this suggestion because they will have the cabs to their advantage."

Enclosed with that letter was the leaflet referred to above. In a later letter (dated the 27th October) the plaintiff expressed satisfaction with the type of truck and with the fact that they were "built up to be lefties" and hoped for speedy shipments.

What next happened was that Frankel asked the defendant for a further payment. Frankel apparently said that the manufacturers would not deliver the trucks unless he paid them a large sum. Frankel asked the defendant for a further advance of £18,000, which he later reduced to £15,000. The defendant declined to pay saying this was contrary to the original arrangement and saying that he had neither the authority to pay nor the money with which to pay. The defendant then returned by air to Lagos.

The next development in the situation was that Frankel himself went to Lagos. A meeting took place on the 13th November at which the plaintiff, the defendant, Frankel and Mr. McVicker (of Lagos) were present. Much evidence was given in regard to that meeting and in regard to the events which followed it. In the result the plaintiff gave Frankel a cheque (dated the 18th November) for £15,000. The issue is raised as to whether the plaintiff lost that sum of £15,000 (for its loss is now assumed and is the basis of the claim) as a result of the defendant's negligence and breach of duty. The learned Judge held that Frankel told the plaintiff at the meeting on the 13th November of his inability to get "returns" from some other business in which he was engaged and said that he required a further £15,000. He held also that the plaintiff gave Frankel the £15,000 on the 18th November after he had obtained a letter written by Frankel dated the 15th November which was forward to him by the defendant with a covering letter of that date. The letter of the 15th written by Frankel is of importance. Its terms were as follows:

"Dear Sirs,

I hereby confirm my acceptance of your order for 30 Bedford Trucks, long wheelbased model OLBC Chassis cab, at factory price of £673 12s. 0d. delivered London Docks, plus 12 per cent. plus 5 per cent., representing agreed commissions to be paid to myself and my Agents.

Delivery will take place within 60 days of my receiving the sum of £15,000 to augment the £5,000 already acknowledged by me, which I will take at 30/50 proportion of the overall contract for 50 Trucks, and credit you with the sum of £3,000 for the above mentioned 30 Trucks.

I hereby undertake to indemnify you against any loss or losses whatsoever that may arise from this deal through my inability to deliver to Lagos Port.

As soon as shipment will commence you will have to cover me for the difference in the sum received and the final C.I.F. costs. It is understood that part-deliveries are acceptable.

My Bankers are Messrs. Barclays Bank, Ltd. 232, Bishopsgate,

London E.C.3, to whom enquiries can be made to your satisfaction.

Yours faithfully,
(Sgd.) B. FRANKEL

The plaintiff did not respond to Frankel's suggestion that inquiry of Barclays Bank could be made. The plaintiff knew that though £5,000 had been already paid to Frankel no trucks had been shipped. Trust was being reposed in Frankel but now Frankel was asking for three times as much money as before. The learned Judge held that the plaintiff took matters into his own hands, that he negotiated with Frankel in disregard of a known risk in doing so (which he had come to know both by what the defendant had told him and from what he had learnt from Frankel) and that the payment by him of the £15,000 was uninfluenced by the defendant's previous conduct in words or writing. The learned Judge expressed his conclusion very clearly when he said:

“ Notwithstanding plaintiff's repeated and very much repeated assertions in evidence that defendant throughout was the medium of negotiation with Frankel it is my opinion and finding that at this stage the plaintiff negotiated direct with Frankel and was persuaded or resolved, with the silent acquiescence or approval of McVicker which I shall refer to later, to put up the £15,000. Frankel was a very persuasive fellow. The plaintiff in cross-examination said that he discussed with Frankel ‘ not his financial position ’ of which the defendant had told him previously but that his, Frankel's ‘ expectations in the return of his business had failed to materialize.’ This was a trenchant admission on the part of the plaintiff. So putting together what the defendant had told the plaintiff regarding Frankel's difficulties and what the plaintiff discussed direct with Frankel, when he was armed with this knowledge, it must be held that the plaintiff had ample information to put him on his guard and to employ caution to the fullest extent.”

McVicker gave evidence to the effect that the defendant supported Frankel in his request for £15,000: this evidence was definitely rejected by the learned Judge. The learned Judge considered that McVicker entertained doubts about Frankel but failed to disclose his doubts to the plaintiff who had confidence in him (McVicker). In the Federal Supreme Court this view was criticised on the ground that the plaintiff and McVicker met for the first time on the 13th November. The Federal Supreme Court considered that the defendant had lied as to what had happened at the meeting of the 13th November and as to other matters and considered that “ the plaintiff's evidence which has the ring of truth should have been accepted as also McVicker's evidence as to the part the defendant played at the meeting.” Their Lordships observe however that the learned Judge who saw the witness said that McVicker was not a reliable witness and was plausible. The Federal Supreme Court considered that the defendant owed a duty to the plaintiff to let him know the whole truth about the risk that the plaintiff was running by agreeing to advance more money and that the defendant failed in his duty. The Court considered that the learned Judge “ misdirected himself on the evidence when he held that the plaintiff paid the sum of £15,000 to Frankel without the agency of the defendant and that the payment was uninfluenced by the defendant's previous conduct in words or writing.”

Their Lordships are unable to concur in the views of the Federal Supreme Court. The learned Judge had said in terms that he rejected McVicker's

evidence that the defendant supported Frankel in his request for £15,000. Their Lordships are not persuaded that there were sufficient reasons for reversing this finding of fact by a Judge who had seen the witnesses. But quite apart from this their Lordships do not consider that it was shown that the loss of the £15,000 was attributable to negligence on the part of the defendant. While it must be recognised that the events leading to the payment of the £15,000 cannot be entirely divorced from those which lead to the payment of the £5,000 the reasons which their Lordships have earlier given for concluding that the defendant was not negligent in regard to the £5,000 apply with added force in regard to the £15,000. The plaintiff knew that Frankel had originally asked for and received the sum of £5,000, that thereafter no trucks had been shipped and that the demand was then made for a further and very much larger sum. In Lagos there was a new situation for the plaintiff to face. Frankel was persuasive. The plaintiff saw Frankel and could form his own opinions. Doubtless the plaintiff was impressed. He sought no assurance from Frankel's bank and he was content to accept that Frankel would do all that he promised. He cannot blame the defendant for the loss that resulted from Frankel's later failures. While it may be that in looking back over the events of 1952 and looking at them in the light of what was later known and later became apparent all concerned might at different moments have acted differently, their Lordships are not satisfied that there was negligence in the defendant which brought about the lamentable loss of either the £5,000 or the £15,000. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgments below set aside and that the judgment be entered for the defendant. The respondent must pay the costs in the Supreme Court and in the Federal Supreme Court and before their Lordships' Board.

Appeal Allowed.

Solicitor for the appellant: *Messrs. A. L. Bryden and Williams.*

Solicitor for the respondent: *Messrs. Hatchett Jones and Co.*

NANA KATABOA II, OHENE OF APESOKUBI . . . APPELLANT

AND

NANA OSEI BONSU, OHENE OF ASATU
(CONSOLIDATED APPEALS) RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 481

1961 July 18

Lords Hodson, Guest and Mr. L. M. D. de Silva

Judgment was entered in favour of one party on 3rd March, 1931. During the pendency of appeal the parties entered into an agreement on 12th July, 1939, to settle the matter by reference to a committee appointed by the parties to investigate the matter. Upon this agreement the appellant discontinued his appeal. The main question for consideration is whether the judgment of 3rd March, 1931, purporting to fix the boundary in dispute operates as a valid judgment for the purpose of the litigation in which this appeal arises or is no longer operative having been superseded by the settlement between the parties of 12th July, 1939.

Held: A new boundary was to be fixed but there was no agreement concluded

between the parties fixing a boundary in substitution for that declared in the 1931 judgment. There was here no more than an ineffective agreement to go to arbitration to fix a boundary and there was never any certainty as to what the parties had agreed should be the boundary. The settlement of 1939 was inchoate and never ripened into a concluded agreement settling the boundary in supersession of that fixed by the 1931 judgment.

LORD HODSON. These consolidated appeals are from judgments of the West African Court of Appeal given in the first case on the 20th February, 1956, and in the second on the 13th February, 1956.

The first (No. 47 of 1959) is dependent upon the second (No. 24 of 1960) and their Lordships will accordingly deal with the second appeal before referring again to the first.

Their Lordships agree with Coussey, President of the West African Court of Appeal, that it is unnecessary to recapitulate the history of the litigation which has lasted for more than forty years for it is set out in more than one judgment of the Courts and fully and accurately summarised in the judgment of the learned Chief Justice Sir Mark Wilson sitting in the Land Court. His judgment, the subject of the appeal to the West African Court of Appeal, reversed the judgment of the Buem Native Appeal Court and restored that of the trial Native Court the Akan Native Court " B " at Kadjebi dated 2nd September, 1953.

The dispute is between the Stool and people of Asato (the respondent) and the Stool and people of Apesokubi (the appellant) and relates to a piece of land to the east of the Oprana Range in Togoland possession of which has been awarded to the respondent.

The main question for consideration is whether a judgment of the 3rd March, 1931, purporting to fix the boundary in dispute operates as a valid judgment for the purpose of the litigation in which this appeal arises or is no longer operative having been superseded by a settlement between the parties reached on the 12th July, 1939.

The judgment of the 3rd March, 1931, declared as follows: " Apesokubi Chief is guilty, the land property belongs to Asatu. The proper boundary fixed in this judgment is the top of Oprana Hill from river Asuikoko southward stream Mutabe and down the stream to an ' Ntombe tree,' and the road cleaning heap on Asato-Apesokubi road." The effect of this judgment is shown upon a plan prepared for the parties by a surveyor on the 15th June, 1932, which has been exhibited (N). This judgment stands unreversed.

After eight years of litigation while an appeal was pending on the part of the appellant in the Buem State Council the parties came to terms on the 12th July, 1939.

These terms were in writing and read as follows:

" Whereas there is dispute between the Sub-Division of Apesokubi and the Sub-Division of Asato in the Buem District, British Togoland, as the boundary between them.

And whereas this dispute has been in the Omanhene's Court, in the District Commissioner's Court of Kpandu, in the Court of the Commissioner of the Eastern Province, in the West African Court of Appeal and back to the Court of Buem State Council.

And whereas it is desirable to effect an amicable settlement between the two said parties so that peace and prosperity may result to the mutual benefit of both parties and their subjects.

Now it is agreed as follows:

1. The Ohene of Apesokubi and the Ohene of Asato agreed to discontinue the land dispute, and each party should bear his own costs incurred during the 30 years controversy.
2. The Ohene of Apesokubi and the Ohene of Asato acting each and on behalf of his respect Elder's and Councillors agree to abide by the decision of the Councillors Worawora, Tapa, Apesokubi and Asato that the boundary should remain as traditionally known.
3. The Committee as appointed by the both parties will carry out the preliminary investigation as to the extension of the traditional boundary right cross the forest if any.

THIS DOCUMENT was executed by the parties after the contents have been read over and interpreted in the Twi language by Mr. Seth D. Opoku of Worawora to the Assembly of the representatives of Worawora, Tapa, Apesokubi and Asato, they seemed perfectly to understand and approved of the provisions thereof and the principal parties thereto signified their said approval in the customary manner by providing one (1) bottle wine and one (1) live sheep."

On the same day a notice of discontinuance was sent by both parties to the Buem State Council in pursuance of paragraph 1 of the terms.

This notice reads as follows:

" It is agreed together by the above-mentioned parties viz. Nana Kwasi Adu of Apesokubi and Nana Osei Bonsu of Asato with our undersigned Elders upon the valuable advice of our Nkwantahene and the youngmen of our respective towns Apesokubi and Asato to discontinue the above-named suit pending in your Court."

It is to be noted that the appeal was discontinued and not the action. Accordingly the only question is whether the whole litigation was effectively compromised by the terms of settlement so that no reliance could thereafter be placed upon the judgment of 1931.

The submission of the appellant is first that the parties by the terms of 1939 compromised the suit by substituting for the boundary fixed in 1931 that boundary which was described as " the traditional boundary " a new formula set out in paragraph 2 of the terms and complete in itself. It is further submitted that as a separate matter the fixing of the boundary on the ground rendered it necessary that a committee should carry out a preliminary investigation as provided in paragraph 3 of the terms.

Abortive attempts were made to carry out the arrangement envisaged in paragraph 3. They came to nought but it is submitted that in the events which have happened it cannot be contended that the judgment of 1931 survived the settlement of 1939.

It is argued that when the parties agreed to abide by the decision of the councillors that the boundary should remain as traditionally known they were in effect saying that the new decision superseded the 1931 judgment and that a different boundary was fixed. It is said that, notwithstanding the tentative provisions of paragraph 3, this agreement is enforceable since if the parties cannot agree as to the boundary fixed by the decision of the councillors either party can establish as a question of fact where the new line ought to be drawn. In other words it is the agreement of 1939 which has to be enforced not the judgment of 1931. This is not the way in which the case was put in West Africa but is no doubt the strongest way in which the appellants can put their case.

In their Lordships' opinion this argument cannot succeed for paragraphs

2 and 3 of the settlement must be read together.

The effect of the combined paragraphs is that a new boundary was to be fixed and that steps were to be taken as indicated in paragraph 3 to that end but that there was no concluded agreement between the parties fixing a boundary in substitution for that declared by the 1931 judgment. There was here nothing more than an ineffective agreement to go to arbitration to fix a boundary and there was never any certainty as to what the parties had agreed should be the boundary. It was said to be the traditional boundary but the fixing of that boundary remained uncertain until the arbitrators had done their work. This they never did. The settlement of 1939 was inchoate and never ripened into a concluded agreement settling the boundary in supersession of that fixed by the 1931 judgment. Accordingly their Lordships are of opinion that the main contention of the appellant fails.

The second contention is that here there has been a miscarriage of justice because the respondent obtained an order for possession of the land in the action without the appellant having a proper opportunity of putting his case before the Court.

This contention arises from the course taken by the appellant in defending the action and in order to explain the point it is necessary to refer to the relevant Regulations which are the Native Court (Southern Togoland) Procedure Regulations (23 of 1949). The respondent's claim was based on the declaration earlier set out as part of the judgment of the 3rd March, 1931, and identified the land as shown in the plan made on the 15th June, 1932. The claim was contained in a civil summons and prayed for recovery of possession of all portions of the land wrongly occupied by the defendant (the present appellant) or any of his subjects according to the boundary defined in the judgment. The following are the relevant regulations:

“ Regulation 15. The subject matter of the claim or the charge shall be read out by the Registrar to the defendant or the accused person who shall be asked how he answers to the claim or charge.

Regulation 17. Where a defendant or accused person wishes to plead that the Native Court has no jurisdiction or that the claim or charge does not disclose any cause of action or offence or that the subject matter of the claim has already been adjudicated upon, or that (if it is a criminal cause) he has been previously convicted or acquitted of the same offence, the defendant or accused person shall make such plea at any time after he is asked what he has to say in answer to the charge or claim, and his plea shall be written in the Record Book.

Regulation 18. The Native Court shall consider whether a plea made under Regulation 17 is made out and give its decision which shall be written in the Record Book. If the Native Court is satisfied that the plea has been made out, the suit must be dismissed or the accused discharged, as the case may be. If the Native Court is not satisfied that the plea has been made out, it shall order the defendant or the accused (as the case may be) to plead in the ordinary way under Regulation 15, or that the hearing shall continue.

Regulation 34. Interlocutory applications may be made by motion at any stage of proceedings in a cause.”

The appellant moved the Court as he was entitled to do and supported his motion by an affidavit in which he sought to dismiss the respondent's claim “ in limine.” The history of the case was briefly set out in the affidavit and the terms of settlement of July, 1939 were exhibited. The point was taken that the plaintiff was not entitled to bring the action in view of the terms of

settlement and that the judgment of the first trial Court confirmed by the judgment of the West African Court of Appeal was now of no effect and could not be relied on by the plaintiff (respondent to this appeal) in the prosecution of any rights that that judgment conferred on him.

It will be seen that the point then taken by the appellant is the same as the main point upon which he now relies that is to say that the judgment of 1931 had been superseded by the settlement of 1939.

After various adjournments of the hearing of the motion the record shows under date the 2nd September, 1953, the following note:

"After having studied Mover's and Opposer's motion and affidavits the Court orders that parties do give statement under Regulation 17 of Regulations 23 of 1949 to enable it to give a fair judgment."

The Plaintiff's representative was then sworn and gave evidence in support of the claim.

After the plaintiff's representative had concluded his evidence the appellant asked no questions and added "I have nothing to say again in regard to making a statement apart from the explanation given in support of my motion."

The Court thereupon retired for consultation, then returned and delivered judgment in favour of the plaintiff ordering that by virtue of the judgment of 3rd March, 1931, confirmed by the West African Court of Appeal on the 20th April, 1937, he has been declared the "Decree Holder" of the area in dispute and should therefore by virtue of this order take possession thereof.

The contention of the appellant is that the Court was in error in giving judgment when it did for the preliminary point only had been disposed of and the respondent never had an opportunity of pleading "not guilty" to the general issue under Regulation 15. Their Lordships are in agreement with the Chief Justice and with the West African Court of Appeal that there is no substance in this contention. If the appellant had in fact been shut out from his defence by the compressed procedure which was followed the result would be different but it is clear that the defence raised in the action was the same as the ground for disposing of the action by preliminary motion so that no injustice was done. The last words spoken by the defendant (respondent) show that he did not desire to add anything to the grounds stated in his affidavit.

There was no injustice although it is true that there was not a definite decision given upon the motion before judgment in the action as the Regulations contemplate.

Their Lordships agree with the Chief Justice who in his judgment said of the appellant "In effect his filing of the motion as mentioned was obviously taken by the Court as a denial of liability. It could mean nothing else and it stated very fully why the defendant denied the plaintiff's right to a decree for possession. It cannot in those circumstances be said that anybody was in any doubt when the hearing began on 4th August, 1953, as to what the defendant's answer to the claim was." In a later passage after referring to the note on the record, he said:

"After full consideration I have come to the conclusion, largely from studying the proceedings which actually followed this interim decision of the Court, that what they meant to do was to order, in the words of the last clause of Regulation 18, that the hearing of the suit

should continue. It is true that at that stage they had not recorded their decision on the preliminary point raised by the defendant, but a perusal of the judgment will show that they considered and dealt with that point and came to a definite decision on it which is recorded in the judgment."

Their Lordships are in agreement with the Chief Justice that the appellant was never shut out from arguing his full case and that the irregularities of procedure which occurred at the trial did not cause any injustice to him.

When asked before judgment whether he had anything more to say he was content to rely on the statement already made and gave no indication that he had any other defence to the action than the one he has consistently raised throughout the litigation, viz. that the respondents were barred by the settlement of 1939 from relying upon the judgment of 1931.

For these reasons their Lordships will advise the President of Ghana that the appeal be dismissed and that the costs of the appeal be paid by the appellant.

The other appeal (47 of 1959) arises out of an inquiry under the Forestry Ordinance in the matter of the Kabo River Forest reserve the Oprana section of which comprises in whole or in part of the area of land which is the subject of the appeal which has been previously dealt with in this judgment.

This appeal is from the West African Court of Appeal which on the 20th February, 1956, following its judgment of the 13th February, 1956, dismissed the appellant's appeal from a decision of the Reserve Settlement Commissioner dated 3rd May, 1954. The Commissioner acting pursuant to section 9(6) of the Forestry Ordinance accepted the decision of the Native Tribunal dated March, 1931, and recorded the boundary between the Stools of the appellant and respondent accordingly.

Their Lordships will advise the President of Ghana that this appeal also be dismissed and that the appellant pay the costs of the appeal for the same reasons as those given in support of their judgment in the main appeal.

NAJA DAVID C. H. GHASSOUB AND N. H.
GHASSOUB TRADING IN PARTNERSHIP AS NAJA DAVID
SAWMILL COMPANY AND ANOTHER . . . APPELLANTS

AND

EDWARD KOTÉY ANNAN SASRAKU . . . RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL GHANA]

(1961) G.L.R. 496

1961 July 24

Lords Denning, Morris of Borth-y-Gest
and Mr. L. M. D. de Silva

Land in Ashanti is alienable by sale.

LORD MORRIS OF BORTH-Y-GEST. This case concerns certain lands approximately eight square miles in area which formed part of a much larger area of land in Chempaw. The original plaintiff in the action sued as

the head and representative of a family company of Teshie people (hereinafter called the plaintiff family company) and claimed that his family company had become the owners of the lands (the eight square miles) in or about the year 1925. The original plaintiff died in the course of the proceedings and the respondent was substituted in his place. The respondent representing the plaintiff family company claimed that the lands (consisting of three adjoining pieces of land) were sold by the Stool of Chempaw. The Stool of Chempaw is a sub-Stool to the Paramount Stool of Kokofu. Kokofu is within what was, prior to 1957, the colony of Ashanti. The respondent (representing the plaintiff company) further claimed that the sale had been with the knowledge and consent of the Paramount Stool of Kokofu and that his family company had been in possession ever since they had purchased.

At the time when the plaintiff family company claimed to have purchased the lands the Omanhene of Kokofu was Nana Kofi Adu. But in the year 1951 he was destooled for selling Stool lands. His successor, who was entooled the same year, was Nana Osei Assibey III. He gave evidence at the trial and said that at the time of his entoolment he was told that three pieces of land at Chempaw had been sold. He had sent for the family company: they attended and told him that they had bought the land by outright sale by "Guaha." In the course of his evidence while referring to the destoolment of Nana Kofi Adu he also said that "The Odikro of Chempaw was similarly destooled for selling Stool lands in collaboration with Nana Kofi Adu."

The action arose out of certain events which took place early in 1956. A member of the plaintiff family company who was a headman of a village on the lands in question was working on his farm when he heard the noise of the felling of trees. He went to investigate and saw a caterpillar-machine. It had, he said, "cut a swathe right through from Chempaw over our boundary into our land." He said that they (the plaintiff family company) had kept the boundaries of their land cut. He saw a young man with an axe cutting a mahogany tree. Inquiries revealed that those who were engaged in the process of felling trees (certain persons trading in partnership as Naja David Sawmill Company) were doing so pursuant to rights which they claimed were given to them under a timber felling agreement made by them with Nana Osei Assibey III and his elders, representing the Kokofuhene State on the 30th October, 1953. By that agreement the Sawmill Company were to be entitled upon stipulated terms to cut down certain prescribed numbers of trees of defined species during a certain period. The trees could be felled within the area of Chempaw lands. That was an area of approximately forty square miles which included the lands (approximately eight square miles in area) which the plaintiff family company claimed that they had acquired in or about the year 1925. Not unnaturally the plaintiff family company through their head and representative brought proceedings to protect what they alleged were their rights. They claimed an injunction to prevent the Sawmill Company from trespassing on their lands. The Sawmill Company were not in a position either to admit or to deny that the plaintiff family had acquired the lands which they claimed but put them to strict proof that the land which they claimed was sold to them with the knowledge and approval of the Stool of Kokofu. As the Sawmill Company could only rely upon the rights given to them by their agreement of the 30th October, 1953, the reasonable course was followed of joining Nana Osei Assibey III (representing the Stool of Kokofu) as a co-defendant. In the result the main contestants were the plaintiff and the co-defendant.

The claim which was presented by the plaintiff was that " by native custom evidenced by documents dated the 23rd day of December, 1927, 4th day of August, 1934, and 12th day of April, 1935, respectively " the lands were sold absolutely to the plaintiff family by the Stool of Chempaw and that such sale was with the knowledge and consent of the Paramount Stool of Kokofu. In addition to the claim for an injunction the plaintiff claimed a declaration of his title to the ownership of the lands. It was said that the sale had been by the native custom of " Guaha " performed between the plaintiff and the representatives of the Stool of Chempaw and that the plaintiff's title depended upon that native custom. The three documents above referred to were not relied upon save as constituting evidence that the native custom of " Guaha " had been performed. The case proceeded on the assumption made by all concerned (but now said by the respondent to have been erroneously made) that the documents could not in any further way be relied upon because of the provisions of the Concessions Ordinance. (Mr. Franklin now submits that the Concessions Ordinance (Cap. 136) (see Laws of the Gold Coast 1951 Revision) did not apply and was not in force in Ashanti at the relevant time and he further submits that the relevant Ashanti Ordinances (see Laws of Ashanti (1928 Revision Vol. 1.)) should not be so construed as to be applicable to the three documents.)

The claim of the plaintiff was that from at least the dates of the above mentioned documents his family had been in possession of the lands and that such possession had been adverse to any Stool claims: that the plaintiff had established sixteen villages on the land and had cut and kept cut the boundaries of the land and that no Chempaw or Kokofu man had lived on the land for twenty years or more before 1956.

The co-defendant raised a number of issues in his defence. Prominent amongst them was the following:

" The co-defendant says that the existing custom prevailing in Ashanti and which also prevails at Kokofu is that Stool lands are not sold, and that no portion of the Kokofu Stool land has ever been sold by the Kokofu Stool to anyone."

When the co-defendant was giving evidence he said that his defence to the action was two-fold: (1) That land is not saleable in Ashanti and (2) That the land in question was sold to the plaintiff's family by the Odikro of Chempaw without the knowledge or consent of the then Omanhene of Kokofu, Nana Kofi Adu. He regarded the first of those as the more important.

A consideration of the proceedings in the Supreme Court and in the Court of Appeal leads to the conclusion that the issue which was regarded as of major consequence was the issue as to whether the lands in question had been saleable at all. The issue as to knowledge and consent appears to have commanded a subordinate measure of attention. The fact that it was known, as testified by the co-defendant, that both the former Odikro of Chempaw and the former Omanhene of Kokofu had been respectively destooled because they had collaborated in selling Stool lands may have made it difficult to challenge any evidence (the onus for giving which was on the plaintiff) tending to prove that the alleged sales were with the knowledge and consent of the former Omanhene of Kokofu.

Evidence was given at the hearing of the action that the ceremony of Guaha had been performed but this evidence did not include any positive evidence that any representative of the Paramount Stool was present. The co-defendant maintained that the land in question was not saleable. He said

that the plaintiff's family company had never paid any tribute or rent and that though during the years after his enstoolment he had sent for them they had refused to come to terms with him.

The action in the Supreme Court (Land Court) was heard by Sarkodee-Adoo J. He considered that the evidence overwhelmingly supported the contention that land was saleable in Ashanti. He said: " I find that the Plaintiff's Company is in possession of the said land as owners thereof by right of purchase under an absolute sale by ' Guaha ' from the Stool of Chempaw with the knowledge and consent of the Paramount Stool of the Kokofu State." He held that the plaintiff was entitled to a declaration of title and to an injunction. The co-defendant had counterclaimed for a declaration of title, for recovery of possession and for damages for trespass. The counterclaim was dismissed. The defendants and the co-defendant appealed to the Court of Appeal (van Lare Ag. C.J., Granville Sharp J.A. and Ollenu J.) who, subject to certain observations as to the nature of the plaintiff's rights in regard to the land and subject to a revision of the order for costs, dismissed the appeal. Summarising the main issues Granville Sharp J.A. said in his judgment:

" It could not be questioned on the evidence that the three purported sales relied upon by the plaintiff had in fact taken place and it was not seriously disputed that ' Guaha ' had been performed on each occasion. The evidence upon these matters was all one way. There remained only the issues as to whether land in Ashanti was alienable by sale and if so, whether the sales here in question were carried out without the knowledge and consent of the co-defendant the Paramount Stool over the vendor Stool, the Chempaw."

He said that though there had been ten grounds of appeal they had not all been argued and that the arguments presented raised the three main themes: (a) that the sales by custom of " Guaha " were not proved (b) that it was not proved that the sales were made with the knowledge and consent of the Paramount Stool, the co-defendant and (c) that sale of land in Ashanti is not possible under native custom. The Court of Appeal rejected all these contentions. In the course of his judgment (with which van Lare Ag. C.J. and Ollenu J. agreed) Granville Sharp J.A. said:

" There was evidence that the Omanhene had in fact assented to other sales of lands in the locality and it was proved that certain destoolment charges against him to which he made no answer, included complaints in respect of such sales. Two important facts emerged in the course of the evidence. In relation to the first and the third sales, the documents are witnessed by the Linguist to the Omanhene of Kokofu which signature is binding on the Omanhene, and it would be unlikely that he could have been in ignorance of the intervening sale, though no signature affecting him appears on the relevant document. The three sales were of contiguous parcels of land comprising in all an area of some eight (8) square miles.

These portions had, at the date of the objection raised by the later occupant of the stool, been occupied by the plaintiff family company for periods varying between 20 and 30 years. The whole area had been clearly demarcated and the boundary cuts and marks had, it appears, been meticulously kept and cleared. Even if it could not be said, as I hold it could, that on this evidence the learned Judge was correct in finding knowledge and consent on the part of the Kokofu Stool, the facts

clearly constitute proof of such laches and acquiescence on the part of the Stool as would render it inequitable to interfere with the plaintiff in occupancy of the land, and still less so if it should be in the interest of the Sawmill Company whose felling agreement is in the most general terms and would seem to grant them 'carte blanche' to wander over the whole length and breadth of the Kokofu Stool lands and fell wherever they encountered fellable timber, this to the extent of thousands of trees."

The Court of Appeal appear to have been in error in thinking that the third document was witnessed by the linguist to the Omanhene of Kokofu (though the first seems to have been) and Mr. Franklin for the respondent did not desire to support any contention that if the signature of such linguist appears on the first of the documents the knowledge and consent of the Omanhene ought from such circumstance to be inferred.

Before their Lordships' Board it was recognised by the appellants that both the Land Court and the Court of Appeal had decided that land in Ashanti was alienable and it was not sought to challenge such conclusion. In his careful argument on behalf of the appellants Mr. Jayawardena submitted firstly that it had not been proved that any of the sales were made with the knowledge and consent of the Paramount Stool of Kokofu and secondly that even if they were they were invalid because they offended against the provisions of the Concessions Ordinance which was in force at the date of the sales by Guaha. In regard to the latter submission their Lordships observe that it was not advanced either in the Land Court or in the Court of Appeal and that it finds no place in the Grounds of Appeal contained in the Notice of Appeal to the Court of Appeal. It follows that the judgments contain neither mention of the submission nor any observations in regard to it. Mr. Franklin while urging that the submission was misconceived was content that it should be advanced. He was the more content because he sought in turn to contend that the declaration of title pronounced in his client's favour ought not to bear the limitations referred to in the judgment of Granville Sharp J.A. in the Court of Appeal. He sought so to contend on the basis that the three documents above referred to possessed more than evidentiary value and that it was only because of a mistake as to which was the relevant Concessions Ordinance that it had been assumed that the documents were themselves valueless save as evidence of the performance of "Guaha." It is to be observed, however, that the respondent had not sought any leave to appeal or to cross-appeal against the judgment of the Court of Appeal.

Their Lordships do not consider that it would be appropriate at this stage of the litigation to embark upon new inquiries or to deal with issues not previously advanced and in regard to which their Lordships do not have the benefit of the opinions of the Land Court or the Court of Appeal. Accordingly their Lordships find it unnecessary to express any view in regard to the interpretation or the applicability of the Concessions Ordinance to which both learned Counsel referred.

Mr. Jayawardena's submission that it was not proved that the sales to the plaintiff family company had been with the knowledge and consent of the Paramount Stool of Kokofu merits careful consideration. Mr. Franklin submitted the contrary. He contended in the alternative that if such knowledge and consent had been lacking the result would have been that the sales were voidable but not void and he contended that they had not been avoided. He further contended that in any event the appellant Nana

Osei Assibey III was "estopped by laches amounting to acquiescence."

The fact that at the trial the issue that was regarded as of dominant consequence was the issue as to whether land in Ashanti was saleable may well have induced a certain economy in the measure of the attention devoted to the evidence establishing the knowledge and consent of the Paramount Stool. Their Lordships have however come to the conclusion that it has not been shown that the findings of the Land Court and the Court of Appeal ought to be disturbed. Before any dispute arose the lands in question had been occupied by the plaintiff family company for periods of between twenty and thirty years. After the purchase by the plaintiff family company no Kokofu man had claimed the lands. According to the evidence the plaintiff family company had kept the boundaries of the land cut. They had kept boundary marks clear. They had not paid any tribute. They had not paid rents or tolls. It was known that the former Omanhene had in fact assented to other sales of land. Indeed it was known that he and the Odikro of Chem-paw had collaborated in selling lands. By reason of these various circumstances it was reasonable and permissible for the courts to infer and to arrive at the conclusion that there had been knowledge in and consent by the Paramount Stool. Having reached this conclusion their Lordships find it unnecessary to express any views in regard to the alternative contentions advanced by the respondent.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeal should be dismissed and that the appellants should pay the costs.

NII AMON KOTEI SUBSTITUTED FOR NII AMASAH NIKOI
OLAI, MANTSE OF ASERE DJORSHIE FOR HIMSELF
AND REPRESENTING THE STOOL OF AND SUBJECTS OF
ASERE DJORSHIE APPELLANT

AND

THE ASERE STOOL RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 492

1961 July 24

Lords Denning, Morris of Borth-y-Gest
and Mr. L. M. D. de Silva

Customary Law: Usufructuary rights of subject of a stool

The usufructuary right of a subject of a Stool is not a mere right of farming with no right to alienate. Native law or custom in Ghana has progressed so far as to transform the usufructuary right once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, as long as he does not prejudice the right of the paramount Stool to its customary services. (a) He can alienate it to a fellow-subject without obtaining the consent of the paramount Stool: for the fellow-subject will perform the customary services. (b) He can alienate it to a stranger as long as proper provision is made for commuting the customary services. (c) On his death it will descend on his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do. The law on the subject is developing rapidly.

LORD DENNING. This case is concerned with an area of 900 acres of land four miles north-east of Accra which may be called "the Mukose land." It is undulating land of little agricultural value and situate on high ground. It is short of water and only inhabited by small groups of persons who till the soil in the immediate vicinity of their huts. But their Lordships were informed that it has potential value for building purposes.

The plaintiff is the head of the Nikoi Olai family and he claims that the land is part of the ancestral property of the Nikoi Olai family of Asere. In 1947 he found that the members of another family called the Abbetsewe family had purported to sell the land to a Lebanese trader named Mousbah Captan. The transaction had been carried out by two deeds. The first deed dated 25th October, 1947, was a conveyance of the land by James Adams and five others who were principal members of the Abbetsewe family to J. A. Quaye and two others for £200: the second deed dated 4th December, 1947, was a conveyance of the land by J. A. Quaye and the two with him to Mousbah Captan for £2,500. In order to validate this transaction, as they thought, James Adams and the other members of the Abbetsewe family got the head of the Asere Stool to witness the conveyance and paid him £1,000 for giving his consent, this sum being, so it was said, the customary one-third share due to the Asere Stool and people.

Faced with this sale, the head of the Nikoi Olai family on 20th April, 1948, brought an action against James Adams and the other five members of the Abbetsewe family claiming that the 900 acres was the ancestral stool property of the Nikoi Olai family of Asere, Accra, damages for trespass and an injunction. The head of the Nikoi Olai family brought the action in the Ga Native Court "B." But the Judge of the Land Court ordered it to be transferred into the Land Court and he directed that the Stool of Asere should be joined as a defendant in addition to the six members of the Abbetsewe family. "The Asere Stool" therefore appears as a party, meaning no doubt the Asere Mantse representing the Stool of Asere.

The action was tried before Jackson, J. for ten days between 18th October, 1951, and 1st November, 1951: and he gave judgment on 22nd November, 1951. He rejected decisively any right or title in the Abbetsewe family. "That family," he said, "*qua* family, possessed no title or interest in this land—they possessed no title whatsoever by the deed dated 25th October, 1947, and when less than six weeks later, these three members of that family purported to convey that estate to Mousbah Captan by their deed dated the 4th December, 1947, they conveyed precisely nothing." This finding has never been challenged or disputed. But Jackson J. not only condemned the Abbetsewe family for selling land which did not belong to them. He also condemned the head of the Asere Stool for consenting to it and taking £1,000 for his consent. The Judge said this about it: "The acts of the defendants and especially that of the Asere Manche do display a wicked and reckless disregard of the trusts imposed upon the occupant of a Stool." The Judge accordingly found in favour of the plaintiff and granted an injunction against the defendants, including the Asere Stool, to restrain them from selling the land. He ordered the defendants to pay the costs.

Stopping there, it might be thought that the plaintiff, the head of the Nikoi Olai family, had won a considerable victory: and he had, indeed, against the Abbetsewe family whom he had sued. But not so against the Asere Mantse whom the Judge had brought into the case of his own motion. It appears that there has been much dispute about the position of the Asere Stool. The Nikoi Olai family have for a long time claimed that they were entitled to occupy the Asere Stool themselves. But the Judge made it clear in

his judgment that he regarded the Nikoi Olai family as subjects of the Asere Stool. He refused to declare that the land was the ancestral property of the Nikoi Olai family as they claimed it was. On the contrary he only declared that "as subjects of the Asere Stool they possess rights of farming in the area, subject only to such rights as may have been granted to strangers for farming by the Asere Manche or are possessed by other subjects of the Asere Stool." The plaintiff was aggrieved by the limitation thus put upon the rights of the Nikoi Olai family and appealed to the West African Court of Appeal, but on the 4th March, 1955, that Court, consisting of Foster-Sutton P., Coussey J.A., and Hearne J.A., dismissed his appeal with costs. He now appeals to their Lordships' Board.

Their Lordships would first point out that they can have no concern with the dispute about the occupancy of the Asere Stool. That is not within the jurisdiction of the Courts. It was considered by the State Council in 1931 who then ruled that the Agbon and Frempong families were entitled to occupy the Stool alternately to the exclusion of the Nikoi Olai family. But in 1958 the Governor-General appointed a committee to inquire further into the dispute and this committee reported in September, 1959, that the claims of the Nikoi Olai family, and the Agbon and Frempong families were indistinguishable and inseverable. The committee recommended that the Stool should be occupied in rotation in this order: (i) Nikoi Olai, (ii) Frempong, (iii) Nikoi Olai, (iv) Agbon. The committee recommended that the present occupier of the Asere Mantse's Stool (of the Agbon family) should continue to occupy the Stool until his death, deposition or abdication. The Asere Mantse at present is Nii Akrama II of Agbon.

Putting aside the constitutional question, the first point to be considered is whether the Nikoi Olai family are entitled to these 900 acres of land as their ancestral property or whether it is Asere Stool land. Upon this point the Nikoi Olai family relied greatly upon an earlier case decided in 1948 by the same Judge, Jackson J. It was a case where a piece of land was required for a wireless station. It was part of these Mukose lands. The Government had acquired it. The compensation had been assessed by Korsah J. But the question was: To whom was the compensation payable? The rival claimants were the Nikoi Olai family and the Asere Mantse. Jackson J. held that the Nikoi Olai family were the parties in possession of 7/8ths of the area as the owners thereof and, as such, were entitled to receive compensation for 7/8ths of the area of the land: but that in respect of the remaining 1/8th the Asere Mantse was entitled to receive compensation for that portion. The Nikoi Olai family asserted before their Lordships that this amounted to a *res judicata* adjudging that they were the absolute owners of the Mukose lands as their family lands free from any rights of the Asere Stool. Their Lordships cannot so regard it. Although Jackson J. found that the Nikoi Olai family were owners in possession of 7/8ths, he also found that their rights were subject to the paramount title of the Asere Stool: and on that account the Nikoi Olai family had no "right to alienate without the consent of the paramount Stool."

In the present case Jackson J. came to a similar conclusion. He held that the Mukose lands were Asere Stool lands. He based this finding on evidence that the Asere Stool had placed headmen on the land: that these headmen permitted strangers to farm upon that land and collected tolls from them; and the headmen paid these tolls over to the Asere Mantse. Their Lordships have examined this evidence and are of opinion that it supports the Judge's finding that "the tolls collected were paid by the collector to the Asere Mantse." It was said by Mr. Davies that, even if this were so, it does not

warrant the inference that it was Asere Stool land. The tolls were only paid by strangers and they may have been paid, not for the use of the land itself, but as a recognition of the political jurisdiction of the Asere Mantse. Their Lordships cannot accept this view. It seems clear upon the evidence that these strangers paid the tolls for the use of the land.

The West African Court of Appeal affirmed the decision of Jackson J. but their Lordships feel bound to notice that they seem to have made two slips in their reasoning. They seem to have been under the impression that the compensation was awarded according to the rights of the parties in the whole land, that is, as to 7/8ths to the Nikoi Olai family for their possessory right to the whole, and as to 1/8th to the Asere Stool for their right to manage and control the land and receive tolls. But Mr. Dingle Foot felt bound to concede that the compensation was not divided on that basis. Nor indeed could it be. The only persons entitled to compensation were "the parties in possession of such lands as being the owners thereof." It was therefore a necessary finding by Jackson, J. in the wireless case that the Nikoi Olai family were entitled in possession as being the owners of 7/8ths of the land. There was another error made by the West African Court of Appeal. They relied on the evidence of one Djani Kofi in an earlier case, which had been specifically excluded. And Mr. Dingle Foot felt obliged to admit this. In view of these errors made by the West African Court of Appeal, it cannot be said that there are two concurrent findings that these lands were Asere Stool lands.

In these circumstances it is open to their Lordships to reconsider the evidence adduced before Jackson J. in the present case: and they find there was sufficient evidence on which he was entitled to find, as he did, that the Mukose lands were Asere Stool lands, in this respect, that the Asere Stool had a paramount title. The payment of tolls to the Asere Stool and the recognition of headmen in the villages is sufficient proof of such a paramount title in the Stool. Nevertheless there was a great deal of evidence to show that, subject to the paramount title of the Asere Stool, the Nikoi Olai family had an estate or interest in the Mukose lands. The crucial findings on this point are these:

(i) The Nikoi Olai family were the original founders of the village of Mukose: and the land in issue was occupied very many years ago by members of the Nikoi Olai family. Much of it has been used exclusively by members of that family (hence the 7/8ths area for which they obtained compensation for the wireless station). But some of it has been used by strangers by the permission of the headmen and in respect of land so occupied by strangers tolls have been paid to the Asere Stool (hence the 1/8th area for which the Asere Stool received compensation). It is true that the village of Mukose was abandoned in 1926 but farms have been maintained by the descendants of the old settlers. "I am satisfied," said Jackson J. in the wireless case, "that the Nikoi Olai family formerly occupied the major portion of the land . . . and have since their first settlement . . . enjoyed all the rights of owners in possession."

(ii) The Nikoi Olai family have asserted their estate or interest in the land successfully, not only in the claim for compensation, but also in the proceedings against the Abetsewe family. Furthermore, the head of the family gave evidence that he inspected the land from time to time and asserted their title against anyone who was there. "I used to go and inspect the land and if I saw anyone there, I asked him how he got there."

(iii) In the light of this evidence, it cannot be said that the Nikoi Olai family have abandoned their rights. It is true that the village of Mukose was

abandoned and fell into ruin but there is nothing to warrant the suggestion that the family ceased to have anything to do with the land such as to warrant the inference of abandonment. Indeed, they have vigilantly upheld their rights.

What was the nature of this estate or interest in the land? There was no evidence on this point. Jackson J. seems to have thought it was a right of farming with no right to alienate except with the consent of the paramount Stool. Hence his declaration that "as subjects of the Asere Stool they possess rights of farming in the area." In this he no doubt had in mind the evidence which he had heard earlier in 1951 in cases about the *Kokolemle Lands (Golightly v. Ashrifi*, Privy Council Appeal No. 31 of 1958). But their Lordships would point out that the findings in the *Kokolemle* case depended entirely on the evidence in those cases: and must not be taken to be determinations of law which are of general application. Their Lordships have been referred to a series of decisions in the Land Court in recent years, affirmed on occasion by the Court of Appeal, from which it appears that the usufructuary right of a subject of the Stool is not a mere right of farming with no right to alienate. Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount Stool to its customary services. He can alienate it to a fellow-subject without obtaining the consent of the paramount Stool: for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On his death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do. The law on the subject is developing so rapidly that their Lordships think it wrong to limit the right of the plaintiffs in the way that Jackson J. did.

Their Lordships will accordingly report to the President of Ghana that in their opinion the declaration made by Jackson J. and affirmed by the West African Court of Appeal should be varied so as to grant the plaintiffs a declaration that they possess such rights in the area edged in green, on the plan, Exhibit 1, as are conferred by law on a subject of a Stool who is in possession. But inasmuch as the plaintiffs have not succeeded in their claim to be absolute owners free of the Asere Stool altogether, and thus have in part failed but in part succeeded, their Lordships will report to the President of Ghana that in their opinion no order should be made as to the costs of this appeal and that the order for costs made by the West African Court of Appeal should be set aside, leaving each party in that Court also to pay his own costs.

R. B. WUTA-OFEI APPELLANT
 AND
 MABEL DANQUAH RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1961] 1 W.L.R. 1238; [1961] 3 All E.R. 596; [1961] 2 W.L.R. 562

Possession—Land—Vacant and unenclosed—Intention to retain possession—Active steps in relation to land unnecessary—Slightest amount of possession sufficient against trespasser without title.

West Africa—Gold Coast—Land, vacant—Possession, proof of—Intention to retain—Active steps in relation to land unnecessary—Trespass.

The suit land, at Christiansborg, Accra, which the respondent alleged was granted to her by the Stool of Osu in 1939 in accordance with native custom, was included in land which, pursuant to section 2 (1) of the Accra Town (Lands) Ordinance, 1940, vested in the Chief Secretary in trust for His Majesty. In 1956 a divesting order was made releasing the suit land. Notwithstanding the Ordinance of 1940 the respondent had had her original gift confirmed in 1945 by an indenture which was duly registered. In 1948 the appellant (who pleaded a grant of the land to him by the Osu Stool prior to that to the respondent) having erected a building on the land, the respondent claimed against further trespass. Until 1948 the suit land was vacant and unenclosed, but the respondent deputed her mother to look after the plot and kept watch on it [to] see that no one intruded. The appellant contended that there was no evidence to establish that the respondent was in possession at the date of his entry on the land in 1948, and that assuming that she was in possession before the date of the Ordinance of 1940 her possession was determined thereunder and she had taken no active steps thereafter to reassert her possession:

Held, (1) that while section 2 (1) of the Ordinance determined the respondent's right to possession, it did not affect the factual aspect of possession—if she was in actual possession as at the date of the Ordinance the section did not change that state of facts.

(2) That to establish possession it is not necessary for a claimant to take some active step in relation to the land such as enclosing or cultivating it. In the case of vacant unenclosed land which is not being cultivated little can be done on the land to indicate possession. The type of conduct which indicates possession must vary with the type of land. Here the possession which the respondent sought to maintain was against the appellant who never had any title to the land and the slightest amount of possession would be sufficient. There was no evidence that the respondent had ever abandoned her possession which she obtained under the grant of 1939, and there was sufficient evidence after 1940 of an intention to retain possession to entitle her to maintain an action for trespass.

Dictum of Parke B. In *Bron v. Notley* (1848) 3 Ex. 219 at p. 222 that “unless some act be done indicating an intention to the contrary, possession ceases, as soon as the interest,” not followed.

Dictum of Lord Hatherley in *Bristow v. Cormican* (1878) 3 App.Cas. 641 at p. 657, H.L. applied.

Order of the West African Court of Appeal affirmed, but for different reasons.

The following cases, in addition to those referred to in the judgment, were cited in argument:

- Ohene Moore v. Akesseh Tayee* (1934) 2 W.A.C.A. 43;
- Sundar v. Parbati* (1889) L.R. 16 I.A. 186; 5 T.L.R. 863, P.C.;
- Doe dem. Watt v. Morris* (1835) 2 Bing.N.C. 189;
- Emmerson v. Maddison* (1906) A.C. 569; 22 T.L.R. 748, P.C.;
- Asher v. Whitlock* (1865) L.R. 1 Q.B. 1.

APPEAL (No. 25 of 1960) from an order of the West African Court of Appeal (Coussey P., Korsah C.J. and Verity Ag. J.A.) (November 29, 1956) affirming a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division (Land Division) (Van Lare J.) (September 2, 1955).

The following facts are taken from the judgment of the Judicial Committee: The plaintiff-respondent brought a suit on April 10, 1948, in the Ga Native Court claiming to be the owner of a piece of land at Christiansborg, Accra, which she alleged was granted to her by the Stool of Osu (Christiansborg) in 1939 in accordance with native custom, the gift being later

confirmed and evidenced by an indenture, dated December 31, 1945, and registered in the Deeds Registry. She alleged that the defendant-appellant had trespassed on her land by building a block wall round the land and she claimed a declaration of title to the land, £50 damages for trespass and an interim injunction against further trespass. The cause was later transferred from the Native Court to the Supreme Court. After pleadings had been ordered by Van Lare J. the plaintiff expanded her civil summons and claimed recovery of possession, mesne profits and a perpetual injunction. The defendant in his statement of defence pleaded that the plaintiff had no title to the land because five years before the plaintiff's alleged grant the Osu Stool had granted the land to him and that he could not be ejected from the land. During the course of the hearing the defendant was allowed to add a new paragraph to his defence based on Ordinance No. 44 of 1940, entitled Accra Town (Lands) Ordinance, cap. 87. This aspect of the defence is more fully referred to later.

After evidence before the trial judge, Van Lare J. on September 2, 1955, gave judgment for the appellant. An appeal was taken to the West African Court of Appeal and the court of November 29, 1956, made an order setting aside the judgment of the Supreme Court granting the plaintiff a declaration of title. As to the substantive relief, that was, for trespass, the appeal was dismissed.

The appeal to the Board was therefore solely related to the question of trespass upon which it was submitted that the West African Court of Appeal came to a wrong decision. There was no cross-appeal and the respondent did not challenge their decision in regard to title.

The history of this piece of land was that in March, 1939, the Osu Stool made an oral grant of the land in dispute to the respondent and duly confirmed it by instrument. But it was the oral grant, according to Van Lare J. which was decisive, and the respondent therefore became owner and entitled to possession of the land as at that date. The plot was demarcated and the respondent caused pillars with her initials " M.D. " on each pillar to be placed on the four corners of the plot. The site was looked after by the respondent's mother, but there was no evidence of the land being put to any use at that time. On October 26, 1940, the Accra Town (Lands) Ordinance (No. 44 of 1940), cap. 87, was passed under which certain areas of land, including the land in dispute, vested in the Chief Secretary in trust for Her Majesty. Section 2 was in the following terms:

" 2. (1) The lands described and delineated in the indentures mentioned and described in the First and Second Schedules hereto which lands are also specified in the Third Schedule hereto shall, subject to the reservations described in the Fourth Schedule hereto, forthwith by virtue of this section become and be vested absolutely and indefeasibly in the Chief Secretary for the time being in trust for His Majesty, free from all competing rights, titles, interests, trusts, claims, liens, demands and restrictions of all kind whatsoever.

(2) When in the opinion of the Governor there is no longer any need for any particular part of such lands to remain so vested in the Chief Secretary the Governor may by Order published in the Gazette direct that any particular part of such lands shall cease to be so vested either forthwith or from a date to be fixed by such Order, and thereupon such particular part of such lands shall be held and enjoyed as though the same had never been assured by indenture to the Governor of the Gold Coast or vested under the provisions of his Ordinance in the Chief

Secretary for the time being in trust for His Majesty.”

Section 5 provided as follows:

“ 5. (1) Any person who claims that he had any right, title or interest to or in such lands or any part of them before they vested in the Chief Secretary under the provisions of section 2 (1) shall lodge a claim in writing with the Commissioner of Lands within three months of the date of the notice mentioned in section 4.

(2) Such claim shall specify the area and boundaries of the land claimed and the particulars and evidence of the right, title or interest claimed therein and, in the case of any person other than a person who has executed an indenture mentioned in the First or Second Schedule hereto, the compensation claimed in respect thereof.

(3) Such claim shall be accompanied by any deeds or other documentary evidence relating to the title to the land claimed.

(4) No claim shall be entertained unless the same is made in accordance with the provisions of this section, and any right, title or interest in respect of which no claim has been made within three months of the date of the notice mentioned in section 4 shall be deemed to have determined.”

Thereafter in terms of the Ordinance the title to the land was in the Chief Secretary. But notwithstanding that Ordinance the respondent had her original gift confirmed by an indenture, dated December 31, 1945, and registered in the Accra Deeds Registry. Among the recitals to this deed is contained this clause: “ Whereas the said grantee ” (the respondent) “ entered into and has been in possession of the said piece of land ever since.”

The next step was taken sometime in 1948 when the appellant started to build on the land. The respondent thereupon gave instructions to her solicitor to write to the appellant, which he did on March 15, 1948, stating her title to the land and complaining of the appellant’s trespass. Despite her protests the appellant continued his building and the building had now been completed and was valued by the defendant at £7,700.

In the meantime by deed of release and covenant dated February 6, 1948, between Osu Stool and the Governor of the Gold Coast Colony the Government contracted to make an order for release of land including the land in dispute. But the formal divestment order under section 2 (2) of the Ordinance was not made until May 5, 1956, when the case was before the West African Court of Appeal. The respondent’s title to the land had thus revived, but because the divestment order was not made until after the suit had been commenced and judgment given the respondent did not challenge the decision of the West African Court of Appeal that she was not entitled in this process to a declaration of title.

1961. June 26, 27. *Gilbert Dold* and *Dick Taverne* for the appellant.

J. G. Le Quesne for the respondent.

July 24. The judgment of their Lordships was delivered by LORD GUEST, who stated the facts set out above and continued: In order to maintain an action for trespass the respondent must have been in possession at the date of the appellant’s entry on the land in 1948. This is very largely a question of fact upon which the Board do not have the benefit of much evidence. Nor do they have the assistance of the courts below. The reason is that at the stage when evidence was being led and the appeal being heard parties and the court were concentrating on the question of title and the question of possession was not closely examined.

The appellant maintained that there was not sufficient evidence to establish that the respondent was in possession at the critical period. It was argued, first, that assuming she was in possession before October 26, 1940, the date of the Ordinance, her possession was determined either under section 2 (1) or section 5 (4) of the Ordinance. So far as section 2 (1) is concerned, this no doubt determined her right to possess, but did not affect the factual aspect of possession. In other words, if the respondent was in actual possession of the land as at October 26, 1940, the section did not change that state of facts. So far as section 5 (4) is concerned, their Lordships adopt the reasoning of Verity Ag.J.A. when he held that the determination of rights under that section only affected rights which might entitle a person to a claim for compensation against the Chief Secretary. It is, accordingly, irrelevant to consider this sub-section in an issue between competing claimants to possession of the land.

Their Lordships now turn to the central issue in the case—whether the respondent has proved that she was in possession in 1948. The appellant has argued that the respondent would require to have taken some active step to reassert her possession after 1940. This was said to follow from the decision in *Brown v. Notley* (1848) 3 Ex. 219, 222 when Parke B. said: “The question is whether, after his interest ceased, he could be presumed to be in possession. Now, if he continued in possession after that time, he would be a wrongdoer; and therefore he must be presumed not to have continued in possession, unless an intention to the contrary be clearly shown. If he had kept his cattle on the close, or the gate locked with a key, which he kept, the case might have been different. But though there was nothing to indicate the giving up possession, there was no evidence of an intention to remain after the term ended, so that the possession was in a neutral state. He must, therefore, be considered to have been out of possession; if not, the consequence would be, that he would be liable to an action of trespass, or to an action on the implied contract to deliver up possession at the end of the term. Unless some act be done indicating an intention to the contrary, possession ceases as soon as the interest.”

Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient. In *Bristow v. Cormican* (1878) 3 App.Cas. 641 at p. 657, H.L. Lord Hatherley said: “There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser.”

There is no evidence that the respondent ever abandoned her possession, which in virtue of her grant in 1939 she obtained. Therefore, if there is evidence after 1940 of an intention to retain possession, that would in their Lordships' view be sufficient to entitle her to maintain an action for trespass. It was said that her conduct was neutral. Their Lordships do not agree. It is true that there is no evidence when the pillars were erected. But if

they were erected after 1940, that would be a definite act indicating possession. Even if erected before 1940, their continuance is some evidence of the respondent's state of mind as affecting possession. In the indenture of 1945, which was registered the respondent declared that she had entered into possession of the land and been in possession ever since. The only reasonable inference from her evidence is that up to 1948, the date of the appellant's entry on the land, she deputed her mother to look after the plot and that she was keeping watch on the land to see that no one intruded. At any rate, when she did notice the appellant's blocks on the land she took prompt action to warn the appellant off the land.

The evidence is exiguous, but in their Lordships' opinion it is sufficient to satisfy the test and is adequate proof of the respondent's intention to continue her possession after 1940, and establishes that when the appellant entered the land in 1948, she was in possession. She is therefore entitled to maintain an action for trespass. Their Lordships consider that the order of the West African Court of Appeal is well founded, but for different reasons from those advanced by Verity Ag. J.A.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeal ought to be dismissed, and that the appellant ought to pay the respondent's costs of the appeal.

Solicitors: *A. L. Bryden & Williams; Herbert Oppenheimer, Nathan and Vandyk*

KWAME MENSAH OTHERWISE NANA AKWAMUHENE APPELLANT

AND

KOJO ABROKWA AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 502

1961 July 25

Lords Hodson, Guest and
Mr. L. M. D. de Silva

Where an agreement prescribes that the giving of notice to the other party is a condition precedent to sale of pledged land, the giving of notice is an essential step and failure to give notice rendered the sale a nullity.

MR. L. M. D. DE SILVA. The respondents instituted this action in the Kumasi West District Court against the appellant and two others for a declaration of title to and recovery of possession of a cocoa farm at Manfo in Ghana. That Court entered judgment for the respondents. On appeal the Asantehene's "A2" Native Appeal Court set aside the judgment and dismissed the action. On an appeal from the judgment of the Native Appeal Court the Land Court restored the judgment of the Kumasi West District Court. On a further appeal to the West African Court of Appeal the judgment of the Land Court was affirmed. The present appeal is from the judgment of the West African Court of Appeal.

This case was decided by each of the Courts in Africa on the basis that the English law was applicable to the questions which arose. Counsel for the

appellants sought to raise on this appeal certain points of customary law which he submitted was applicable. These points were not raised in the Courts in Africa and are not even mentioned in the "case for the appellant" filed in the proceedings before the Board. Their Lordships were not prepared to entertain them. They had not had the assistance of the views upon them of the Courts which have dealt with the case up to now.

On the 11th March, 1939, the respondents received a loan from one Kwabena Frimpong, the 1st defendant in the action (not an appellant in this appeal) and in respect thereof executed a document in the latter's favour in the following terms:

"WHEREAS WE the undermarked Kojo Abrokwa and Kwabena Akromah all of Manfro in the Kumasi District have this 11th day of March, 1939, received the sum of Four— [sic] eleven shilling (£4:11:0) from Kwabena Frimpong of Abrepo village as loan in consideration for which We Hereby pledge the undermentioned One (1) Cocoa Farm to the said Kwabena Frimpong as security against the said loan.

1. We do hereby faithfully promise to pay the said sum of four— eleven shillings (£4:11:0) on or before the 30th day of November, 1939.

2. Provided always and it is hereby agreed and declared that in default or failure to pay the said sum aforesaid on or before the time specified above it shall be lawful for the said Kwabena Frimpong to forfeit or sell and dispose of the cocoa farm hereunder described and deposited as security either by Private or Public Auction after two (2) weeks Notice to us and if the amount realised at such sale shall not cover the said sum of four pounds eleven shillings (£4:11:0) it shall be lawful for the said Kwabena Frimpong to call on us for whatever balance that may be found due (deducting all expenses attendant to the sale).

3. We further agree to have no claim against the said Kwabena Frimpong should he exercise the Power hereinbefore contained in paragraph (2) above mentioned.

4. Provided always and it is hereby agreed and declared that the Power of forfeiture and sale hereinbefore contained shall not be exercised unless and until default shall have been made in payment of the said sum of Four Pounds eleven shillings (£4:11:0) on or before the time above specified.

5. In case of failure to pay the above mentioned sum of Four pounds eleven shillings (£4:11:0) at the time specified, the said Kwabena Frimpong has the discretion to grant extension of time upon accepting any interest that may be due on the principal sum and upon payment of consideration."

The case for the appellant is that the respondents failed to make due repayment of the loan and that therefore the property was duly sold by auction by Kwabena Frimpong (1st defendant but not an appellant) in terms of the document set out in the previous paragraph and bought by one Akwasi Badu (the 2nd defendant, not an appellant) and that Akwasi Badu in turn sold the property to Kwame Mensah 3rd defendant who is the present appellant. On these alleged facts the appellant says he is the lawful owner of the property. The appellant also says that the respondents stood by for a long period without disputing the validity of the sale, that he must be held to have acquiesced in it and cannot now dispute it.

The respondent was not represented at the hearing of this appeal. It is

necessary for their Lordships to examine whether the sale passed title and also the plea of acquiescence.

The validity of the sale was challenged in the Courts in Africa on more than one ground. Their Lordships find it necessary to examine here only one ground because on an examination of that ground they have formed the view that no title passed upon the sale. Counsel for the appellant was constrained to admit that, whatever may be the proper description in law of the transaction effected by the document set out above, there could be no effective sale if the notice stipulated by it was not given. There was an issue between the parties as to whether or not such notice had been given. The evidence given involved a direct conflict between the respondents (1st respondent alone gave evidence) who said they had not been given notice and the evidence of witnesses called by the appellant and of the appellant himself to the effect that it had. The trial Court which saw and heard the witnesses held that no notice had been given. It quite rightly rejected the argument that the acceptance in evidence of a copy of an alleged notice was "proof that the notice was served" and found that there was no proof that it had been served. Their Lordships have examined the evidence upon which it was sought to establish that notice had been served and have no hesitation in coming to the conclusion that the view of the trial Court was correct. Some adverse comment was made by the Native Appeal Court but their Lordships do not think this comment affords good reason for disturbing the view of the Native Court. The Land Court and the West African Court of Appeal while upholding the respondents' claim said nothing upon the point.

Upon the conclusion arrived at by their Lordships in the previous paragraph no title passed on the sale. An argument which found favour with the Native Appeal Court (but not adopted by the Land Court or the West African Court of Appeal) was that the failure to give notice was an "irregularity" with regard to which the respondent had to take certain prescribed steps before he could challenge the sale. This argument is unsound. The giving of notice was an essential step and failure to give notice rendered the sale a nullity.

Their Lordships will next examine the question of acquiescence. The appellant has been in possession for a long period without legal proceedings being taken against him. This fact is no doubt relevant but not conclusive. It is common ground that no law of limitation is applicable in the territory concerned.

The appellant's argument that there was acquiescence is based on an assumption of facts which in their Lordships' opinion have not been established. It is said that the respondents stood by for a long period without disputing the appellant's right to the land and allowed him to effect improvements in the belief that he was the true owner.

In the first place the first respondent (who alone gave evidence on behalf of the respondents) stated in evidence that after the sale he raised questions about its validity with the first defendant (not an appellant) and the first defendant in evidence admitted that the first respondent told him he had not received "the required notice." It does not appear from the evidence that the fact of this incident became known to the other defendants although it is not improbable that it did. But it eliminates the possibility of suggesting that the respondents were guilty of any fraud or that they deliberately kept quiet so as to give the defendants the impression that all was well in order to see what they could get by doing so.

Next it is to be observed that neither the third defendant nor the second defendant said that the respondents had stood silently by without raising

any questions. This is the least they should have done if they wish to assert that the respondents had stood by silently. The appellant did say that "they (meaning the respondents) did not disturb my possession of the farm." This refers to some sort of physical disturbance. The absence of such disturbance is not sufficient to establish a case for the appellant on the facts. It is true that the respondents themselves did not say affirmatively in evidence that they had raised questions with the defendants and had not stood silently by. But it is clear that in the trial court no question of acquiescence or resembling acquiescence was raised. The respondents could not be expected in these circumstances to do otherwise than they did.

It is usual and proper practice for a defendant to put his case to the plaintiff in cross-examination. No question was asked of the first respondent (who alone gave evidence for the respondents) suggesting the respondents had stood by. In a proceeding in a Native Court too much importance cannot be attached to the failure to observe a point of practice. But apart from any technical consideration of proper practice it would have been reasonable in this case for the appellant to have done so if he wished to establish upon the facts that the respondents stood by.

It is urged for the appellant that the respondents voluntarily gave up possession. There is no evidence of this. They were in possession till after the sale. It is stated in the case for the appellant that "there is no direct evidence of precisely how or when the plaintiffs gave up possession of the farm to the purchaser." That statement is correct and it cannot be said that the respondents (plaintiffs) voluntarily gave up possession.

Their Lordships do not find it necessary to discuss certain submissions of law made by the appellant on the question of acquiescence because on the views expressed by them in the immediately preceding paragraphs they are of opinion that the facts upon which those submissions would be relevant have not been established.

For the reasons which they have given their Lordships will report to the President of Ghana as their opinion that this appeal ought to be dismissed and that no order as to the costs of this appeal ought to be made, as the respondents were not represented at the hearing of the appeal.

KWAMI BADU AND OTHERS APPELLANTS

AND

AMBA AMOABIMAA, QUEEN MOTHER OF THE
AMPIAKOKO SECTION OF THE YEGO FAMILY
AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

(1961) G.L.R. 506

1961 July 26

Lords Denning, Morris of Borth-y-Gest
 and Mr. L. M. D. de Silva

Three families fused together to form one family, bringing with them their various holdings into common land held and enjoyed by the new extended family. The families later by mutual agreement decided to separate into their composite units and sever family ties created upon fusion.

Held: that upon severance of family ties, land held by individual families reverted to the original units, the owners before the fusion to form one family.

MR. L. M. D. DE SILVA. The plaintiffs-respondents, who are the Queen Mother of a section of a family (the Ampiakoko section of the Yego Family of Nyakrom) and a linguist instituted this action on behalf of the members of the said section against certain persons in the Agona Native Court " B " for a declaration that three parcels of land known as the Buafi, Otsinkorang and Busumpa lands had been founded or acquired by Ampiakoko their ancestor. They also asked for possession of these lands. The appellants consist of some of the original defendants, persons substituted in place of original defendants who had died and certain persons who were added as defendants on their application that this should be done.

The Agona Native Court entered judgment in favour of the respondents. On appeal this judgment was set aside and the action dismissed by the Land Court. On a further appeal the West African Court of Appeal reversed the judgment of the Land Court and restored the judgment of the Native Court. The appeal now under consideration is from the judgment of the West African Court of Appeal.

It is common ground that several generations ago the ancestors of the parties migrated as four or five distinct families (all of the Yego Clan) from different parts of Ashanti to Nyakrom which is within twenty-five miles of the sea coast. At Nyakrom they united to form one composite group which became known as the Yego Family of Apaa Quarters of Nyakrom. The four or five families became houses within the composite group. As a result of the union every member of each of the four or five houses had the right to farm freely on all the lands of the composite group so long as he did not trespass on land already cultivated by others.

The question debated before the Native Court is stated thus in the judgment of that Court:

" Now the question at issue is this: Were the lands in dispute *i.e.* Buafi, Otsinkorang and Bosumpa founded by Ampiakoko, the plaintiffs' ancestor or by Buasi, Otsinkorang, Abuenyi, the defendants ancestors and Ampiakoko?"

This appears to have been the substantial question raised in the Native Court. It was essentially a question of fact to be determined on evidence. It was as already stated answered in the plaintiffs' favour by the trial Court which held that the lands had been founded by Ampiakoko " for his descendants " before the union with other families to form a composite group. Their Lordships agree with the Court of Appeal that there is no reason to disturb this view. This does not conclude the matter.

In 1949 disputes arose within the Yego Family of Apaa Quarters and one consequence of these disputes was that an action was instituted in the Agona Native Court " B " by one Kofi Donkor a member of the Ampiakoko House against one Kwesi Eduamoah a member of the Eduamoah House. In the course of the hearing a settlement was reached by which the houses agreed to sever the family ties which bound them into a composite group. There were representatives of other houses there. They were consulted and agreed. There was a special ceremony to mark the severance. The President of the Court asked each side to provide a live sheep and a bottle of rum. The sheep were slaughtered and the cutting of the tie ceremony was accomplished. An order of the Native Court was drawn up on 13th May, 1949, in these words:

“ In view of the agreement arrived at by both parties as to separation of Family Ties, it is needless calling upon any other witnesses in this case nor asking the defendant to make his defence.

It is hereby ordered and directed, by consent of both parties, that the Family Ties hitherto existing between Kofi Donkor as representing the members of Ampiakoko section of Yego Family (Apaah Section) of Nyakrom and all his descendants of the one part, and Kwesi Eduamoah and with him Henry Saah, Kwami Badu and Kerami Otsinkorang as representing the other four houses of Yego family (Apaah Section) at Nyakrom and all their descendants of the other part, *Be separated* and the same are hereby separated, each party not having any further family dealing with the other.

The question of the Yego Family (Apaah Section) Stool of Nyakrom and all the properties attached thereto or belonging to the said Family shall be later settled amicably between the parties by Nana Kobina Botchey, Adontehene of Agona State, who shall see to the division of such properties and to the ownership of the Stool.”

In the present case the Native Court expressed the view that under the consent order there had been a severance of family ties, and that on severance the ancestral property of the Ampiakoko section reverted to it for the sole use and occupation of its members. It did not say in express language that the latter was a consequence of the former but their Lordships have no doubt that that view was implicit in what it said. The Land Court found itself unable to accept the view of the Native Court. With regard to this the West African Court of Appeal said:

“ The learned Judge (of the Land Court) expressed a view as a general proposition that the lands of a family stool cannot revert to one branch of a family. The Native Court, however, in the particular circumstances of the present case, held that on severance each house assumed title, to the exclusion of the other houses, of the lands acquired by its founder. That is a finding on the native custom applicable to the case.”

It went on to say that the Land Court could not properly on the material before it have taken the contrary view. Their Lordships agree. There was no material upon which it could be said that the view of the Native Court upon this point of customary law was wrong.

It was urged for the appellant that in the absence of a term in the agreement (of the 13th May) to the effect that the ancestral properties were to revert to each house no such consequence followed. Their Lordships being of opinion as already stated, that under the relevant law applicable to the parties in the circumstances of this case the reversion of the ancestral properties followed as a matter of course they do not think any such term was necessary.

It was also urged that the amicable settlement referred to in the second paragraph of the order had not taken place and that in consequence the whole of the order was ineffective in law. Their Lordships do not agree. On severance the ancestral lands at once reverted to the houses to which they originally belonged. That did not depend on any “ amicable settlement.” The only need for an amicable settlement was as to any property of the Yego Stool, which was not the ancestral property of any one of the houses, but was the property of the Stool which it itself had acquired whilst it was a composite Stool. No one house was entitled to that Stool property and a division had to be made.

It should be mentioned that both parties took the order twice before a magistrate for reasons which do not appear in the record of the proceedings in this case. It is not of much importance that they do not. On 13th August, 1949, Kwesi Eduamoah appealed to Mr. Wallis, who dismissed the appeal saying: "The Parties need not comply with the Order. Arbitration is essentially voluntary. There is therefore nothing to appeal against." On 7th February, 1950, Kofi Donkor appealed to Mr. Ferguson, who said: "No order by a court which this court could direct should be enforced has been brought to my notice." Their Lordships are of opinion that these proceedings before the magistrates did not affect the validity of the separation or its consequences in native customary law. Each house was entitled to its ancestral property. But it did mean that the position of the Stool property was unresolved.

It has been urged that the findings in a case (now under appeal) brought by one Kwami Badu and others against Kofi Donkor are a bar to the present proceedings. It is necessary to consider this argument.

Kofi Donkor was at one time the head of the Yego Family. On the 22nd November, 1950, a general meeting was held of the Yego Family and it was resolved that "Kofi Donkor be removed and he is this day removed from the position of Head of the Yego Family (Amaa Quarters) of Nyakrom." Kwami Badu was appointed head of the Family in his place. Kofi Donkor does not appear to have handed over the paraphernalia and other property of the Stool to his successor. On the 11th June, 1951, Kwami Badu and other heads of houses brought an action in the Native Court "B" at Swedri asking for the delivery of the Stool property against "Kofi Donkor (ex-head of Yego Family Amaa Quarters)." The action was not against him as representing the Ampiakoko section. On 5th July, 1953, the court gave judgment for the plaintiffs and ordered Kofi Donkor to deliver up the Stool with its paraphernalia and lands. That judgment only affected the Stool lands.

The order in that case made by the Native Court is as follows:

"Judgment in this case is therefore entered for plaintiffs for the said Stool with its paraphernalia and all the lands, with costs to be taxed.

Defendant is hereby ordered to deliver up possession and surrender all the properties mentioned hereunder to plaintiffs for the whole Amaa Yego Family, Nyakrom including defendant's section on or before the 19th day of July, 1952."

It will be observed that the Ampiakoko section of the Yego Family ("defendant's section") was one of the parties in whose favour order was made against Kofi Donkor and there is no order adverse to the Ampiakoko section.

The subject matter of the present proceedings, namely, the lands at Otsinkorang, Busumpa and Buafi are included in the order but in the circumstances mentioned this cannot prevent the Ampiakoko section from asserting that those lands are their ancestral lands. Moreover, Amba Amoabimaa the Queen Mother of the Ampiakoko had applied to be joined as a party to the case but her application was rejected. She is a plaintiff in the present proceedings and it is not disputed that she rightly represents the Ampiakoko section. The action, as already stated, was against Kofi Donkor personally as ex-head of the Yego Family as a whole. Their Lordships are of opinion that the Ampiakoko section are not prevented by those proceedings from asserting the present claim.

It has been held by the Native Court that "consequent upon the breaking

of the family tie " the heads of the appellants' sections of the Yego Family prevented the respondents " from having anything to do with their family lands of Kyekyegya." This finding was confirmed by the Court of Appeal. Both courts took the view that the appellants by this action regarded their ancestral lands as their sole property and that the respondents were equally entitled to regard their ancestral property as solely theirs. Their Lordships agree. Some evidence was pointed out to their Lordships that the action taken by the appellants was for reasons other than those mentioned but this evidence has not been accepted.

A point which found favour with the Land Court was that it was not established that the appellants were in possession of the lands in question and that therefore no order for possession should be made against them. Their Lordships do not think it is well-founded. The appellants undoubtedly claimed the right to go on the lands and farm them. If they are there an order is necessary to get them out. If they are not there it does them no harm.

For the reasons which they have given their Lordships will report to the President of Ghana that this appeal ought to be dismissed and that the appellants should be ordered to pay the costs of this appeal.

ADEL BOSHALI APPELLANT

AND

ALLIED COMMERCIAL EXPORTERS LIMITED RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1961) All N.L.R. 917

1961 Nov. 14

Lords Hodson, Guest and Devlin

Sale of Goods—Sale by Description—Sale of Goods Act, 1893, sections 15(1), 53(3).

Contract—Breach—Exemption Clause—Will not protect party for breach which goes to root of Contract.

Evidence—Loss of Profit—Uncorroborated evidence of plaintiff—Will be accepted if unchallenged by defendant.

The appellant agreed, by correspondence, to buy a large quantity of "36-inch dyed crepe Quality AS1000 grey cloth foreign origin" from the respondent. In one of the two letters embodying the contract, a sample was forwarded by the respondent to the appellant and referred to as Quality AS1000; it was a term of the contract that the goods to be supplied by the respondent to the appellant should correspond to the description of the goods given in the contract; which description was evidenced by the sample. The contract also contained an exemption clause in the following terms: "For goods not of United Kingdom origin we cannot undertake any guarantees or admit any claims beyond such as are admitted by and recovered from the Manufacturers."

After a consignment of the goods had been delivered to the appellant he rejected the remainder of the goods on the ground that they were disconform to contract. The appellant claimed damages for breach of contract; alleging that the shipping sample forwarded to him was inferior in quality to the sample descriptive of the goods previously forwarded to him by the respondent. The respondent counter-claimed for special and general damages for the appellant's

breach of contract for non-acceptance of the goods. The shipping sample was tendered by the respondent in evidence as a sample of the goods shipped or to be shipped. The appellant claimed, apart from the market value of the goods, loss of profit at the rate of 6d. per yard. The only evidence adduced at the trial to support such loss of profit came from the appellant, and he was not cross-examined on the basis that his claim was excessive. The trial court found that the sale was one by description and not by sample, gave judgment in favour of the appellant and awarded damages at the rate of 6d. per yard as loss of profit on the whole consignment.

The respondent appealed to the Federal Supreme Court.

The Federal Supreme Court held (a) that the appellant had failed to prove that the bulk of the goods did not correspond to the original description, the test having been restricted to the shipping sample; (b) that the evidence given by the appellant to the effect that he would have made a profit of 6d. per yard was not sufficient proof of his actual loss of profit; (c) that the exemption clause contained in the contract would in any event have protected the respondent from liability.

The Supreme Court reversed the judgment of the trial court and awarded the Respondent £425 11s. 5d. on the counter-claim.

The appellant appealed.

Held: (1) Although a sale cannot be regarded as one by sample unless the contract contains a term, express or implied, to that effect, if a sample of the goods, the subject matter of the contract is forwarded by the seller to the buyer, the sample will be taken into consideration as evidence of the description of the goods given by the seller.

(2) A judge is entitled to accept uncorroborated evidence as to loss of profit given by a plaintiff, who is an expert in the trade out of which the cause of action arose, and who is not cross-examined on the basis that his claim is excessive.

(3) An exemption clause in a contract will avail a party only if he is carrying out the contract in its essential respect; and a breach which goes to the root of a contract disentitles the party from relying on such clause. In this case, the exemption would apply only if the goods were in accordance with the contract: as they were substantially different the exemption cannot avail the respondent.

Appeal allowed.

Case referred to:

Karsales (Harrow) Limited v. Wallis (1956) 2 All E.R. 866; 100 Sol. Jo. 548.

Act referred to:

Sale of Goods Act 1893 (56 and 57 Vict. c. 71), s. 15(1), 53(3)

Gratiæn Q.C., (within him *Bernstein*) for the appellant.

Respondent *ex parte*.

LORD GUEST (delivering the Judgment of the Lords of the Judicial Committee). The facts out of which these appeals arise have been fully set out in the judgments of Abbott J. in the Supreme Court of Nigeria and of Nageon de Lestang F.J. in the Federal Supreme Court and it is unnecessary to rehearse these facts in any detail.

The contract which resulted from correspondence between the appellant and respondent in March, 1952, was for the purchase by the appellant from the respondent of 85,000 yards "36-inch dyed crepe Quality AS1000 grey cloth foreign origin" at 1s. 10d. per yard. C.I.F. The contract is embodied in two Sale Notes, dated respectively 24th March and 1st April, 1952. After a consignment of the goods had been delivered to the appellant he rejected the remainder of the goods on the ground that they were disconform to contract. In the action No. 496/53 the appellant claimed damages amounting to £3,531 8s. 11d. for breach of contract. The respondent counterclaimed for £1,666 14s. 2d. as special and general damages for the appellant's breach of contract by non-acceptance.

In this action the Trial Judge found for the appellant and awarded damages amounting to £3,406 7s. 6d. in respect of the respondent's breach

of contract, and he dismissed the counterclaim. The Federal Supreme Court held that the appellant had failed to prove breach of contract and gave judgment for the respondent on the counterclaim to the extent of £425 11s. 5d. Before their Lordships' Board the respondent was not represented and he did not lodge a printed case.

Both the Trial Judge and the Federal Supreme Court took the view that the contract was a sale by description and not a sale by sample. Their Lordships are of opinion that this was a correct conclusion. There was not in the words of section 15(1) of the Sale of Goods Act, 1893, any term in the contract to the effect that the sale was by sample. From this conclusion however, the Trial Judge and the Federal Supreme Court arrived at different results. While the Judge held the respondent in breach of contract, the Federal Supreme Court expressed the opinion that there was no evidence that the goods did not correspond with the description. This view could only have been formed by the elimination from their consideration of the sample, their Lordships take the view that the sample must be taken into consideration as evidence of the description given by the seller of the goods. The Trial Judge has found as a fact that the sample Exhibit "AB" had attached to it a label "AS1000-65000." This sufficiently identifies it with the goods referred to in the letter from the respondent to the appellant dated 10th March, 1952, as "Quality AS1000" and with the goods referred to in the subsequent Sales Notes. The sample explains the description given in the contract and the parties treated the sample as an accurate description of the stipulated quality of the goods. The appellant succeeded in establishing before the Trial Judge that the shipping sample forwarded to him by the respondent was inferior in quality to the sample Exhibit "AB." Therefore, assuming that the shipping sample was typical of the bulk of the goods to be supplied, these goods did not correspond to the description of the goods given in the contract and as evidenced by the sample.

The Federal Supreme Court held that the appellant had failed to prove that the bulk of the goods did not correspond to the original sample. No test was in fact applied to the bulk of the goods, the test being restricted to the shipping sample. Their Lordships consider that there is force in the argument that as a matter of strict proof no evidence was produced as to the quality of the bulk of the goods. But the shipping sample was put forward by the respondent as a sample of the goods shipped or to be shipped and before the Trial Judge the case was conducted on the basis that the shipping sample was typical of the bulk of the goods. In these circumstances their Lordships are of opinion that it would be taking an unduly technical view to hold that the appellant's proof had failed on this point when both parties had accepted the position as indicated above. For these reasons their Lordships consider that the Trial Judge was right in holding the respondent in breach of contract and that his judgment on this point should be restored.

The Federal Supreme Court criticised adversely the Trial Judge's findings as to damages in several respects. In the first place it was said that the appellant had failed to prove any damages in regard to the goods accepted. The Trial Judge awarded damages on the basis of the loss on resale at 7d. per yard. The appellant gave evidence that the cost of the goods to him including duty and delivery charges was 2s. 4d. per yard and that owing to the inferior quality of the goods he could only obtain 1s. 9d. From these figures a loss on resale of 7d. per yard was calculated. No cross-examination was directed to this method of calculating his loss.

The Federal Supreme Court took the view that this method of calculating

damages was not in accordance with section 53 (3) of the Sale of Goods Act, 1893, in that there was no evidence of the market value of the goods at the time of delivery. While it is true that the evidence of the appellant did not specifically relate the figure of 2s. 4d. per yard to the market value of the goods, in effect what he was saying was that the market value of the goods was the cost to him namely 2s. 4d. plus the profit which he could have made on the resale namely 6d., a total of 2s. 10d. per yard. From this market value the price which he obtained from the goods namely 1s. 9d. would require to be deducted leaving a loss of 1s. 1d. per yard. The Trial Judge accepting the appellant's evidence awarded damages at the rate of 6d. per yard as profit on the whole consignment of 85,000 yards. But as a figure of 6d. per yard has already been included in the market value of the goods in the first calculation, in order to avoid duplication the figure of 6d. requires to be deducted from the rate of 1s. 1d. per yard leaving a balance of 7d. per yard, being the rate at which the damages have been calculated by the Trial Judge in respect of the goods accepted. In their Lordships' view the Federal Supreme Court approached the question of damages upon the correct basis, but they took an unduly strict view of the standard of proof required. The Trial Judge arrived at a substantially accurate assessment of the damages under this head and their Lordships' view is that his award falls to be sustained.

The Federal Supreme Court took the view that the figure of 6d. per yard for loss of profit on the sale of the goods awarded by the Trial Judge rested on the *ipse dixit* of the appellant that he would have made a profit of 6d. and that this was not sufficient proof of his actual loss of profit. The only evidence as to loss of profit came from the appellant who was an expert in the trade whose evidence was accepted by the Trial Judge. He was not cross-examined on the basis that his claim was excessive. The Trial Judge was in their Lordships' view fully entitled in the absence of any contrary evidence to take the figure of 6d. per yard as the appellant's loss of profit.

The Trial Judge further awarded the appellant in name of damages £246 19s. 0d. being the refunds which the appellant said he had made to sub-purchasers in respect of shortages in quantity. As evidence of the shortages a Certificate of Inspection was produced showing that in some cases the yardage marked on the pieces in the bundles did not correspond to and was in fact greater than the actual yardage. But the contract as embodied in the Sale Notes was for a total length of cloth of "85,000 yards 36 inches"; there was no evidence of any particular shortage in bundles delivered to sub-purchasers but merely an omnibus claim of £246 19s. 0d. Further the yardage marked on the pieces in the Certificate of Inspection was in nearly every case in excess of 36 inches. There was no satisfactory proof of the claim made in respect of the refund to sub-purchasers and it must in their Lordships' view fail.

The damages to be awarded therefore consist of:

£1,034 8s. 6d.	being loss on resale
£2,125 0s. 0d.	being loss of profit
<u>£3,159 8s. 6d.</u>	

But from this sum there admittedly falls to be deducted £900, being the total of two sums of £500 and £400 paid by the respondent to the appellant on account in settlement of claims. It was never contended that these sums were in full settlement of the appellant's claim, but he must give credit to the respondent for these sums from the sums awarded as damages.

It follows from the fact that breach of contract has been established that the counterclaim must fail and that the Federal Supreme Court was in error in giving judgment for the respondent.

Before passing to the action No. 610/53 it is necessary to take note of a point raised in the judgment of the Federal Supreme Court, relating to the last condition of the contracts which was in the following terms: "For goods not of United Kingdom origin we cannot undertake any guarantees or admit any claims beyond such as are admitted by and recovered from the Manufacturers."

The Federal Supreme Court held that this condition would in any event have protected the respondent from liability. Their Lordships do not agree. An exemption clause can only avail a party if he is carrying out the contract in its essential respects. A breach which goes to the root of a contract disentitles a party from relying on an exemption clause. (*Karsales (Harrow) Ltd. v. Wallis* (1956) 2 All E.R. 866, Denning L.J. at p. 869.) The exemption would only apply if the goods were in accordance with the contract. As they were substantially different goods, the exemption cannot avail the respondent.

The action No. 610/53 is entirely separate from the other action and consists of a claim for £697 9s. 2d. by the respondent against the appellant. It appears that the appellant was unable to pay for the first consignment of goods delivered under the contract and that he gave to the respondent two promissory notes one for £480 14s. 5d. and the other for £486 14s. 9d. against delivery of the goods. These promissory notes were dishonoured at maturity by the appellant. The appellant asked the respondent to debit his account with the amount of the two promissory notes. This was done as is shown by Exhibit "V" from the respondent's sale manager in which the amount of the two promissory notes has been debited to the appellant's account. This is not a claim by the respondent for any balance of account and in fact the appellant's account is in credit with the respondent. The Trial Judge was therefore right in their Lordships' view in holding that this action must be dismissed.

Their Lordships will therefore humbly advise Her Majesty that these appeals ought to be allowed and the judgment and order of the Federal Supreme Court of Nigeria set aside and the judgment of the Supreme Court of Nigeria restored subject to the limitation of the amount of damages for which judgment is awarded in Suit No. 496/53 to £2,259 8s. 6d. The respondent must pay the appellant's costs of the appeal to the Federal Supreme Court and of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. Rexworthy, Bonser and Simms.*

BENJAMIN LEONARD MACFOY APPELLANT

AND

UNITED AFRICA COMPANY LIMITED RESPONDENTS

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

[1961] 3 W.L.R. 1405; [1961] 3 All E.R. 1169; [1962] A.C. 152

Practice—Pleadings—Long vacation—Statement of claim delivered during long vacation without direction of court—Whether void or voidable—Effect on subsequent proceedings—R.S.C., Ord. 64, r. 4; Ord. 70, r. 1—R.S.C. of Sierra Leone, Ord. 52, r. 3; Ord. 50, r. 1.

Void or Voidable—Pleading—Delivered in long vacation—Effect.

West Africa—Sierra Leone—Practice—Statement of claim delivered during long vacation—Effect—R.S.C. of Sierra Leone, Ord. 52, r. 3; Ord. 50, r. 1.

The plaintiffs issued a writ against the defendant in the Supreme Court of Sierra Leone during the long vacation, which ran from July 15 to September 15 and on September 5, 1958, still during the long vacation, delivered and filed a statement of claim. The defendant, who had entered an appearance, delivered no defence, and on September 29 judgment was signed against him by default. His application to set aside that judgment on the ground that he had a good defence on the merits was dismissed by the Supreme Court, and he appealed to the West African Court of Appeal when, for the first time, he contended that the statement of claim, having been delivered in the long vacation, was a nullity and that all subsequent proceedings were void. On his appeal against the refusal of that court to set aside the default judgment:

Held, (1) that, there being no express provision in the Rules of the Supreme Court of Sierra Leone that the time set by the Rules for pleadings were to run during the long vacation, Ord. 52, r. 3, of those Rules brought into operation in Sierra Leone the practice and procedure of the High Court in England as to pleadings during the long vacation.

(2) That either by the terms of the English R.S.C., Ord. 64, r. 4, or by the practice of the court (see note in the Annual Practice to Ord. 20, r. 1.) it was a breach of the Rules for this statement of claim to have been delivered and filed during any part of the long vacation except by direction of the court or a judge, and the plaintiffs had filed it without any such direction.

(3) That rule 1 of Order 50 of the R.S.C. of Sierra Leone (identical with rule 1 of Order 70 of the English R.S.C.), which provided that "non-compliance with any of the rules . . . shall not render any proceedings void unless the court shall so direct, but such proceedings may be set aside . . . as irregular . . .," only applied to proceedings which were voidable, not to proceedings which were a nullity: *Anlaby v. Praetorius* (1888) 20 Q.B.D. 764; 4 T.L.R. 439, C.A.; *Craig v. Kanssen* [1943] K.B. 256; [1943] 1 All E.R. 108, C.A.

(4) That the delivery of the statement of claim in the long vacation was only voidable and not void—it was only an irregularity and not a nullity—and it was therefore a matter for the discretion of the court whether it should be set aside or not, and not having been avoided there was no ground on the facts of this case for interfering with the discretion of the court below refusing to set aside the default judgment.

Judgment of the West African Court of Appeal affirmed.

The following cases, in addition to those referred to in the judgment were cited in argument:

Lloyd v. Great Western Dairies Co. [1907] 2 K.B. 727; 23 T.L.R. 570 C.A.;

Gill v. Woodfin [1884] 25 Ch.D. 707, C.A.;

Williams v. De Boinville [1886] 17 Q.B.D. 180, *Fry v. Moore* [1889] 23 Q.B.D. 395, C.A.;

Hewitson v. Fabre [1888] 21 Q.B.D. 6; 4 T.L.R. 510, D.C.;

Boyle v. Sacker [1888] 39 Ch.D. 249; 4 T.L.R. 661, C.A.;

Rev v. Justices of Leicester [1827] 7 B. & C. 6.

APPEAL (No. 67 of 1960), by special leave, from a judgment of the West African Court of Appeal (June 5, 1959) affirming a judgment of the Supreme Court of Sierra Leone (January 9, 1959) whereby the appellant's application to set aside a default judgment dated September 29, 1958, in an action between the respondents and the appellant, or to stay execution thereof, was refused.

The following facts are taken from the judgment of the Judicial Committee: In Sierra Leone the long vacation runs from July 15 to September 15. On August 16, 1958, during the long vacation, the United

Africa Company Ltd. issued a writ in the Supreme Court of Sierra Leone against B. L. MacFoy. It was indorsed with a claim for £5,690 15s. 9d. for goods supplied. It was duly served, and on September 2, 1958, the defendant entered an appearance. On September 5, 1958, still during the long vacation, the plaintiffs delivered and filed a statement of claim in which they alleged that the defendant was indebted to them in the sum of £5,690 15s. 9d. for oil products supplied to him, which he had sold to the public and had not paid for. The long vacation ended on September 15, 1958. More than 10 days elapsed thereafter and no defence was delivered by the defendant. On September 29, 1958, the plaintiffs signed judgment against the defendant in default of defence. The judgment ran as follows: "The defendant not having delivered any defence herein it is this day adjudged that the plaintiffs recover against the said defendant £5,690 15s. 9d. and damages to be assessed."

In November 1958 the defendant applied to set aside the judgment. He also applied for a stay of execution. These applications were heard by Bairamian C.J. on January 9, 1959. The defendant did not suggest that the judgment was a nullity, and void. He treated it as a regular judgment but sought to set it aside because he said he had a good defence on the merits as to all but £250. He swore an affidavit setting out the reasons why he was too late to file a defence. But the Chief Justice dismissed his applications. Execution was levied and his goods sold.

On March 14, 1959, the defendant gave notice of appeal to the West African Court of Appeal. The appeal was heard on June 1, 1959, by Hurley and Ames Ag. J.J.A. and Watkin-Williams J. On the hearing of the appeal the defendant for the first time took the point about the delivery of the statement of claim in the long vacation. He said that it was a nullity and that all subsequent proceedings were void. On June 5, 1959, his appeal was dismissed. He now appealed, by special leave, to Her Majesty in Council.

Oct. 23, 1961. *E. F. N. Gratiaen Q.C.* (Ceylon) and *T. O. Kellock* for the appellants.

Mark Littman Q.C. for the respondents.

Nov. 27. The judgment of their Lordships was delivered by LORD DENNING. The question in this case is what is the effect of delivering a statement of claim in the long vacation? (His Lordship stated the facts set out above and continued): There is no question that all the earlier steps, prior to the statement of claim, were properly taken during the long vacation. The writ was duly issued on August 16, 1958. It was duly served. On September 2, 1958, the defendant duly entered an appearance. But what then was to happen about pleadings? The Supreme Court Rules provide by Ord. XVI, r. 1, that "Within ten days after appearance, the plaintiff shall deliver to the defendant a statement of his claim . . . and shall forthwith file a copy thereof with the court"; and by Ord. XVI, r. 2, that "The defendant shall within ten days of the delivery of the statement of claim deliver to the plaintiff his defence . . . and forthwith file a copy thereof with the court." In case of default of pleading the Supreme Court Rules provide by Ord. XXIII, r. 1 that if the plaintiff does not deliver a statement of claim "within the time allowed for that purpose" the defendant may apply to dismiss the action for want of prosecution: and by Ord. XXIII, r. 2, that "If the plaintiff's claim to be only for a debt or liquidated demand and the defendant does not, within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs."

Such are the times set by the Rules for pleadings, but do those times run

during the long vacation? There is no express provision in the Rules of the Supreme Court of Sierra Leone as to what can be done in vacation. Order XLIV, r. 1, simply says that "The vacations to be observed in the Supreme Court shall be three in every year, viz., the long vacation, the Christmas vacation, and the Easter vacation. The long vacation shall commence on the 15th July and terminate on the 15th September, the Christmas vacation shall commence on 23rd December and terminate on the 4th January; and the Easter vacation shall commence on the Wednesday before Easter and terminate on the Saturday after Easter." But there is no provision as to what can or cannot be done in vacation.

It was suggested to their Lordships that, as nothing was said, the times for pleading ran during the vacation: but their Lordships cannot accept this view. Their Lordships think that the position is covered by Ord. 52, r. 3, which says that: "Where no other provision is made by these rules the procedure, practice and forms in force in the High Court of Justice in England on the 1st day of January, 1957, so far as they can be conveniently applied, shall be in force in the Supreme Court." Their Lordships think this rule brings into operation in Sierra Leone the procedure and practice of the High Court in England as to pleadings during the long vacation. This is to be found in Ord. 64, rr. 4 and 5, of the Rules of the Supreme Court.

Ord. 64, r. 4, sets out some special causes in which pleadings may be amended, delivered or filed during the last 11 days of the long vacation and then says "But pleadings shall not be amended, delivered, or filed during any other part of such vacation, unless by direction of the court or a judge."

Ord. 64, r. 5, says that "Save as in the last preceding rule mentioned, the time of the long vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, delivering, or filing any pleading unless otherwise directed by the court or a judge."

Applying Ord. 64, r. 5, to the present case it is quite plain that, if the statement of claim was validly delivered and filed on September 5, 1958, the time for defence would not start to run until the end of the long vacation, namely, September 15, 1958. The defendant would then have 10 days to deliver his defence, that is, he would have until September 25, 1958. He did not deliver it within that time and the plaintiffs were therefore entitled to bring judgment as they did on September 29, 1958.

So the whole question is whether the statement of claim was validly delivered and filed on September 5, 1958. There is no doubt that it was a breach of the Rules for it to be delivered in the long vacation: for it is quite well settled in England, either by the terms of Ord. 64, r. 4, or by the practice of the court (see the note in the Annual Practice to Ord. XX, r. 1) that in such a case as this pleadings are not to be delivered or filed, during any part of the long vacation except by direction of the court or a judge. The plaintiffs did not comply with this rule. They delivered the statement of claim in the long vacation and filed it without any direction of the court or a judge.

What is the effect of this non-compliance? The framers of the Rules inserted special provisions to deal with non-compliance. Ord. 50, rr. 1 to 4 of the Rules of the Supreme Court of Sierra Leone is in identical terms with Ord. 70, rr. 1 to 4 of the Rules of the Supreme Court of England. Rule 1 says that: "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall so direct but such proceedings may be set aside either

wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit.”

This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the court without going under the rule: see *Anlaby v. Praetorius* [1888] 20 Q.B.D. 764; 4 T.L.R. 439 C.A.; *Craig v. Kansson* [1943] K.B. 256; [1943] 1 All E.R. 108, C.A.

The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose, for instance, in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that no statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In this case the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiffs signed judgment in default of defence, that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the court whether it should be set aside or not.

Once this stage is reached, it becomes plain that there is no ground for interfering with the decision of the West African Court of Appeal. As they pointed out:

“ The defendant knew when the statement of claim was delivered to him, and he knew it was then vacation. He made no application in the court below to set aside the statement of claim as having been delivered irregularly; he did not raise the point in any way until he appeared in this court to argue the appeal over eight months after the statement of claim had been delivered. Instead of applying to have the statement of

claim set aside, he allowed judgment to go against him by default and then moved to have the judgment set aside. In that application, he proceeded on the basis that the judgment was a regular and subsisting one. In support of the application, he made an affidavit with the object of showing that he had a defence on the merits, and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by counsel, and the application was argued on the merits of the defence."

In the light of the history, it is well within the discretion of the Court of Appeal to refuse to set aside the judgment.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

Solicitors: *T. L. Wilson & Co.; Linklaters & Paines.*

NWUBA MORA AND OTHERS . . . DEFENDANTS/APPELLANTS
AND
H. E. NWALUSI AND OTHERS . . . PLAINTIFFS/RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1962) 1 All N.L.R. 681

1962 June 19

Lords Evershed, Morris of Borth-y-Gest
and Pearce

Courts—Privy Council—Appeal on Facts—Concurrent judgments of two Courts—Privy Council will not review.

Courts—Appeal—Misdirection of Fact—Fact not essential to ultimate finding of Trial Court—Effect.

Evidence—Former proceedings re adjacent lands—Weight of evidence. Real Property—Prescription—English rule—No corresponding Nigerian rule. Customary Law—Title by Conquest—Prescription—Real Property—Title by Conquest—Words and Phrases—Miscarriage of Justice—Violation of some principle of Law or Procedure.

The respondents brought this action in the High Court, Eastern Nigeria, claiming a declaration of Title to a tract of farm land of about 250 acres in extent, situate some distance North of Enugu. There were no buildings or dwellings on the lands, which were used solely for the cultivation of crops. It was agreed that the lands in ancient times belonged to a tribe which had been evicted therefrom in war, and that the victors and their successors had since occupied them, claiming title by right of conquest.

The respondents claimed that, as the present representatives of the victorious tribe, they were in exclusive possession until 1948, when the lands were invaded by the tribe represented by the appellants; while the appellants claimed that they, the appellants, were the true present representatives of the victorious tribe, and that it was the plaintiffs who had usurped the lands by trespass in 1948.

At the Trial oral evidence was adduced by each side in support of their respective versions of the land's early acquisition by conquest, and of its possession since 1948; traditional evidence was called in support of each version; and four plans of the land, two prepared on behalf of each side were admitted in evidence. The appellants, for the purposes of one of their plans, adopted one of the respondents' plans; and the Trial Judge made a personal inspection of the land in the presence of the parties and their counsel. Furthermore, the appellants adduced evidence of a series of law suits

successfully fought by them from 1922 to 1949 with regard to adjoining lands, based on their version of the conquest and succession.

The Trial Judge, for the purposes of his judgment, treated the area in dispute as that shown on the respondents' plan adopted by the appellants. He expressed preference for the story put forward by the respondents' witnesses and his disbelief of the defendants' witnesses, and alluded to the defendants' witnesses' denial of an understanding of certain words in Ibo, *Ogu Amakom*, which were suggested as being well understood as meaning "war of alliance." He also preferred the evidence of the Respondents' witnesses on the matter of possession of the land. He made the Declaration of Title sought by the respondents and awarded damages for Trespass against the appellants. The appellants appealed to the Federal Supreme Court.

Before the Federal Supreme Court the Respondents conceded that there was no justification for the Trial Judge's conclusion on the evidence that the word *amakom* was well known, and that the defendants' had lied by stating the contrary, and that he had therefore misdirected himself as regards that word. The Federal Supreme Court held that the Judge's judgment was not thereby disabled, and further saw no reason to disturb the Judge's findings of fact on the possessory evidence. They dismissed the Appeal. The appellants appealed to the Privy Council.

On Appeal to the Privy Council it was contended, *inter alia*, on behalf of the appellants (1) that the misdirection of the Trial Judge in regard to the word, *amakom*, had such effect upon the Judge's general conclusion as to affect his repudiation of the appellants' witnesses to such an extent that he should not have preferred the respondents' case on the traditional evidence, with resultant effect as regards the possessory evidence; and (2) that both the Trial Judge and the Federal Supreme Court had failed to give due significance to the appellants' consistent successes in the series of lawsuits concerning the adjoining lands, in the light of the provisions of section 45 of the Evidence Act (Cap. 62).

Held: (1) The issues raised in this action and on the appeal to both the Federal Supreme Court and to the Privy Council are essentially issues of fact.

(2) When there are concurrent judgments of two courts on a pure question of fact, the Privy Council will decline to review the evidence for a third time; unless a departure from such practice is justified by proof of some miscarriage of justice or some violation of some principle of law or procedure, or unless the case is of so unusual a character as sensibly to make the general rule inapplicable.

(3) From the Judgment of the Trial Judge it is clear that there was no failure on his part to appreciate that the onus of proof lay on the plaintiffs/respondents.

(4) Since the Trial Judge's decision was not based solely on the traditional evidence, which could not be conclusive apart from the question of possession and exercise of rights of ownership over the land, his misdirection on the word *amakom* did not disable his judgment.

(5) The lawsuits involving the adjacent lands being, as regards the plaintiffs/respondents, *res inter alios actae*, the weight of evidence to be derived therefrom was pre-eminently a matter for the Trial Judge.

(6) In this matter there occurred no miscarriage of justice or violation of principle of law or procedure sufficient to take it out of the general rule to be applied where there have been concurrent judgments in a case involving a question of fact; nor was the case so unusual as, for that reason, to take it out of the general rule.

Obiter: (a) There is in Nigeria no law corresponding to the English rule of prescription.

(b) In Nigeria, proof of possession of land following conquest will suffice to establish ownership.

Judgment of the Federal Supreme Court affirmed.

Appeal dismissed.

Cases referred to:

Scrimati Bibhati Devi v. Kumar Ramendra Naragan Roy [1946] A.C. 508.

Nwabisi v. Idigo and Anor., (Privy Council Appeal, No. 4 of 1958) (unreported).

Ekpo v. Ita, XI N.L.R. 68.

Act referred to.

Evidence Act, Cap. 62, s. 45.

APPEAL from the Federal Supreme Court (Nigeria).

Dingle Foot Q. C. for defendants/appellants.

LORD EVERSHED (delivering the Judgment of the Lords of the Judicial Committee). This appeal is related to the claim of the respondents before the Board, who were the plaintiffs in the action and to whom their Lordships will for convenience refer in this judgment as the plaintiffs, to the ownership of a tract of land in Eastern Nigeria. Their Lordships were informed that the land is situated some distance to the north of Enugu, the Capital of Eastern Nigeria and that its extent is some 250 acres. It appears from the evidence to be farming land, used substantially for the cultivation of yams and cassava but without buildings or habitations upon it.

It was not in dispute between the plaintiffs and the defendants (the appellants before their Lordships) that the tract of land in question was part of a larger area which had in ancient times belonged to and been occupied by the Norgu tribe; that at some date long ago the Norgu tribe had been evicted therefrom in war; and that the land in dispute (hereafter called the Agu Norgu land) had since been occupied by victors in the war claiming it by right of conquest. The issue in the action was—who those victors were. It was the plaintiffs' case that the tribe they represented, the Amawbi tribe, had fought the war against the Norgu as one of an alliance of several tribes and had ever since possessed the Agu Norgu land as their share of the fruits of victory—until (except for a survey in 1941) about the year 1948 when (according to their case) their possession was disturbed by invasion of men of the Awka tribe represented by the defendants.

The answer of the defendants to the claim was, in addition to its denial, that the Norgu people had been conquered by the Awka people alone and that, as a consequence, the Agu Norgu land had ever since been occupied by that tribe—until the year 1948 when (as the defendants said) the plaintiffs disturbed their possession.

There is in Nigeria no law corresponding to the English rule of prescription for conferring a title to land. It is however not in doubt that proof of possession following conquest will suffice to establish ownership. In the present case therefore, as Mr. Dingle Foot pointed out in opening the appeal, the evidence was related to two matters; first, evidence (what he called the traditional evidence) related to the ancient Norgu war, its participants and consequences; second evidence related to the occupation in fact in recent times and during living memory.

One of the difficulties in the case much experienced by their Lordships has been the precise identification of the Agu Norgu Land. There were before their Lordships four plans, two prepared on behalf of each side; but the correlation of the plans in some respects has been impossible. On the other hand all the plans were mutually admitted as regards physical features, measurements, areas and general accuracy. The learned trial judge further made a personal inspection of the land in the presence of the parties and their counsel. In the circumstances and particularly since the defendants for the purposes of one of their plans—as appears upon its face—adopted one of the plaintiff's plans, called GA62/49, their Lordships agree with the Federal Supreme Court that the judge was entitled for the purposes of his judgment to treat the Agu Norgu land as that shown on the last mentioned plan. This, however, is a matter of detail.

Upon the substance of the case the learned trial judge, Hurley J., after hearing twelve witnesses for the plaintiffs and eight for the defendants and after making his inspection and the hearing of counsels' arguments delivered a long and careful judgment on the 28th April, 1954. Upon the

traditional evidence he expressed a preference for the story of the ancient war put forward by the plaintiffs and in so doing alluded to his disbelief of the defendants' witnesses who in course of cross-examination denied an understanding of the words *Ogu Amakom* which were suggested to be well understood in Ibo as meaning "war of alliance." On the evidence of possession he also preferred unhesitatingly the evidence given on the plaintiffs' side. He therefore made the declaration of title sought by the plaintiffs and awarded them a sum of £300 for damages.

The case came before the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton F.C.J., Jibowu and de Lestang F.J.J.) who on the 18th March, 1957, dismissed the appeal. It was conceded before the Federal Supreme Court on the plaintiffs' part that there was no justification for the trial judge's conclusion on the evidence that the word *Amakom* was well known and that the defendants had lied by stating the contrary and that the judge had therefore upon this matter misdirected himself. Nonetheless the Federal Supreme Court held that the trial judge's judgment was not thereby disabled and, more particularly, saw no reason to disturb the judge's findings of fact on the possessory evidence.

Mr. Foot put in the forefront of his forcible argument for the defendants the submission that both the trial judge and the Federal Supreme Court had failed to give effect to the rule, unquestionably applicable to a claim of this character, that the onus of proof rests firmly upon the claimant. He further contended that the misdirection of himself by the trial judge in regard to the word *Amakom* had in truth a much more far reaching effect upon his general conclusion. Putting the matter interrogatively, Mr. Foot asked: if the judge had not disbelieved the defendants' witnesses for the reason which he stated (as he should not have done) is it clear that he would not have preferred the defendants' case on the traditional evidence; and if so, what would have been the effect as regards the possessory evidence? Mr. Foot also laid emphasis, naturally enough, upon the series of law suits successfully fought by the defendants during the period from 1922 to 1949 (their success being in one case affirmed by the Federal Supreme Court) in which the defendants had established their right and title to lands, formerly Norgu territory, in the immediate neighbourhood of—if they did not, as Mr. Foot submitted, in some cases overlap—the Agu Norgu land. If, as Mr. Foot submitted, some of the lands which were the subject of this litigation did overlap the Agu Norgu land, then, as he contended, the plaintiffs should be held to be estopped from asserting their present claim by their conduct in standing passively by while the legal contests were being fought. But even if the claim to estoppel were not made good the trial judge and the Federal Supreme Court had, as Mr. Foot contended, failed to give due significance to the defendants' consistent successes in these actions.

Allied to this submission was Mr. Foot's further contention that in the Court below no attention had been paid to the terms of section 45 of the Nigerian Evidence Ordinance: "acts of possession and enjoyment of land may be evidence of ownership . . . not only of the particular piece of land with reference to which such acts are done but also of other land so situated or connected therewith by locality . . . that what is true as to the one piece of land is likely to be true of the other piece of land." Even therefore if, contrary to his argument, the plaintiffs were not estopped by their passivity in regard to the long succession of law suits above-mentioned, and if those law suits were rightly regarded by the Courts below, *quoad* the plaintiffs, as *res inter alios actae*, still, said Mr. Foot, the unbroken series of success by the defendants in those actions, which were related (at least) to adjacent

lands and had depended on the prevalence of the defendants' traditional evidence, should have been taken into account and should, had they so been, have weighed heavily in the defendants' favour. Finally, upon matters more of detail, Mr. Foot challenged the validity of the trial judge's rejection of certain evidence given on the defendants' side because it had (contrary, as the judge said, to the testimony of the defendants' own plans) suggested the concurrence of the southern boundary of the disputed land with the Uvunu river; and submitted that the plaintiffs' possessory evidence, at best, fell short of establishing the extent of their alleged possession.

The acceptance of these submissions would have required a re-trial *ab initio* of the plaintiffs' claim—a result from which, however lamentable after so great a lapse of time, Mr. Foot did not at all shrink; and in their Lordships' view it would not indeed be right on that ground alone to reject the appellants' arguments, so forcibly urged by Mr. Foot and, at least in their cumulative effect, by no means unimpressive. In their Lordships' view however, the conclusive answer to all these criticisms upon the judgments under appeal lies in this. The issues raised in the action were, essentially, issues of fact and in respect of those issues there are before their Lordships concurrent judgments of the trial judge and the Federal Supreme Court. In such cases the rule which the Board should follow was clearly enunciated in the judgment of Lord Thankerton as recently as 1946 in the case of *Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy*. In his judgment in that case Lord Thankerton reviewed the previous authorities and formulated the conclusions which resulted from those cases and which the Board in cases such as the present should follow in a series of numbered paragraphs (see [1946] A.C. 508 at pp. 521 and 522). From this formulation it is made clear that the Board should decline to review the evidence for a third time when there are concurrent judgments of two courts on a pure question of fact unless a departure from such practice was justified by proof of "some miscarriage of justice or some violation of some principle of law or procedure" or unless the case were of so unusual a character as sensibly to make the general rule inapplicable. Lord Thankerton proceeded to define the phrases "miscarriage of justice" and "violation of some principle of law or procedure" as follows:

" . . . miscarriage of justice means such a departure from the rules which permeate all procedure as to make that which happened not in the proper sense of the word judicial procedure at all . . . the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be correct the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

Can it then be said that the circumstances of this case are so unusual or that there has been here established some miscarriage of justice or violation of some principle of law or procedure going so much to the root of the issues in dispute, as to bring the present case within the exception to the general rule?

The first submission made by Mr. Foot as suggesting an affirmative answer to the question just posed is that founded on his argument as to the onus of proof which he put in the forefront of his argument. Mr. Foot referred to the recent unreported case before the Board of *Nwabisi and Another v. Idigo and Another* (Privy Council Appeal No. 4 of 1958) in

which the judgment of the Board by Lord Jenkins emphasised the proposition, undoubtedly correct, that in a case of a claim to land the onus lies firmly upon the claimant. In the course of his judgment the noble Lord accepted the statement of Webber J. as regards onus of proof in *Ekpo v. Ita*, XI N.L.R. 68 namely: "In a claim for a Decree of Declaration of Title the onus is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact." The noble Lords also cited with approval the language in the case then under appeal of Sir Stafford Foster Sutton F.C.J.:

"the onus of proving that they were entitled to the declaration of title to the land in dispute was upon the plaintiffs. The learned trial judge reached the conclusion that they had not discharged that onus and nothing that was said at the hearing of this appeal has persuaded me that he ought to have held otherwise."

The date of the judgment (28th July, 1959) is later than that of the Federal Supreme Court in the present case and it was Mr. Foot's contention that, had the decision in *Nwabisi v. Idigo* been before the Federal Supreme Court on the hearing of the appeal in the present case, their conclusion might well have been different.

Their Lordships have been unable to accept this argument. It is to be noted that the Board in *Nwabisi v. Idigo* affirmed a judgment of the Nigerian Federal Supreme Court (affirming a judgment of Hurley J.) delivered in February 1957 by Sir Stafford Foster Sutton F.C.J. who was a member in the present case of the Court upon hearing of the appeal from the same trial judge. We cannot think in the circumstances that either Hurley J. or the Federal Supreme Court could have been unmindful of the rule which had so recently been invoked.

Mr. Foot drew attention to a passage (at p. 103 of the record) where Hurley J. is reported as saying "On the evidence as a whole on the question I am not satisfied that Amawbia were not the original owners of Amawbia lands or that Awka were the original owners . . ." But this passage referred to a secondary defence of the defendants related not to the land in dispute but to the land lying to the south thereof and now, unquestionably, occupied by the Amawbi tribe. Upon the main question the learned trial judge after referring to the witnesses whom he had had the advantage of seeing and hearing and to his inspection said: "I find the weight of evidence greatly in favour of the plaintiffs." And again: "The plaintiffs have satisfied me that within living memory at least they have been in possession, disturbed only by the 1941 survey, to the exclusion of Awka until 1948." In the circumstances their Lordships cannot find in the judgment of the trial judge any failure on his part to appreciate where lay the onus of proof.

In the Federal Supreme Court Jibowu F.J. referred in his judgment (with which the other members of the Court concurred) to the passage secondly cited from Hurley J.'s judgment and proceeded: "the finding of fact is, in my view, amply supported by the evidence before him and the finding could not, in my view, have been affected by the misdirection on *Ogu Amakom*."

Their Lordships respectfully accept the language of Jibowu F.J. In their view the judgment under appeal cannot be disabled by attributing to the Court below any failure to appreciate where lay the onus of proof.

As regards the trial judge's misdirection on *Ogu Amakom* their

Lordships find themselves equally in concurrence with the view of the Federal Supreme Court. As observed by Jibowu F.J. the trial judge had expressed a preference for the account of the Norgu war put forward on the plaintiffs' traditional evidence and relied only upon the witnesses' answers about *Ogu Amakom* in support of that view. "One cannot say" observed Jibowu F.J. "that he was wrong as to that," and the learned Federal Justice went on to point out that in any case the trial judge's decision was not based only on the traditional evidence "which could not be conclusive apart from the question of possession and exercise of rights of ownership over the land in dispute" (p. 124 of Record).

Their Lordships come, third, to the arguments based on the previous litigation. In their Lordships' view, agreeing with the judgment in the Court below, the defendants failed to show that any of the land which was the subject of their lawsuits overlapped the Agu Norgu land. In these circumstances Mr. Foot conceded that his argument as to estoppel could not be sustained. As regards the effect of section 45 of the Nigerian Evidence Ordinance the most that can be gained from an invocation of the section is that the title to the lands disputed in those cases which the Awka tribe established could be taken into account, as a matter of relevant evidence, in determining the ownership of the Agu Norgu land. It is no doubt true that the result of those actions involved an acceptance in them of the defendants' account of the ancient war. But, in their Lordships' view, those lawsuits being, as regards the plaintiffs, *res inter alios actae*, the weight of the evidence to be derived therefrom in the present dispute was pre-eminently a matter for the trial judge. Their Lordships upon this question as upon the preceding two questions cannot find any miscarriage of justice or violation of principle of law or procedure sufficient to take the case out of the general rule to be applied where there have been concurrent judgments in a case involving a question of fact. Nor, in their Lordships' view can the case be said to be so unusual as for that reason to take it out of the general rule.

In the circumstances their Lordships can deal briefly with Mr. Foot's more detailed arguments. Upon the point made by him in reference to the defendants' plans it is sufficient to say that, as regards the Agu Norgu land, the river Uvunu in fact, as is conceded, lies substantially to the south of its southern boundary. As regards the evidence of possession it is true that the plaintiffs' witnesses did not precisely state the bounds of the areas respectively. It is difficult to suppose, if the plaintiffs' evidence be accepted upon the face of it, that the intrusion anywhere on the land in dispute of men from other tribes than the Amawbi would not have been evident and quickly noticed. In their Lordships' view, having regard to the size of the area in question, the nature of the farming, so far explained, and the apparent absence upon it of any dwellings or buildings, it cannot be fairly said that, if the trial judge accepted the plaintiffs' evidence (as he did and as their Lordships think he was entitled to do), it nonetheless failed sufficiently to state the extent of the possession and therefore to make good the plaintiffs' claim.

In the circumstances and for the reasons stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

OMAR LABABEDI AND OTHERS (TRADING UNDER THE
NAME AND STYLE OF LABABEDI & COMPANY) . APPELLANTS

AND

CHAIRMAN, LAGOS EXECUTIVE DEVELOPMENT
BOARD RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1962) 1 All N.L.R. 691

1962 July 18

Lords Cohen, Guest and Pearce

- Town Planning—Acquisition of lands—Lagos Central Planning Scheme, 1951—Date of making of Scheme—Date of Approval by Governor—Vesting Date—Date of Commencement of Scheme—Lagos Town Planning Ordinance, Cap. 103 (1948 ed.) s. 16, 18, 20, 22, 23, 42(1)—Making of Scheme not suspended if date of Operation be postponed.*
- Town Planning—Acquisition of Lands—Lagos Central Planning Scheme 1951—Interim between Date of Making and Vesting Date—Right of Freeholder to grant Leases during Interim period.*
- Town Planning—“Injurious Affection of Property”—Lagos Central Planning Scheme 1951—Does not cover Acquisition of Lands or Leaseholds—Compensation for “Injurious Affection”—Procedure not applicable to claim for Acquisition of lands or Leaseholds—Lagos Town Planning Ordinance, Cap. 103, (1948) (Ed.), s. 38(1), 38(4).*
- Town Planning—Acquisition of Lands—Lagos Central Planning Scheme 1951—Compensation for Acquisition of Lands or Leaseholds—Right to Compensation of Lessee under lease granted during Interim between Date of Making of Scheme and Vesting Date—Procedure applicable to such claim—Lagos Town Planning Ordinance, Cap. 103 (1948 Ed.), Part VII, s. 41, 42(4), 46, 51(1).*
- Town Planning—Acquisition of Lands—Lagos Central Planning Scheme 1951—Compensation for Acquisition of Leaseholds—Lease entitled to full compensation for Unexpired Residue of Term of the Lease.*

The respondent is the person nominated by law to institute legal proceedings on behalf of the Lagos Executive Development Board, a statutory corporation established under the Lagos Town Planning Ordinance and empowered by that Ordinance to make Town Planning Schemes in respect of land in Lagos.

The appellants are the lessees of No. 9 Aroloya Street, Lagos, under a Deed of Lease dated 3rd June, 1955, whereby the freeholders of the premises demised the same to the appellants for a term of seventy years from the 15th August, 1955.

In 1951, the respondent framed a Planning Scheme, which received the approval of the Governor-in-Council on 18th January, 1952, and which included within the area to be acquired the property No. 9 Aroloya Street. The Scheme came into operation on the 1st October, 1955; being the date appointed by the Governor-in-Council in the Order of Approval.

Clause 32 of the Scheme provided that all leases and rights of occupancy under any tenancy in respect of any land to be acquired under the Scheme should terminate, under section 41 of the Act, one month after the date of Commencement of the Scheme as approved by the Governor, *i.e.*, on 1st November, 1955.

The appellants lease was executed, and the term of years thereunder began, after the Scheme had been approved by the Governor-in-Council, but before its commencement.

The proceedings on appeal were commenced by the respondent taking out an Originating Summons in the High Court of Lagos for the determination of the question, whether the appellants were entitled to be compensated for the full

value of the term granted under the lease. The High Court ruled in favour of the appellants; holding that they were entitled to full compensation for the unexpired residue of the term of years under the lease.

From this ruling the respondent appealed to the Federal Supreme Court.

The question on the Summons was amended by the Federal Supreme Court by substituting the words, "to receive full compensation for the unexpired portion of the term at the date of the vesting of the property in the Board," for the words, "to be compensated for the full value of the term."

The Federal Supreme Court varied the Judgment of the High Court by ruling that the appellants were not entitled to full compensation, but that the compensation payable was to be determined, "upon a balance of equities."

The appellants appealed to the Privy Council.

The appellants contended, before the Privy Council, that as the Scheme provided for the acquisition of the property by the Board, the land vested, in terms of section 43(1) of the Lagos Town Planning Ordinance, on the 1st October, 1955, the commencement date, free from incumbrances; and the Board were bound, under section 42(4) of the Ordinance, to offer compensation to the appellants as lessees having, on that date, an interest in the land so acquired by the Board; Section 42 of the Ordinance is in Part VII thereof, which is that part which deals with the Acquisition and Disposal of Land for a Scheme.

The respondent submitted that the appellants' rights, if any, arose under section 38(1) of the Ordinance for "injurious affection" of their property by the Scheme. He submitted that the appellants' rights were extinguished when the property vested in the Board under section 42(1) and that their property was accordingly, "injuriously affected" by the making of the Scheme. This submission involved the assumption that section 38(1) of the Ordinance is the only section which gives a right to compensation. However, he contended that the Date of the Making of the Scheme was the date it received the Governor's approval, *i.e.*, the 18th January, 1952, and that since the appellants' lease was not then in existence they were not entitled to any compensation whatsoever.

In this regard, the appellants argued that the Date of the Making of the Scheme was the 1st October, 1955, the date of its commencement, and that, if section 38(1) was the section upon which compensation depended, their Lease was then in operation and they were entitled to compensation.

It is to be noted that under Parts VI and VII of the Lagos Town Planning Ordinance, respectively, two different methods of Procedure for obtaining compensation are provided: Under section 38(1), a claim for "injurious affection" has to be made by the claimant within a limited period; While on the acquisition of land under a Scheme, the Board must, under section 42(4), offer compensation to the owner of the land, or other persons interested, and if any question arises as to the amount to be paid it is to be determined by the High Court upon an Originating Summons in accordance with the procedure set out in sections 44 to 47.

On Appeal:

Held: (1) The vesting date of a Scheme under the Lagos Town Planning Ordinance is the date appointed by the Governor-in-Council for the commencement of the Scheme.

(2) The date of the making of a Scheme under the Lagos Town Planning Ordinance is the date of the Governor's approval of the Scheme.

(3) The making of a Town Planning Scheme, under the Lagos Town Planning Ordinance, is not suspended until it comes into operation; it is none the less made although its operation may be postponed.

(4) A freeholder of lands, included within an area to be acquired for a Town Planning Scheme under the Lagos Town Planning Ordinance, is entitled to grant a lease of the lands at any time until the vesting date.

(5) The term "injurious affection," as used in section 38(1) of the Lagos Town Planning Ordinance does not cover the acquisition of land or leaseholds; and the provisions of the Ordinance as to compensation for "injurious affection of property," and the procedure applicable to such a claim, do not apply to a claim for compensation for the acquisition of land or leaseholds under the Ordinance.

(6) The acquisition of land or leaseholds by the Lagos Executive Development Board under a Town Planning Scheme is provided for in Part VII of the Lagos Town Planning Ordinance; and the provisions of that Part of the Ordinance as to compensation, and the procedure to be followed to determine

the amount of such compensation, are applicable in the event of such an acquisition.

(7) Since, in this matter, the leasehold interest of the appellants was in existence on the vesting date, the Lagos Executive Development Board, upon the vesting of the land in them, free from incumbrances, acquired on that date the appellants' leasehold interest, under section 42(1) of the Lagos Town Planning Ordinance, and compensation became payable to the appellants under section 42(4) in respect of such acquisition.

(8) The compensation payable to a lessee upon the acquisition of lands, under a Town Planning Scheme made under the Lagos Town Planning Ordinance, is full compensation for the unexpired portion of the term at the date of the vesting of the property in the Lagos Executive Development Board.

Appeal allowed.

Acts and Laws referred to:

Lagos Town Planning Ordinance, Cap. 103 (1948 ed.), s. 16, 18, 20, 22, 23, 38(1), 38(4), 41 42(1), 42(4), 46, 51(1). Pt. VI, Pt. VII.

Town Planning Act 1925 (15 Geo. 5, c. 16) s. 10.

Lands Clauses Consolidation Act 1845 (8 and 9 Vict. c. 18).

APPEAL from the Federal Supreme Court (Nigeria).

LORD GUEST (delivering the Judgment of the Lords of the Judicial Committee). This appeal concerns the compensation, if any, payable to the appellants in respect of property at No. 9 Aroloya Street, Lagos, which was the subject of the Lagos Central Planning Scheme 1951. They claim to be so entitled under the Lagos Town Planning Ordinance in virtue of a Deed of Lease dated 3rd June, 1955, whereby the freeholders of No. 9 Aroloya Street granted a lease of the premises to the appellants for seventy years commencing on 15th August, 1955.

The respondents are a statutory corporation established under the provisions of the Lagos Town Planning Ordinance and empowered to make town planning schemes in respect of land in Lagos. The respondents framed the Lagos Central Planning Scheme, 1951. No. 9 Aroloya Street fell within the area of the Scheme and was part of the land to be compulsorily acquired.

The relative provisions of the Ordinance are as follows: section 16 provides that the Governor-in-Council may upon representations being made to him declare an area to be a town planning area. Section 18 provides for the Board upon the declaration of a town planning area causing town planning schemes to be made for the area. The scheme has to be published in the *Gazette* and notice has to be given to every owner of property affected by the scheme; there are provisions for the hearing of objections (section 20).

Section 22 provides that (1) The Governor-in-Council may make an order approving a scheme submitted to him under section 21 or rejecting it or approving it with such conditions and modifications as he thinks fit.

(2) The approval or rejection of any scheme under sub-section (1) shall be notified in the *Gazette*.

(3) Notification of the approval or rejection of any scheme under sub-section (2) shall be conclusive evidence that such scheme was duly framed and approved or rejected, as the case may be.

Section 23 provides that (1) A scheme shall not have effect unless and until it is approved by order of the Governor-in-Council, and before giving his approval the Governor-in-Council may make such modifications thereto as he thinks fit.

(2) A scheme when so approved shall have effect as if enacted herein.

Section 38(1), (3) and (4) provides that (1) Any person whose property is

injuriously affected by the making of a scheme shall, if he makes a claim for the purpose within the time (if any) limited by the scheme, not being less than three months after the date when notification of the approval by the Governor-in-Council of the scheme is published in the Gazette in accordance with the provisions of section 22, be entitled to obtain compensation in respect thereof from the board.

(3) Where, by the making of a scheme, any property is increased in value, the board, if it makes a claim for the purpose within the time (if any) limited by the scheme (not being less than three months after the date when notice of the approval by the Governor-in-Council of the scheme is published in the Gazette in accordance with the provisions of section 22 hereof), shall be entitled to recover from any person whose property is so increased in value a sum equal to one-half of the amount of that increase."

(4) Any question as to whether any property is injuriously affected or increased in value and any question as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation or which the board is entitled to recover and any question as to the apportionment of such a sum amongst the several interests in such property shall in default of agreement be determined by the court as hereinafter mentioned.

Section 41 provides that where an approved scheme provides for the acquisition of any land by the board, all leases and all rights of occupancy under any tenancy in respect of such land which are existing at the time of the notification that the scheme is approved under section 22 shall be deemed to be terminated, if not previously terminated by agreement, on the expiration of the period appointed in the scheme in that behalf, but without prejudice to any lessees' or occupiers' rights in any compensation payable under section 38 or 46.

Sub-section (1) of section 42 provides that (1) where an approved scheme provides for the acquisition of any land by the board, such land shall vest in the board on such day as is appointed in the scheme in that behalf, free from incumbrances, but without prejudice to any lessees' or occupiers' rights in any compensation payable under section 38 or 46.

Sub-section (4) of this section provides that (4) When any land becomes vested in the board under the provisions of this section, the board shall by notice in writing proceed to offer to the owner thereof and to such other persons, if any, as have any interest therein, such compensation therefor as the board thinks fit.

Sub-section (2) of section 44 and section 46 provide for the lodging of objections and for the determination by the Supreme Court of any question as to the amount of compensation payable in respect of acquired land and as to the apportionment of such compensation among the persons having an interest in the land.

Sub-section (1) of section 51 provides for the basis upon which compensation for land compulsorily acquired is to be assessed. Paragraph (a) provides for the compensation being assessed upon an estimate of the fair market value of the interest estimated at the time when the scheme was published under section 20.

The respondent framed the Lagos Central Planning Scheme 1951 which received the approval of the Governor-in-Council on 18th January, 1952. In pursuance of clause 2 of the Order in Council (Approval) the scheme came into operation on 1st October, 1955, being the date appointed by the Governor. Clause 32 of the scheme provides that all leases and rights of occupancy under any tenancy in respect of any land to be acquired under

the scheme should terminate under section 41 of the Ordinance one month after the date of commencement of the scheme as approved by the Governor. The lease to the appellants is dated 3rd June, 1955, that is after the date of the Governor's approval, but before the scheme came into operation.

The proceedings out of which this appeal arises were commenced by the respondent taking out an originating summons in the High Court of Lagos for the determination of the question whether or not the appellants were entitled to be compensated for the full value of the term granted under the lease.

Mr. Justice Coker answered the question in the appellants' favour. When the respondent appealed against this judgment to the Federal Supreme Court, the question was amended to the effect of substituting for the words "to be compensated for the full value of the term" the words "to receive full compensation for the unexpired portion of the term at the date of the vesting of the property in the Board."

The Federal Supreme Court varied the judgment of Mr. Justice Coker by ruling that the appellants were not entitled to full compensation.

The first question is whether the appellants' right to compensation, if any, arises under section 38(1) or under section 42(4) of the Ordinance. This question was not dealt with in the Federal Supreme Court. The appellants contended before the Board that as the scheme provided for the acquisition of No. 9 Aroloya Street by the Board the land vested in terms of section 42(1) of the Ordinance in the Board on the 1st October, 1955, free from incumbrances and that the Board were bound under section 42(4) to offer compensation to the appellants as lessees having an interest in the land which had been acquired by the Board. The respondent on the other hand argued that the appellants' right, if any, arose under section 38(1) for injurious affection. It was submitted that the appellants' rights were extinguished when the land vested in the Board under section 42(1) and that their property was accordingly injuriously affected. This submission by the respondent involved the assumption that section 38(1) is the only section in the Ordinance which gives a right to compensation. This must therefore cover compensation for the acquisition of land, compensation for the extinguishment of leases, and compensation for the injurious affection of land by the making of a scheme. Upon this argument "injurious affection" must be an all embracing expression covering these three different conceptions. "Injurious affection" is a well-known term in English law and is in fact the very word used in the English law and is in fact the very word used in the English Town Planning Act, 1925, section 10, a section which is in very similar terms to section 38(1) of the Ordinance and was probably the origin of section 38(1). In English law the term "injurious affection" does not cover the acquisition of land or leaseholds and is a term which is certainly not apt for such a purpose. Their Lordships would not be inclined to attribute such a meaning to the expression unless the construction of the Ordinance as a whole forced them to this conclusion and that no other interpretation was reasonably possible.

Their Lordships have these observations to make upon the general pattern of the Ordinance. Part VI, in which section 38 is to be found, is headed "Property injuriously affected or increased in value by a scheme." Part VII, which contains section 42, is headed "Acquisition and disposal of land for scheme." This layout indicates that the Ordinance is making separate provisions for the different effects of a scheme. Injurious affection is the antithesis to increase in value both of which are contained in Part VI,

but the acquisition of land is an entirely different conception which falls under Part VII.

Moreover, if section 42(4) gives no independent right to compensation and the only right to compensation derives from section 38(1), as contended for by the respondent, then it is at least strange to find that there are two different methods of procedure for obtaining compensation under Parts VI and VII. Under section 38(1) a claim has to be made for injurious affection within a limited period. Under sub-section (4) of that section any question as to the amount of compensation is determined by the Court. In contrast, in Part VII under section 42(4) an offer of compensation has to be made by the Board to the owner or other persons interested. If any question arises as to the amount of the compensation this is determined by the Court following upon an originating summons and the procedure set out in sections 44 to 47. This consideration of the pattern of the Ordinance indicates that it is probable that the procedure for obtaining compensation under Part VI is for injurious affection and the procedure for obtaining compensation under Part VII is for the acquisition of land. Their Lordships have accordingly reached the conclusion that the compensation payable for injurious affection is separately dealt with under section 38 from the compensation payable for acquisition under section 42(4). It is moreover reasonable to suppose that the Board might be unaware of a claim for injurious affection unless it was made to them; hence the reason for a claim under section 38(1). Whereas if property is acquired compulsorily, the Board would presumably know the persons interested and would therefore be in a position to make an offer of compensation under section 42(4). Their Lordships have accordingly reached the conclusion that the appellants' right to compensation arises under section 42(4) in respect that upon vesting of the land in the Board free from incumbrances their lease was acquired and that the Board were bound to offer to the appellants compensation under section 42(4) as persons other than the owner interested in the land. It follows that the appeal will be allowed and the judgment of Mr. Justice Coker restored.

With regard to the judgment of the Federal Supreme Court their Lordships find themselves in agreement with Acting Federal Justice Hubbard, that until vesting date the freeholder was entitled to grant a lease of the property. This reinforces the view which their Lordships have formed upon the construction of the Ordinance. But they do not agree with the views of the Federal Supreme Court that the question of compensation is to be determined "upon a balance of equities." In their Lordships' view the question depends upon a proper construction of the various provisions of the Ordinance.

If the appellants' right to compensation had depended on section 38(1) of the Ordinance, there was a dispute between the parties as to whether they were so entitled. Under section 38(1) the parties entitled to compensation are those whose property "is injuriously affected by the making of a scheme." The appellants argued as an alternative to their first submission and on the assumption that their right to compensation depended upon section 38 that the date of the making of the scheme was the date when the scheme came into operation on 1st October, 1955, and that as their lease was then in existence they were entitled to compensation. The respondent on the other hand contended that the date of the making of the scheme was the date when the Governor approved the scheme under section 23 and that as the appellants' lease was not then in existence, they were not entitled to compensation. As the Board have held that the appellants' right to

compensation arose under section 42 and not under section 38, the question of the proper interpretation of section 38 is academic. However argument was devoted to this question and it may be of assistance to parties to know the Board's views. Their Lordships will express them quite shortly. They have no hesitation in rejecting the appellants' argument on this question. It is implicit in the wording of section 38 that the date of the making of the scheme is the date of the Governor's approval because the time limit of three months begins to run from the date of the Governor's approval under section 22. Moreover, by section 23 upon the Governor's approval the scheme has effect as if it had been enacted in the Ordinance. Having regard to the provisions in the Ordinance as to the inception and approval of a scheme, their Lordships have little doubt that a scheme is made when the Governor signifies his approval. Although the scheme may not come into operation until a later date, it has effect under section 23 upon the Governor's approval. The making of a scheme is not suspended until it comes into operation; it is none the less made although its operation may be postponed.

Certain decisions of the English Courts were referred to dealing with the effect of notices to treat under the Lands Clauses Act. But in their Lordships' view there is no proper analogy between these provisions and those contained in the Ordinance.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of Mr. Justice Coker restored. The respondent must pay the appellants' costs of the appeal.

Appeal allowed.

YISA DAWODU AND OTHERS . . . DEFENDANTS/APPELLANTS

AND

SUWEBATU DANMOLE AND OTHERS PLAINTIFFS/RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1962) 1 All N.L.R. 702; [1962] 1 W.L.R. 1053

1962 July 25

Lords Evershed, Jenkins and Guest

Courts—Federal Supreme Court—Appeal—Additional Evidence before the Federal Supreme Court—Direction by Court to call new Evidence—Discretion—Original case—Issues before Court on Appeal—Federal Supreme Court Rules, Rule 30.

Practice and Procedure—Appeal—Federal Supreme Court—Additional Evidence. Customary Law—Idi Igi—Ori Ojori—Rules of Succession to estate of intestate—Yoruba native Law and Custom—When applicable.

Customary Law—Applicability—Law not contrary to Natural Justice Equity and Good Conscience—Supreme Court Ordinance, Cap. 211 (1948 ed.), s. 17—Principles of Natural Justice applicable in community where polygamy accepted.

Customary Law—Idi Igi—Not repugnant to Natural Justice, Equity or Good Conscience—Supreme Court Ordinance, Cap. 211 (1948 ed.), s. 17.

Words and Phrases—Idi Igi—Ori Ojori—"Original Case."

Suberu Dawodu, deceased, died in September, 1940, leaving five surviving children and the children of four other children who had died during his

lifetime. He had four wives, all of whom pre-deceased him, and his children were the issue of those wives by each of whom he had one child or more.

The plaintiffs/respondents in this Appeal are two of the deceased's children and the three children of a pre-deceased child; while the defendants/appellants are three of the deceased's children and nine children of pre-deceased children.

The proceedings were brought by the plaintiffs/respondents; and in their Statement of Claim they sought a Declaration that certain rents from property in Lagos, which had belonged to the deceased, be divided among the children, and the issue of the deceased children, into fourths, *per stirpes* of each of the wives of the deceased, in accordance with an alleged will. The defendants/appellants denied the existence of any will, and claimed a division into ninths according to the number of deceased's children; the issue of each pre-deceased child sharing their parent's share among them. This, the defendants/appellants claimed, was the proper and appropriate Native Law and Custom of Lagos in the circumstances and was known as *Ori-Ojori*.

At the trial, the plaintiffs/respondents failed to prove the existence of a will; but adduced evidence of a Yoruba Native Law and Custom of Lagos, known as *Idi-Igi*, whereby the estate of an intestate is distributable according to the number of the mothers of the children of the intestate; and that these rents should, therefore, be divided into fourths, and not into ninths as claimed by the defendants/appellants.

On the other hand, the defendants/appellants brought evidence to the effect that the custom of *Idi-Igi* had been abrogated, and that another Yoruba custom known as *Ori-Ojori*, whereby an estate is distributable according to the number of children of the deceased intestate, had been adopted in Lagos.

The trial Judge found that the division into fourths was in accordance with the Native Law and Custom *Idi-Igi*, which was relevant, and had not been abrogated, as alleged by the defendants/appellants: But, he held that that custom was not applicable, by reason of section 17 of the Supreme Court Ordinance, since it was "Repugnant to natural justice, equity and good conscience" in that it was contrary to the modern idea that the basis of distribution is the number of the children of an intestate. He, thus, made an Order for the division of the rents into ninths.

On Appeal, the Federal Supreme Court, pursuant to Order 30 of its Rules called further evidence of custom. It also found that the relevant custom was *Idi-Igi*, but held that it was not contrary to natural justice, equity and good conscience. They reversed the Judgment of the Trial Court, and made an Order for the division of the rents into fourths.

From this Order the defendants/appellants appealed to the Privy Council.

On Appeal to the Privy Council, the defendants/appellants contended, *inter alia*, that, since it was no part of the plaintiffs'/respondents' case, as set out in the Statement of Claim, that the division should be in fourths under Native Law And Custom, it was outside the scope of Rule 30 for the Federal Supreme Court to direct or permit the calling of further evidence upon such question.

Held: (1) In this matter, the question, what was the appropriate Native Law and Custom to be applied to the facts, was the main issue on the appeal to the Federal Supreme Court.

(2) Under Rule 30 of the Federal Supreme Court Rules, the Federal Supreme Court, on hearing an appeal, is competent to exercise its discretion and direct the calling of new evidence on a main issue on the appeal; even though that issue had not been specifically raised in the pleadings.

(3) The Privy Council will not, in the absence of special circumstances, interfere with the concurrent findings of two Courts on a question of fact.

(4) *Idi-Igi* is the Yoruba Native Law and Custom whereby the estate of an intestate, whose wives have pre-deceased him, is distributed according to the number of the mothers (wives of the intestate) of the children of such intestate.

(5) *Idi-Igi* is an integral part of the Yoruba Native Law and Custom relating to the distribution of intestates' estates; and is in full force and observance, and has not been abrogated.

(6) *Ori-Ojori*, a Yoruba Native Law and Custom, whereby the estate of such an intestate is distributed according to the number of his children, is a discretion of the head of the family for the avoidance of litigation.

(7) The principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted, should not, in a matter of succession and distribution of an intestate's estate, be readily equated with those applicable to a community governed by the rule of monogamy.

(8) *Idi-Igi*, in its application to the distribution of the estate of an intestate, who left children by his four wives, is not contrary to the principles of natural justice, equity and good conscience.

Appeal dismissed.

Act referred to:

Supreme Court Ordinance, Cap. 211 (1948 ed.), s. 17.

Rules and Orders referred to:

Federal Supreme Court Rules, Rule 30.

APPEAL from the Federal Supreme Court (Nigeria).

Bernstein for the appellants.

Le Quesne, Q.C., (with him *Heald*) for the respondents.

LORD EVERSHERD (delivering the Judgment of the Lords of the Judicial Committee). This appeal is concerned with an unhappy family dispute between the children and remoter issue, by his four wives, of Suberu Dawodu, who died in September 1940. The substantial question is whether certain rents arising from property known as 4 Balogun Square, in Lagos, should be divided among Dawodu's children and issue in fourths or in ninths; *i.e.* whether the children and the issue of the deceased children *per stirpes* of each of Dawodu's four wives should respectively receive one fourth of the rents or whether such rents should be divided into nine equal shares the children of a deceased child taking between them the share the child would have taken if living.

In the course of the case the division into fourths was referred to as a division according to a custom known as *Idi Igi* and the division into ninths according to a custom known as *Ori-Ojori*. It may be observed that of the deceased's four wives (all of whom are also dead) one, Morinatu, had one child only, a daughter, the first plaintiff in the action; another, Raliatu, had two children, namely, the second plaintiff, a daughter, and a son now deceased, of whom the remaining three plaintiffs are the children; but the other two wives, Moriamo and Osenatu had each three children, of whom the first three defendants are the three surviving, the remaining nine defendants being children of the other three children now deceased. It follows from the statement of the deceased's family that division into fourths materially favours the plaintiffs but division into ninths materially favours the defendants.

Having regard to the issues raised before their Lordships it is desirable to state briefly the history of the distribution of the rents since Dawodu's death as it appears from the evidence and findings of the trial Judge. Not long after Dawodu's death a meeting took place between members of his family. It was then suggested by some of the children that Dawodu had left a will, but as no will had been or could be found, it was then agreed that letters of administration to the deceased's estate should be taken out by four of the surviving children, namely, Amusa, a son of the deceased's wife Moriamo (who was then the eldest son and head of the family) and the first and second plaintiffs and second defendant; and that the rents in question should be distributed in fourths in the manner above stated, that is, according to *Idi-Igi*. The grant of administration was accordingly obtained and it appears not to be in doubt that for ten years or more the distribution of the rents was made in fourths and generally so accepted. Before the end of that period, however, Amusa received a letter from a member of the family (being the letter recorded at page 56 of the Record) suggesting that division into fourths was wrong and that division into ninths according to the number of the deceased's children should be substituted therefor. As a

result a further meeting or further meetings was or were held at some later time thereafter but before the death of Amusa, which occurred in August, 1953. Although it was suggested in evidence at the trial on the defendants' behalf that agreement had been reached for such substitution, the learned trial Judge (Jibowu J.) found as a fact that there had been no agreement and, as a consequence, following the institution of some other abortive proceedings, the present action was instituted at the beginning of the year 1954. By their Statement of Claim the plaintiffs in the action alleged that Suberu Dawodu had in truth left a will and that he had thereby directed a division of his property into fourths and they asked accordingly for a declaration that the rents in question should be so divided as they had been until the dispute arose. By their defence the defendants denied the existence of any will and claimed a division into ninths as being in accordance with the proper and appropriate native law and custom which would require such division.

An order was made upon interlocutory proceedings in the action that certain evidence should be taken on commission on the plaintiffs side tending to prove the existence and contents of the alleged will. This was done accordingly but such evidence was at the trial rejected by Jibowu J. as inadmissible. In their Lordships' opinion there is no doubt that the learned Judge was right to reject the evidence and indeed it is no longer contended by the plaintiffs (and was not so contended before the Federal Supreme Court) that Suberu Dawodu died otherwise than intestate. At the trial the evidence consisted of that of the first two plaintiffs and the first defendant (which substantially related to the history above mentioned) together with the evidence on the defendants' side of one Moriamo Molade, a sister of the intestate, which was in part directed to the appropriate native law and custom. The learned trial Judge in the course of his judgment found that division into fourths was in accordance with native law and custom:

“ Moriamo Molade, who gave evidence for the defendants, knew about this method of distribution under native law and custom but she considered that the rule is no longer binding as people have become civilised. She, however, could not say when the rule was abrogated.”

The learned Judge then referred to section 17 of the Supreme Court Ordinance which makes native law and custom applicable to such circumstances as have arisen in the present case “ if the native law and custom is not repugnant to natural justice, equity and good conscience ” and proceeded accordingly to consider whether the condition cited in the section was applicable. After referring to certain cases the learned judge concluded native law and custom as found by him (namely *Idi-Igi*) did not satisfy the section:

“ The idea ” he said “ behind the old rule was that each wife who had a child was given no cause for jealousy as it was understood that the number of wives would determine the distribution of the properties of the intestate. Under the rule an only child of a wife got the same share as many children of another wife, with the result that the children did not get equal shares of their father's estate. This does not agree with the modern idea that the basis of distribution is the number of the children of the intestate, which assures equal shares to all the children.”

The learned trial Judge accordingly made an order for division of the rents into ninths. From this judgment the plaintiffs appealed to the Federal

Supreme Court and upon the case first coming before them the learned Judges of the Supreme Court, after hearing argument by counsel, proceeded to invoke the powers contained in Rule 30 of the Rules of the Federal Supreme Court and adjourned the case in order that further evidence on both sides could be called upon the question: What in truth was the Yoruba native law and custom properly applicable? As a result, upon the resumption of the appeal, three witnesses were called on each side whose competence as witnesses upon such question was not challenged. As a consequence, and after hearing argument, the learned Federal Appeal Judges found as a fact that the relevant native law and custom was (as Jibowu J. had also found) for division into fourths, *i.e. Idi-Igi*, subject to the qualification later mentioned; but held, contrary to the view of the learned trial Judge, that such native law and custom was not contrary to natural justice, equity or good conscience. They accordingly reversed the judgment of the trial Judge and made an order for division of the rents into fourths as prayed by the plaintiffs in their original claim. It is from this decision that the defendants have appealed to the Board.

Their Lordships have stated the above narrative as a necessary foundation for a formulation of the questions raised before the Board. Having done so their Lordships can now state those questions and will be able to deal with them without undue length.

The first submission by Mr. Bernstein on the defendants' behalf challenged the validity and propriety of the direction on the part of the Federal Supreme Court for the calling of fresh evidence before them upon the question of the proper native law and custom. Rule 30 of the Rules of the Federal Supreme Court, so far as relevant, is as follows:

“ 30. It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but, for the furtherance of justice, the Court may, where it thinks fit, allow or require new evidence to be adduced; such evidence to be either by oral examination in Court by affidavit or by deposition taken before an examiner or commissioner as the Court may direct. A party may, by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations.”

It was first said on the defendants' side that since it had been no part of the plaintiffs' case, as set out in their Statement of Claim, that the division should be into fourths according to native law and custom it was therefore outside the scope of Rule 30 for the Federal Supreme Court to direct or permit the calling of evidence on the plaintiffs' part upon such question. True it is that the point was not in terms raised by the plaintiffs' Statement of Claim but there can, in their Lordships' judgment, be no doubt from the plaintiffs' Notice of Appeal to the Federal Supreme Court and the record of the argument of counsel before the making of the order under Rule 30, that the question, what in truth was the appropriate native law and custom to be applied, was the main issue between the parties upon the appeal. Moreover, their Lordships are not satisfied that there is in truth any such limitation as was suggested on the powers of the Federal Supreme Court according to the language of the Rule and particularly of its second sentence. In any case it is to be observed that Jibowu, J. had found division into fourths to be in accordance with native law and custom, that is, *Idi-Igi*. Finally, there can in their Lordships' view be no doubt of the justice of the observation in his judgment of Abbott F.J. that the evidence before Jibowu J. on native law

and custom was "scanty." The witness before the trial Judge upon it was the deceased's sister. She appears to have been some eighty years of age but her qualifications as a witness upon such a subject do not appear, and, as the learned trial Judge observed, she could not say when the old customs, *Idi-Igi*, was as she alleged, "swept away."

In the circumstances their Lordships entertain no doubt that it was competent for the Federal Supreme Court to direct the calling of the evidence which they did and that, by so directing, the Court properly exercised its discretion. Mr. Bernstein suggested that a more proper course would have been to remit the case to the trial Judge: but it does not appear that such a suggestion was ever made to the Federal Supreme Court nor can their Lordships find in the Rule any ground for it.

If, then, the fresh evidence was properly directed and heard it is no less clear in their Lordships' opinion that the Judges of the Federal Supreme Court, who saw and heard the witnesses, were entitled to find as they did upon the evidence and that there can be no ground on which the Board could interfere with that finding. The relevant finding was as follows:

"Having very carefully considered all the evidence now before us, I would hold (i) that *Idi-Igi* is an integral part of the Yoruba native law and custom relating to the distribution of intestates' estates; (ii) that *Idi-Igi* is in full force and observance at the present time, and has not been abrogated; (iii) that *Idi-Igi* is the universal method of distribution except where there is a dispute among the descendants of the intestate as to the proportions into which the estate should be divided; (iv) that where there is such a dispute, the head of the family is empowered to, and should, decide whether *Ori-Ojori* ought, in that particular case, to be adopted instead of *Idi-Igi*; (v) that any such decision prevails; (vi) that *Ori-Ojori* is a relatively modern method of distribution adopted as an expedient to avoid litigation."

As their Lordships have already observed, in so far as the Federal Supreme Court found that *Idi-Igi* was and is the relevant native law and custom, their finding was concurrent upon the question with that of Jibowu J. Upon well-recognised principles, the Board would not (in the absence of some special circumstances of which none are present here) interfere with such a concurrent finding. It is, however, to be observed that the Federal Supreme Court's finding in favour of the *Idi-Igi* custom is subject to a qualification, namely, that where dispute arises the head of the family may, in the interests of avoiding litigation, decide that a division into ninths, that is according to *Ori-Ojori*, should be adopted in lieu of *Idi-Igi* and that, should the head family so decide, the decision prevails. It follows that in the present case it would have been competent for Amusa, as head of the family, when the present dispute arose to decide authoritatively in favour of division according to *Ori-Ojori* (which he himself apparently favoured). So it was suggested by Mr. Bernstein that upon the evidence the Board should hold that Amusa had so decided. In their Lordships' opinion there is no possible basis for such a conclusion. There was no evidence of such a decision before Jibowu J. and no finding of the learned Judge to that effect. Their Lordships repeat, in reference to a further submission on Mr. Bernstein's part, that there is equally no basis for a finding that all the children of the deceased mutually agreed to adopt an *Ori-Ojori* division. Though one of the defendants' witnesses did so suggest that evidence was rejected by the trial Judge who held as a fact that no such agreement had been reached.

There remains only the final point whether the Board should hold, contrary to the view of the Federal Supreme Court but as Jibowu J. had decided, that division according to *Idi-Igi* should be rejected as repugnant to natural justice, equity and good conscience. Upon this matter Mr. Le Quesne did not invite their Lordships to base their conclusion upon the point which appears to have appealed to Abbott F.J. viz., that the experience of the first ten years after the deceased's death made a departure from *Idi-Igi* inequitable in the present case. On the other hand their Lordships are not satisfied that as a matter of general principle they would be justified in differing from the Federal Supreme Court's conclusion. Their Lordships were referred to the cases mentioned in the judgment of the trial Judge but it does not appear that the point with which their Lordships are concerned arose in any of them. It has also to be borne in mind, in considering this question, that the only evidence upon native law and custom which was before the learned trial Judge was to the effect that the *Idi-Igi* system had at some unspecified date been "swept away" as outmoded; whereas according to the finding of the Federal Supreme Court *Idi-Igi* still remains in full force and effect. In their Lordships' opinion the principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy. Their Lordships are not therefore satisfied that *Idi-Igi*, proved and found to be still in full force and effect in Lagos, ought not fairly and equitably to be applied to the estate of one who left children by his four wives.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Messrs. A. L. Bryden & Williams.*

Solicitors for the respondents: *Messrs. T. L. Wilson & Co.*

CYRIL BUNTING ROGERS-WRIGHT APPELLANT

AND

ABDUL BAI KAMARA RESPONDENT

[ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL]

1962 Dec. 17

Lords Morton of Henryton, Keith of Avonholm
and Pearce

Legal Practitioner—Professional misconduct. Practice and procedure—Chancery practice. Evidence—Mechanical (tape recorded) evidence: new evidence.

1. A procedure designed for a chancery motion was ill fitting and cumbersome when applied to an inquiry under the Legal Practitioners (Disciplinary Committee) Ordinance, but the fact remains that the applicant's motion was well founded according to the law of Sierra Leone and that the respondent's Counsel at no stage made any application for the matter to be taken out of the ambit of Order 39.

2. (On the ground that admissible evidence—tape recorded conversation was rejected.) Assuming that the question related to a previous statement by the witness inconsistent with his present testimony and relative to the subject-matter of the case, the stage had not been reached at which rebutting evidence could be called. It would be confusing and undesirable for evidence in rebuttal to be interposed during the cross-examination of a witness. Were such a practice allowed it might be used *in terrorem* to intimidate a nervous and honest witness. Nor is it any hardship to the side which has evidence in rebuttal to be able to interpose it during cross-examination, since, if true, its effect has greater force when the witness has persisted in denying it throughout cross-examination. The witness is entitled to have the alleged statement put to him in detail. If he denies it, then, at the proper time, the rebutting evidence may be called to prove the statement.

3. *New evidence*: The words *new evidence* include evidence tendered and refused in the lower Court.

LORD PEARCE. The appellant is a barrister who carried on a legal practice in Sierra Leone. The Supreme Court of Sierra Leone by a judgment dated the 19th February, 1959, ordered that the appellant's name be struck off the Roll of Court. The West African Court of Appeal dismissed an appeal by him. From that dismissal he appeals to their Lordships' Board.

The order of the Supreme Court of Sierra Leone was made pursuant to powers conferred on it by section 26 of the Legal Practitioners (Disciplinary Committee) Ordinance (Cap. 118).

The main purport of that Ordinance was to establish a disciplinary committee to inquire into allegations of professional misconduct. Procedure is there laid down by which complaint may be made to the disciplinary committee who may hear witnesses on oath and must make a report to the Supreme Court if a *prima facie* case of misconduct is made out. The Court then considers the report and after hearing submissions may admonish or suspend a practitioner or strike his name off the Roll of the Court.

Section 26 however gives the Court power to deal with complaints without any previous inquiry by the Committee. It reads as follows:

“ 26 (1) Notwithstanding that no enquiry may have been made by the Committee the Supreme Court shall have power for reasonable cause to admonish any legal practitioner or to suspend him from practising within the jurisdiction of the Supreme Court during any specified period or may order the Master to strike his name off the Roll of Court.

(2) Any application to the Supreme Court to exercise the powers under sub-section (1) shall be made by motion in accordance with the Rules of Court.”

Order 39 rule 4 of the Supreme Court Rules provides:

“ Every notice of motion to set aside remit or enforce an award or for attachment or to strike off the rolls shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.”

The respondent (hereafter referred to as “ the applicant ”) served notice of motion on the 9th June, 1958, supported by 13 affidavits. The grounds were set out in the following terms:

“ 1. The respondent (the present appellant) was engaged and paid to act, and did act, as the legal representative of the complainants

(including the applicant) against Paramount Chief Bai Sama, Santigie Koroma and Santigie Kamara at and for the purpose of an Inquiry held by Sir Harold Willan a Commissioner . . . to inquire into the conduct of the said Paramount Chief Bai Sama and the said Santigie Koroma and the said Santigie Kamara which inquiry was held at Mapeterr in the Loko Massama Chiefdom from the 9th to the 22nd November, 1956. Between the 3rd and the 9th November, 1956, the respondent solicited and obtained from the said Paramount Chief Bai Sama a sum of money to wit £750 for the purpose of influencing his own (*i.e.* the respondent's) conduct as the legal representative of the said complainants at the said Inquiry in a manner favourable to the said Paramount Chief Bai Sama and the said Santigie Koroma and the said Santigie Kamara.

2. The respondent failed to give receipt for any of the money received as aforesaid from the said complainants and the said Paramount Chief Bai Sama."

The second charge related to a breach of professional rules and was of little importance compared to the first.

The substance of the applicant's case was as follows. The applicant and his fellow complainants were antagonistic to Chief Bai Sama. They were known as " strikers " because in token of their grievances they refused to pay their taxes. They engaged the appellant (hereinafter referred to as such throughout although in the Court of First Instance he was the respondent) and paid him £400 to represent them and to endeavour to establish various allegations of misconduct against Chief Bai Sama at the forthcoming Government inquiry into his conduct.

Some days before the inquiry opened the appellant sent for the Chief Bai Sama who came to him at Port Loko with a retinue of six persons. The appellant told him that he would lose his Crown if he did not pay the appellant £1,000. A further meeting was arranged. On the 8th November, the eve of the inquiry, the Chief with his retinue went to the appellant at Bakolo and tendered £500. The appellant was not content with this sum and a further £250 had to be fetched to satisfy his demands. On receipt of £750 he promised to help the Chief.

The Chief in reliance on this arrangement dispensed with his own legal representative and when the inquiry opened on the following day he was surprised to find that the appellant was representing the strikers. As a result he had to ask for an adjournment in order to re-engage his own lawyer. Although one small complaint was proved against the Chief nothing subversive of good government was found against him and he did not lose his Crown. The applicant's notice of motion was not launched until June 1958. His explanation of the delay was that he did not know the full facts until February 1958.

If a bribe was thus received by the appellant from the Chief, the order of the Supreme Court was clearly right.

The appellant's case was a complete denial. He had, he said, no interview with the Chief and never received any money from him. He was not at Port Loko when the first meeting was alleged since he had by then gone back to Freetown where he lived. Nor did he leave Freetown again until the morning of the inquiry. It followed that he could not have had either the first meeting with the Chief alleged to have taken place at Port Loko or the second meeting alleged to have taken place at Bakolo on the eve of the inquiry. In support of the latter alibi he called a magistrate's clerk who

proved that he was in the Police Magistrate's Court at Freetown at 4 on the eve of the inquiry. Since it would take three hours to get by road to Bakolo, this clearly disproved the applicant's evidence that the appellant was in Bakolo at 3.30 p.m. on that day; but it did not disprove the possibility of the appellant having the alleged interview with the Chief later that evening. The appellant contended that the whole case was a plot by the applicant to ruin him. The applicant and he were both concerned in politics and until 1958 they were members of the same political party. Early in 1958 however the applicant changed his political allegiance. From that date the applicant was a political opponent of the appellant and there were also said to have been incidents between them which led to bad feeling. Hence, it was contended, sprang the motives which led to the preferment of a concocted charge in 1958 relating to affairs about which the applicant must (if it were true) have known in 1956.

This defence, however, had not yet been put forward when the motion came before the Court on 13th November, 1958. No affidavits had been filed by the appellant in answer to the full affidavits filed five months before in support of the motion.

The appellant's counsel took objection to the Court hearing the motion without a preliminary inquiry by the disciplinary committee, in the absence of compelling reasons for taking such a course; he contended that reasonable cause must be shown to justify the procedure under section 26. The Court (the Chief Justice of Sierra Leone and Wiseman C.J. of Gambia) held that reasonable cause need not be shown for taking the procedure laid down by section 26 as opposed to the normal inquiry before the disciplinary committee. The words "for reasonable cause" in their view related to the words which followed, viz. "to admonish" and did not relate to the word "enquiry." They ruled that the motion should proceed. That ruling was attacked in the West African Court of Appeal and again before their Lordships' Board. It was argued by analogy with English procedure in respect of solicitors' misconduct that the Court ought not to inquire (save in exceptional cases) without a preliminary inquiry by the Committee. But section 26 imposes no fetter on the Court, and in their Lordships' view the Court were entitled to rule as they did.

After the preliminary objection had been overruled Counsel for the applicant sought to deliver five further affidavits correcting or amplifying matters previously deposed to in the thirteen affidavits filed in June. Counsel for the appellant contested this on the ground that the fresh affidavits were out of time and that any corrections could be made when the deponents were in the witness box. The Court allowed the appellant's objection to the five new affidavits. The appellant did not file or make any application to file evidence and the case proceeded on the 14th November. As each affidavit filed by the applicant was read the deponent was cross-examined by the appellant's counsel.

On the 7th day of the hearing (20th November) when seven of the applicant's witnesses had already been cross-examined, the appellant served fourteen affidavits, thus presenting his case for the first time. The admissibility of these affidavits was considered on 24th November and on 25th November the Court ruled on them. On that date three further affidavits on behalf of the appellant were served on the applicant. The applicant's counsel rightly contended that the affidavits were out of time but that they could be filed by leave as a matter of indulgence subject to terms. He relied on the cogent observations of Wigram V.C. in *East Lancashire Railway Company v. Hattersley*, 8 Hare 72 at p. 85.

By now it had become quite clear that the whole issue was a direct conflict on a question of fact with a number of witnesses on either side. The Court pointed out that had the appellant put forward his affidavits at the proper time, namely before the motion came on for hearing

“ it would have become apparent that the Court was faced with conflicting evidence and could not arrive at the truth without hearing oral evidence and would have wished to hear the witnesses for both sides, in other words the case could not be decided on affidavit evidence and is the sort of case that should have been transferred to the witness list . . . we feel that we ought somehow to assimilate the position now to what it would have been then. It is too late now to say that the hearing shall be on oral evidence pure and simple; for one thing we do not wish to have the witnesses recalled for a full examination as if they had not given evidence, for another the respondent ” (the present appellant) “ is anxious to have his affidavits in and counsel for the applicant does not oppose that request subject to some requests of his own. One of them is that the affidavits of the respondent shall be limited to those already delivered. Nothing has been said to the contrary. The request is granted.

Another is that he shall be at liberty to put in affidavits in reply. This is strenuously opposed . . . We do not think that that rule (Order 39 rule 4) precludes an applicant from putting in affidavits in reply not, we would say, merely to confirm the affidavits put in initially but to meet statements of fact in the affidavits of the other side which are not already dealt with in the initial affidavits.

We think in the circumstances that the right course would be to say to the applicant that he may call any witnesses he wishes strictly in reply and shall deliver to the respondent affidavits in reply to help the respondent in his cross-examination.”

The applicant then delivered nine affidavits in reply. There was much argument on whether those affidavits were properly in reply and the Court ruled on them.

It is difficult for the appellant to criticise with success the procedure which was followed as a result of his own failure to put forward his case at the proper time. The appellant was a practitioner of experience and experienced practitioners appeared for him. They must have been perfectly well aware that the proper method of procedure was for affidavits in answer to be filed before the motion came on for hearing; and, if in spite of the five months which had elapsed since the applicant's affidavits were filed, the appellant wished to file evidence which he had not yet prepared, to ask for an adjournment for that purpose. Their Lordships have no doubt that the Court would, with suitable rebuke, have allowed such an adjournment. The appellant preferred, probably for tactical reasons, to probe the strength of the applicant's witnesses before finally committing himself by filing his evidence—indeed part of his evidence when filed dealt with the evidence given by the witnesses during the first few days of the hearing. Much of the difficulty of the case resulted from that tactical move. Moreover the appellant never asked that the motion should be turned into a witness action. Their Lordships' Board agree with the view expressed by the West African Court of Appeal

“ that a procedure designed for a chancery motion was ill fitting and cumbersome when applied to an enquiry under the Legal Practitioners

(Disciplinary Committee) Ordinance, but the fact remains that the applicant's motion was well founded according to the Law of Sierra Leone and that the respondent's counsel, and he had many helpers, at no stage made any application for the matter to be taken out of the ambit of Order 39 once the preliminary objection to the jurisdiction had been overruled."

When the hearing was ultimately concluded the Court having seen and heard the witnesses gave a very full and careful judgment dealing with the whole of the evidence. They unhesitatingly believed the Chief and various witnesses supporting the applicant's case and they disbelieved the appellant and certain of his witnesses. Those findings cannot be successfully assailed before their Lordships' Board unless there be some misdirection or some wrongful exclusion of evidence that vitiates them and demands a new trial.

The appellant relies on the following matters.

It is contended that the Supreme Court misdirected itself in refusing to treat the evidence of the Chief and his retinue as that of accomplices in a quasi criminal transaction and that this misdirection vitiated their findings. Sir Barclay Nihill Ag. P. in giving the judgment of the West African Court of Appeal said " In this aspect of the case the learned Judges anchored themselves to the House of Lords' decision in *Davies v. D.P.P.* [1954] 1 All E.R. 507 and in fact came to the conclusion that it would be wrong to label any of these witnesses as accomplices. We think that the reasons given for this conclusion are sensible and sound. No one in Bai Sama's party had any criminal intent. They thought and were induced to think by the respondent " (the present appellant) " that if they secured the services of the eminent Mr. Wright in some way or other he would see them through their trouble. To press that there is an analogy between this and participation as principals or accessories in an actual crime is in our opinion not possible." Their Lordships agree with those observations.

It is further contended on behalf of the appellant that although in general the Supreme Court correctly directed itself as to the high degree of proof which the applicant must establish in this case, yet it misdirected itself when dealing with the alibi set up by the appellant in respect of the interview on the day before the inquiry. It is argued that the Court used words which wrongly put on the appellant the onus of showing that it was not possible for him to have been present at the alleged interview with the Chief and his retinue. Their Lordships view, which concurs with that of the West African Court of Appeal, is that the words properly read in their context give no grounds for such criticism. The Supreme Court were in effect pointing out that a true alibi consisted in proof that it was impossible for a person to be present at the same time in two places far removed, whereas in the present case the proof that the appellant was in Freetown at 4 p.m. did not conflict with the possibility of his presence in Bakolo (which could be reached in three hours by motor car from Freetown) at the interview with the Chief that evening. The Court went on to add, " There is no evidence that he slept the night of the 8th in Freetown and it appears to us a serious lacuna in the set up of an alibi." The comment is fair and it shows no error with regard to the onus of proof.

The more substantial arguments before their Lordships' Board deal with the exclusion of evidence.

It is said that as a result of the procedure adopted and of the Court's rulings as to evidence made on the 25th November and the 5th December, highly material evidence was wrongly excluded. One term of the ruling of

the 25th November was that the affidavits of the appellant should be limited to those already delivered. The appellant raised no objection at the time to that term. There was nothing in that ruling which prevented a further application to the Court if some unforeseen event should render it fair that some fresh evidence should be admitted. In fact a further application was made on the 4th December to put in a further affidavit by Bangura, a watchman, for the purpose of controverting the evidence of Seidu Seisay, the independent witness to the first interview with the Chief when the appellant asked for £1,000 subsequently reduced to £750. The Court on the 5th December allowed this. In the Court of Appeal an application was made to introduce three further affidavits with the object of controverting the evidence of Seidu Seisay and complaint was made that these three affidavits were excluded by the general ruling given on 25th November. But these three affidavits were never mentioned in the application made on 5th December. Had the appellant then asked for them to be admitted, there is no reason to think that the Court would not have allowed them to be introduced in the same way as it allowed the affidavit of Bangura for the same purpose.

The general ruling of the 25th November, followed by a particular ruling on 5th December, excluded a subsequent affidavit of Mr. Nelson Williams the Secretary General of the official Opposition Party, the political party of which the applicant was formerly a member and which he left early in 1958. He deposed to political quarrels and a threat by the applicant to ruin the appellant. Much of it is hearsay. It also exhibited a tape-recording to which reference will be made later. Those rulings also excluded an affidavit of the appellant, but this had no value beyond exhibiting a letter from a Chief Alikali Modu who gave evidence for the applicant. This letter was supposed to indicate the existence of a plot. By consent of the applicant's counsel it was admitted as the appellant's exhibit on 10th December.

An affidavit of Newland Kanu was excluded but not because of the general ruling of 25th November. It was sworn on 22nd August, 1958, and if it was regarded as an important part of the appellant's case it is hard to understand why it was not served with the appellant's other evidence on 20th and 25th November. A special application was made with regard to this affidavit on the 15th December. It was conceded that much of it should be struck out as hearsay. Paragraph 8 however remained relating to an interview when the Chief admittedly called on the appellant and (according to the Chief's subsequent account which the appellant denied) asked for a receipt for the £750. Paragraph 8 contains no account of what was said on the matter in dispute but referred to the installation of a tape recording machine before the interview. It did not however exhibit or identify the tape recording. Thus paragraph 8 was not of great value. Kanu disappeared and could not be produced for cross-examination. The appellant's counsel said "In view of Kanu not having been found, to avoid delay, I, like Mr. Millner, leave it to the Court's discretion to say whether his affidavit should be read at all, if any parts are left in." The Court in its discretion rules that since there was no opportunity of testing its veracity by cross-examination of the deponent, the admissible portions should not be read.

Their Lordships are unable to find that any of the above exclusions were unjustifiable or that the Court failed to exercise a proper discretion in ruling upon them.

There remains the more difficult question whether two tape recordings were improperly excluded.

One of the applicant's witnesses Kanoko Kargbo when asked in cross-

examination said that he went to the appellant's office and repeated to him the story which he had heard from the applicant namely that the appellant had received £750 from the Chief. When further asked in cross-examination if he believed the story, he said that he did believe it. He denied that he had said (at the appellant's office) that he "did not believe it because it was impossible for it to happen without the strikers knowing it. I told him that I believed it."

The appellant's counsel then wished to play over to the witness a tape recording of the interview for the witness to identify his voice on it. The applicant's counsel objected to its being played at that stage on the ground that proof must be given of how the recording was made since it might not be a recording of the witness's voice. "At a later stage" said the applicant's counsel "the witness may be recalled after the other side succeeds in putting the document in."

The Court's ruling on 24th November was as follows:

"The mechanical evidence is on a par with Adama or Yoro" (two witnesses who were present at that interview): "if they could not be called to contradict the witness Kanoko it would not be possible to have the mechanical evidence to contradict him; but, as in their case, this point must wait for argument and decision at the appropriate stage. This consideration inclines us to the view that the record should not be played now.

We appreciate Mr. Macaulay's point that he wishes to play the record for the purpose of the witness identifying his voice. But if it were to be played, the witness would be asked: Is it your voice saying this and that and the other? and notes would have to be taken of everything whether admitted or denied by the witness or attributed by him to another person, with the result that what is on the record would go down in the notes of the Court. We must assume that the witness will be truthful and admit his voice, but unless notes are taken of the words he admits to be in his voice, there will be no useful purpose served. It is not possible to limit him to merely saying I can hear my voice here and there. It may not be intended, but the result will be that the Court will be hearing evidence either affirming or contradicting the witness's version of what he said. It would be on a par with interposing Adama or Yoro to give evidence on what the witness Kanoko said; which cannot be done at this stage, if it can be done at all—a point left for decision when the time comes.

Another point which must wait for decision at the appropriate time is whether the recording can be put in evidence as having been faithfully made etc., subject of course to the primary point of whether it is permissible for the respondent to adduce evidence to contradict the witness's version of what he said. There will be no prejudice to the respondent if the record is not played now. If later he succeeds in having it in evidence, Mr. Millner has said that the witness may be recalled.

We are of opinion that the record should not be played now."

Thereafter no specific application was made to put the recording in evidence.

In their Lordships' view the Court were right in ruling that the evidence should not be played at that time.

The question as put to Kanoko related merely to his belief in the truth of the charge and his belief was not a matter on which evidence could be called

in rebuttal since it did not relate to the subject matter of the case. (See for instance *Elton v. Larkins* 5 Car. & P. 390.) The Court however based its ruling on broader grounds, not dependent on the form of the question. Assuming that the question related to a previous statement by the witness inconsistent with his present testimony and relative to the subject matter of the case, the stage had not been reached at which rebutting evidence could be called. It would be confusing and undesirable for evidence in rebuttal to be interposed during the cross-examination of a witness. Were such a practice allowed, it might be used *in terrorem* to intimidate a nervous and honest witness. Nor is it any hardship to the side which has evidence in rebuttal to be unable to interpose it during the cross-examination, since, if true, its effect has greater force when the witness has persisted in denying it throughout cross-examination. The witness is entitled to have the alleged statement put to him in detail. If he denies it, then, at the proper time, the rebutting evidence may be called to prove the statement.

It is plain that the recording, even if it had been put in, would have had no effect on the result. Kanoko was one of the strikers and his affidavit related to the engagement of the appellant by the strikers and their payments of fees to him. Only in cross-examination was he asked about his conversation at the appellant's office. It appears from the excluded affidavit of Nelson Williams which has been read to their Lordships that a tape-recording was made of a conversation of several persons including Kanoko on the occasion in question. The deponent exhibits that recording, states that he made a copy and that from the copy he made a transcript of "the statement of the said Kanoko Kargbo in the said recording as interpreted by the said Adama Bangura." That transcript contains no questions or observations by others but is set out as a soliloquy. It takes the form of a witness's proof. It says *inter alia* "During the enquiry I was mostly at Bakolo. I used to go to Dar-es-Salaam only on very rare occasions. I never saw P.C. Bai Sama or Santigi Koroma or Tigida or any of the P.C.'s (paramount Chief's) people going to Mr. Wright at Bakolo. At that time, we did not want to see any of that kind of people at all. All the time Mr. Wright was at Bakolo, I did not see him go alone to Petifu or any other place at Lokomasama, except when we all used to go to the inquiry and back again. As I know that Mr. Wright had no time to go any other side hence, I say I do not know when their money matter could have passed between him and P.C. Bai Sama." That evidence could add little or nothing to the evidence given by the appellant and his witnesses that he was so surrounded by strikers that the Chief could not have come to him as alleged. Their Lordships are clearly of opinion that it would not have affected the finding of the Court expressed as follows: "It was a lull period between the two enquiries. The general picture painted by respondent's case, that his residence was guarded at night, that he was surrounded by strikers and working late every night, that it was impossible for the Chief and party to come and see him without being observed, is not accurate so far as the relevant nights from the 3rd to the 9th November are concerned."

There is thus no substance in the complaint of the Court's refusal to allow the recording to be played during the cross-examination of Kanoko.

The Court also excluded a tape-recording of a conversation when the Chief went to the appellant's office in February 1958, fifteen months after the important events in the case. There had been no reference to the occasion in the Chief's first affidavit. Nor did the appellant refer to it in his affidavit in answer. The affidavit of Newland Kanu however (which was sworn on 22nd August and served in November and which as above set out

was subsequently disallowed owing to his disappearance and the consequent impossibility of testing it by cross-examination) referred to the deponent having helped to fix up a recording machine prior to a visit of the Chief to the appellant's office in February 1958; but the affidavit did not exhibit the recording. The Chief in an affidavit in reply said "4. I agree that I went in in February 1958 to Mr. Rogers-Wright's office. I was not accompanied by Newland Kanu. I there and then asked him for a receipt for the £750 which I gave him. He made excuses and did not give me any receipt." He adhered to this when cross-examined. No affidavit has ever been produced exhibiting that recording but on 4th December the appellant's counsel asked to be allowed to produce evidence to prove the recording.

On the 5th December the Court ruled on the point as follows: "In regard to Bai Sama's paragraph 4 in his affidavit, having regard to our last preceding Ruling and what is stated in the arguments, we think that the respondent may when he comes as a witness, give the conversation in chief, but should not be allowed to offer any other evidence on that conversation." Later when the appellant gave evidence he denied that there had been any mention of a receipt or of £750 and said that the interview was concerned with various other matters.

The question for their Lordships is whether the Court could properly so rule in its discretion on 5th December. It is contended that so to rule was to exclude improperly evidence of vital importance which might have shown that the Chief was untruthful and the appellant truthful in their respective accounts of that interview, and that this evidence might have turned the scale in the appellant's favour.

The question whether a receipt or the £750 was mentioned in February 1958, was undoubtedly relevant although it occurred many months after the events on which the real issue turned.

On 5th December when the ruling was made the situation stood thus. The appellant was in mercy. He had (deliberately as it would appear) refrained from putting in his evidence at the proper time. When at length he filed it out of time he was put on terms (to which he raised no objection) that he should be confined to the seventeen affidavits delivered by 25th November. He had always been aware of the existence of that conversation of February 1958 since he himself had been present. Yet he himself did not refer to it in his affidavit sworn on the 19 November, 1958; nor did he or Newland Kanu exhibit the tape-recording as either of them might have done.

In spite of this however their Lordships are of opinion that the patience and fairness which the Court consistently displayed would have led them to make a concession to the appellant on this point had they believed that the tape recording would give any valuable guidance to the Court in deciding the real issue in the case.

By 5th December the case had been proceeding for upwards of three weeks. The Court had heard twelve witnesses cross-examined. Seven of these had sworn that they had actually been present at the vital interview in 1956 which the appellant claimed had never taken place. Their Lordships cannot think that the truth or untruth of the Chief's account of a subsidiary interview which took place fifteen months after the event could or should have been a deciding factor. The Chief was an old man, and indeed the appellant's counsel strongly urged his old age as a reason for not trusting to the stability of his memory. If it were shown that he did not mention the £750, it would not disprove his story on the real issue in the case. Even if it seemed that he was deliberately lying about this interview, that would certainly show that he was prepared to embroider his case and it might even

show that he would have been prepared to invent the whole case, but that did not dispose of the other six witnesses. In the event the Court later heard corroboration by an independent witness Seidu Seisai of whose truth they had no doubt. But even viewed on 5th December it was reasonable for the Court to consider that the conversation of one witness in 1958 was of little importance when they had so much evidence of the events in 1956 which were really in issue.

Their Lordships therefore are of opinion that the Court were entitled to rule as they did. They agree with the West African Court of Appeal when it said " Neither can we say that in any of the many orders made during the course of the proceedings did the Judges in the Court below commit any error in law—for the most part it was a matter for their discretion, and from the record it is evident that they did attempt to maintain a fair balance between the parties and were prepared to give indulgence to the respondent where they thought it was essential to his defence."

Finally it was contended that, even if no misdirection of any kind was shown, the West African Court of Appeal erred in not allowing the excluded evidence to be introduced as new evidence in the appeal under Rule 30 of the West African Court of Appeal Order-in-Council 1948 which reads as follows:

" 30. It is not open, as of right to any party to an appeal to adduce new evidence in support of his original case; but for the furtherance of justice the Court may, where it thinks fit, allow or require new evidence to be adduced— . . . A party may, by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations."

The Court of Appeal held that the excluded evidence was not " new evidence " within the ambit of the rule. In their Lordships' view the words " new evidence " do include evidence tendered and refused in the Court below. They think it clear however that had the Court of Appeal considered that the evidence was " new evidence " they would have exercised the discretion which rule 30 gives them and refused to admit it. Their Lordships see no adequate ground for admitting it.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The costs of the appeal will be paid by the appellant.

IBRAHIM MOMORDU ALLIE (ADMINISTRATOR OF THE
ESTATE OF A. A. ALLIE DECD.) APPELLANT

AND

HAJAH FATMATT A KATAH RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL OF SIERRA LEONE AND GAMBIA]

[1963] 1 W.L.R. 202

West Africa—Sierra Leone—Evidence—Deed of family arrangement—Application for approval of court—File relating to application lost—Cause Book, evidentiary value of.
Will—Charge and real property—Part purchase price outstanding—Whether charge on property—“Contrary intention” in will—Real Estate Charges Acts, 1854–1877 (Locke King’s Acts).
Evidence—Documentary—Judgment—Approval of court to family arrangement lost—Cause Book, evidentiary value of—Sierra Leone.

A testator by his will bequeathed to his wife, the respondent, a life interest in five properties with remainder to his son. Clause 30 of the will provided for any mortgage or charge on any of the properties being paid from the rents of all the testator’s properties. The Official Administrator of Estates who had been appointed administrator of the testator’s estate, conveyed the properties to the respondent in fee simple while the son was still a minor. On the death of the son of the age of 29 the appellant, as administrator of his estate, instituted proceedings against the respondent claiming a declaration that the above conveyances should be set aside as having been obtained from the infant son against his interest and by undue influence. The respondent maintained that the conveyances were justified pursuant to a deed of family arrangement entered into between herself, the son and the Official Administrator which, she alleged, had been approved by an order of the court. While a deed in the terms of the deed in question was in fact registered, the file containing the documents relating to the application to the court for approval had been lost, but a Cause Book was produced, containing certain entries relating to the approval of a deed of family arrangement.

One of the five properties, in respect of which there was outstanding part of the purchase price at the date of the testator’s death, had been conveyed to the respondent by the Official Administrator two days before the date of the alleged deed of family arrangement and thus did not come within its terms. The conveyance in respect of that property contained a recital that the Official Administrator had paid the vendor the balance of the purchase price out of the testator’s estate; that the vendor had conveyed the property to the Official Administrator; and that it thus formed part of the residue of the testator’s estate bequeathed to the respondent:

Held, (1) that the *onus* was on the respondent to establish upon a balance of probabilities that the deed of family arrangement received the approval of the court. In the absence of the file the Cause Book could be taken as good evidence of the facts contained therein (*Ex parte Anderson. In re Tollemache* [1885] 14 Q.B.D. 606, C.A.) but it was not by itself evidence of the terms of the deed there purported to be approved. It was apparent from the Cause Book that there must have been two deeds of family arrangement, and what was absent was the identification of the alleged deed with the deed approved by the judge’s order. The connecting link could not be found in recitals of the judge’s order approving the deed in certain conveyance executed by the son after he had attained majority for, in the absence of evidence which was available, the recitals were not evidence of the fact stated therein.

(2) That the unpaid balance of the purchase price of the property conveyed to the respondent before the date of the alleged deed of family arrangement was not paid off by the respondent but by the Official Administrator. Moreover, the provision in clause 30 of the will for the payment of any mortgage or charge from the rents of all the testator’s properties created a special fund which operated as the expression of a “contrary intention” within the meaning of the Real Estate Charges Acts, 1854–1877 (Locke King’s Acts).

In re Fegan (1928) Ch. 45 considered.

Accordingly, with the exception of one of the properties in which third parties had acquired rights on sale by the respondent, the conveyance to the respondent must be set aside.

Judgment of the Court of Appeal for Sierra Leone and Gambia reversed.

The following cases, in addition to those referred to in the judgment were cited in argument:

Doe d. Gilbert v. Rose (1840) 7 M. & W. 102;
Bristow v. Cormican (1878) 3 App. Cas. 641 H.L.;
Carpenter v. Buller (1841) 8 M. & W. 209.

APPEAL (No. 37 of 1961) from a judgment of the Court of Appeal of Sierra Leone and Gambia (April 14, 1961) allowing an appeal from a judgment of the Supreme Court of Sierra Leone (February 23, 1961) in two consolidated actions in which the present appellant as plaintiff sought to set aside six conveyances made to the respondent of properties in Freetown.

The following facts are taken from the judgment of the Judicial Committee: Momordu Allie (the testator), died on January 22, 1948, leaving a will dated August 20, 1946. He was the owner of a great number of properties in Freetown and the principal provisions of the will related to the disposal of those properties. Some of the properties he bequeathed to his wife, Hajah Fatmatta Katah, the respondent, and other properties to his son, Alhadi Antumani. The properties with which this case is concerned were bequeathed by clauses 4 and 13 of the will giving a life interest to his wife with remainder to his son, Antumani, and were as follows: 23 East Street, 2 Kissy Road, 6 Magazine Cut, 46 and 50 East Street, all in Freetown. The property, 48 East Street, Freetown, was bequeathed by clause 25 to his son, Antumani, his heirs and assigns. The testator appointed the respondent and her two sons, Alhadi Baba and Alhadi Antumani his executors. The executors renounced probate and on March 10, 1948, the then Official Administrator of Estates for the colony of Sierra Leone, Ahmed Alhadi, was appointed administrator of the estate of the testator.

By conveyance dated July 15, 1948, Ahmed Alhadi, as Official Administrator conveyed all the above property except 2 Kissy Road to the respondent. The conveyance of 2 Kissy Road by Ahmed to the respondent was dated July 12, 1948. Antumani, the testator's son was born, according to the finding of the trial judge, in 1930, the precise month being unknown. He was thus eighteen years of age at the date of the above conveyance. He died on May 4, 1959, at the age of 29. The appellant was the administrator of his estate. On August 6, 1960, he issued a writ against the respondent claiming a declaration that all the conveyances above referred to should be set aside as having been obtained from the infant Antumani against his interest and by undue influence. In the Supreme Court of Sierra Leone Jones J. set aside the conveyances as null and void. An appeal in the Sierra Leone and Gambia Court of Appeal (Ames P., Benka-Coker C.J. Sierra Leone, and Marke J. Sierra Leone) was allowed and the judgment of the trial judge was set aside.

1962. Nov. 20, 21. *Ralph Milner* and *C. N. Rogers-Wright* for the appellant.

Miss J. R. Bisschop for the respondent.

1963. January 17. The judgment of their Lordships was delivered by LORD GUEST, who stated the facts set out above and continued: Under the testator's will Antumani was entitled upon the death of his mother to the reversion of five of the properties with which this action is concerned and to the absolute interest in the remaining property 48 East Street. By the conveyances to which the infant was not and could not be a party all these properties were conveyed to the respondent in fee simple. Special considerations affect 2 Kissy Road, to which reference will be made later in this judgment. But so far as the remaining five properties are concerned unless there are special circumstances justifying the action of the Official Administrator in flagrantly disregarding the terms of the testator's will, the conveyances could not stand. There are findings of the trial judge which further reinforce this conclusion. His findings are to the effect that Ahamed was for many years on very friendly terms with the respondent and that they

lived together as man and wife. He was further found that Ahmed in his dealings with the trusts affecting Antumani acted *mala fide* and in collusion with the respondent. It is also found as a fact that at the time when the conveyances were executed Antumani was under the influence and dominion of the respondent. Finally, the trial judge found the respondent a most unsatisfactory witness upon whose evidence he could place little reliance.

The respondent, however, has sought to find justification for the conveyances in an alleged deed of family arrangement said to have been approved by an order of the court. This is the crucial issue for determination by the Board. The deed of family arrangement is dated July 14 between the respondent, Antumani "a minor," and Ahmed the Official Administrator. The deed is, however, only executed by the respondent and Ahmed. After a recital, *inter alia*, of the terms of the testator's will, the recitals continue to the effect that the respondent and Antumani were desirous of entering into a family arrangement to provide him with ready cash to secure his advancement in life and to enable repairs to be made to a property which was in a dilapidated condition, and that the respondent had agreed with Antumani to vary the trusts of the will. Under this document it was agreed that the administrator should, presumably in trust for Antumani, obtain possession of certain properties which had been bequeathed to the widow and that the widow should provide £1,500 towards Antumani's advancement in life and £1,000 for the repair of the dilapidated property. On the other hand, the widow was to stand seised of the unencumbered freehold estate of the properties at 23, 46, 48 and 50 East Street and 6 Magazine Cut. These latter properties had been bequeathed by the will with a life interest to the widow and the fee simple to Antumani. Evidence as to the values of the above properties was called before the trial judge who found as a fact that the respondent stood to benefit to the extent of £20,000 whereas Antumani was only to benefit in the sum of £1,470 exclusive of moneys actually paid to him totalling £2,500. It is obvious that even allowing for the fact that what Antumani lost was, except in the case of 48 East Street, only a reversionary interest, the terms of the deed of family arrangement was greatly to his detriment. However, if this deed was approved by the court, this would provide ample justification for the conveyances sought to be set aside.

It is therefore vital for the respondent to establish that this deed of family arrangement was approved by the court. Their Lordships reject without hesitation the initial argument for the respondent that the appellant has to establish that the deed was not approved. The burden of establishing the justification for the conveyances rests fairly and squarely on the respondent and she must establish upon a balance of probabilities that this deed received the approval of the court. The trial judge came to the conclusion that it was not proved that the deed of family arrangement was approved by the judge's order. The Court of Appeal decided that the terms of the deed had been approved.

The deed of family arrangement was produced by a clerk in the Registrar General's office, which office has custody of all deeds registered in Sierra Leone, and there is no doubt that a deed in the terms of Exhibit "H" was so registered. This, however, does not carry the respondent very far. The file containing the documents relating to the application to the court in connection with the deed of family arrangement has been lost and Mr. Young, the acting Master and Registrar of the Supreme Court, produced a Cause Book which has not been transmitted to this country. But the terms

of the Cause Book are set out in the judgment of the trial judge. They are as follows:

“ In the Matter of the Estate of Mormodu Allie deceased.
In the Matter of the Trusts affecting Alhadi Antumani an infant.

<i>Solicitor</i>	<i>No.</i>	<i>Documents</i>	<i>Date</i>
E. A. C. John	1	Affidavit in support	18.6.48
E. A. C. John	2	Summons to approve of Deed of Family Arrangement	18.6.48
E. A. C. John	3	Judge's order approving of Deed of Family Arrangement	21.6.48
C. O. E. Cole	4	Affidavit in support	21.6.48
C. O. E. Cole	5	Summons	29.6.48
C. O. E. Cole	6	Summons	13.7.48
C. O. E. Cole Esq.	7	Affidavit	14.7.48
C. O. E. Cole Esq.	8	Judge's order approving Deed of Family Arrangement	14.7.48.”

On the opposite page, which also dealt with this same matter, is recorded one item namely:

<i>“Solicitor</i>	<i>No.</i>	<i>Documents</i>	<i>Date</i>
C. B. Rogers-Wright, Esq.	1	Affidavit in opposition to application etc.	2.7.48.”

In the absence of the file the Cause Book may be taken to be good evidence of the facts contained therein (*Ex parte Anderson, in re Tollemache* [1885] 14 Q.B.D. 606, C.A.). But it is not by itself evidence of the terms of the deed of family arrangement there purported to be approved. Their Lordships, however, are in entire agreement with the trial judge's criticism of the Cause Book and with his conclusion that it is not established that the deed Exhibit “ H ” was approved by the judge's order. They only desire to add these comments. It is apparent from the sequence of events as inserted in the Cause Book that there must have been two deeds of family arrangement and to one of these opposition was made by Mr. Rogers-Wright presumably on behalf of the infant. Indeed, Miss Bisschop in her persuasive address for the respondent was constrained to admit the existence of two deeds, one of which she says must have been a draft. In this state of the facts it is impossible to arrive at the certain conclusion that the deed of family arrangement which was approved was Exhibit “ H. ” It is equally consistent with another deed of family arrangement not produced having been approved. There is, moreover, no explanation why none of the solicitors whose names appear on the Cause Book was called. They were all alive and available as witnesses. They might have been able, if called, to produce office copies of some of the documents referred to which would have established the connecting link. What is absent in their Lordships' view, is the identification of Exhibit “ H ” with the deed of family arrangement approved by the judges' order of July 14, 1948. The Court of Appeal were able to find this connecting link in certain recitals in deeds executed after Antumani attained majority. In Exhibit “ K ” a conveyance of 17 or 17A, Martin Street, by Antumani to Bole Kamara, dated

September 18, 1954, there is a recital of the judge's order, dated July 14, 1948, approving the deed of family arrangement, and in Exhibit " L " a conveyance of No. 8, Magazine Street, by Percy R. Davies, Official Administrator of Estates to Antumani, dated September 14, 1954, there is a similar recital. So far as Exhibit " K " is concerned there is a finding by the trial judge that at the time when these deeds were executed Antumani was still under the influence and dominion of the respondent. Little reliance can therefore be placed on this recital. This is also a sufficient answer to the respondent's contention that Antumani ratified the deed of family arrangement by this deed and Exhibit " L ." So far as Exhibit " K " and " L " are concerned the Court of Appeal lay stress on the significant fact that these contain a recital of the deed of family arrangement and the Order when these two documents were not prepared by the solicitor who drafted the deed of family arrangement. There are, however, various sources from which the solicitor could have obtained this information, notably from the conveyances challenged. But in any event in the absence of Mr. Davies, who was still alive and available as a witness, the recitals are not evidence of the facts stated therein. Apart from one of the properties, 46 East Street, their Lordships agree with the conclusion of the trial judge. No. 46 East Street has been sold by the respondent and as third parties have acquired rights, this conveyance must stand.

No. 2 Kissy Road stands in a special position. Before his death the testator had contracted to purchase this property, but he had only paid £2,000 out of the purchase price of £3,500. This property was included in the testator's will being bequeathed with a life interest to the respondent and the fee to Antumani. It was conveyed by conveyance, dated July 12, 1948, by Ahmed, the Official Administrator, to the respondent upon a recital that the Official Administrator had paid the vendor the balance of the purchase price out of the testator's estate, that the vendor had conveyed the property to the Official Administrator and that the property thus formed part of the residue of the testator's estate bequeathed to the respondent. This property did not come within the terms of the deed of family arrangement as the conveyance was executed two days before the deed. The trial judge has included this property with the remaining five in his declaration that the conveyances should be set aside. Their Lordships consider that he was right in so doing. The Court of Appeal reached an opposite conclusion. Their view was that the unpaid purchase price became a charge on No. 2 Kissy Road and that unless there was a contrary intention in the will the provision of the Real Estate Charges Acts, 1854-1877 (Locke King's Acts) should apply. The Court of Appeal conclude that as the respondent, who was residuary legatee under the will, paid off the charge, the property was rightly conveyed to her. In their Lordships' opinion the court fell into an error of fact and an error of law. The unpaid purchase price was not paid off by the respondent, but by the Official Administrator according to the recital in the deed. Moreover, there is a clearly expressed contrary intention in clause 30 of the will which provides for any mortgage or charge being paid by the executors from the rents of all the testator's properties. This was a special fund accordingly which operated as the expression of a contrary intention (see *In re Fegan* [1928] Ch. 45). In these circumstances their Lordships consider that the conveyance of No. 2 Kissy Road to the respondent was in breach of trust and must follow the fate of the other conveyances. What the financial effect of this decision will be as between the parties it is not part of the Board's jurisdiction to determine. This will have to be litigated in the local courts.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the order of the Court of Appeal of Sierra Leone and Gambia be set aside and that the order of the Supreme Court of Sierra Leone be restored with exception of paragraph (4) of the order dealing with the property at No. 46, East Street.

The respondent must pay the costs of this appeal and in the Court of Appeal.

Solicitors: *Darley, Cumberland & Co.; Seifert, Sedley & Co.*

SULAY SEISAY APPELLANT

AND

PA SHEKA KANU AND OTHERS RESPONDENTS

[ON APPEAL FROM THE COURT OF APPEAL FOR SIERRA LEONE]

[1963] S.L.L.R. 135

1963 Apr. 1

Lords Evershed, Jenkins
and Guest

Chiefdom—Election—Qualification: male line of succession. Finding of fact of trial Court upheld.

LORD JENKINS. This is an appeal from a judgment of the Court of Appeal for Sierra Leone dated the 21st July, 1961, allowing by a majority of two to one the appeal of the plaintiffs—respondents against a judgment of the Supreme Court of Sierra Leone dated the 21st July, 1960, which dismissed their claim for a declaration that the election of the defendant—appellant as Paramount Chief of the Bonkolenken Chiefdom was invalid, he not being descended from a ruling house within the said Chiefdom and for an injunction restraining him from acting as such Paramount Chief. The defendant—appellant is hereinafter referred to as the defendant and the plaintiffs—respondents are hereinafter referred to as the plaintiffs.

Under section 5 of the Protectorate Ordinance (Chapter 60 of the Laws of Sierra Leone 1960) it is the duty of the Tribal Authority to elect a Chief to be in charge of a chiefdom. In this case it was common ground between the parties that the present Bonkolenken Chiefdom had been formed out of an amalgamation of the former Bonkolenken, Yele, Masakong, Mayopo and Poli Chiefdoms, that the Paramount Chief was required to be a descendant in the male line of or the full brother of a former Chief of one or other of these Chiefdoms, that each of the plaintiffs possessed the required qualification, and that on or about the 6th February, 1959, the Tribal Authority elected the defendant as Paramount Chief of the Bonkolenken Chiefdom. The sole issue in the case was therefore whether the defendant was proved to be qualified as the duly elected Paramount Chief.

The present suit was begun by a Writ of Summons dated the 16th February, 1959. The respective contentions of the parties appear from paragraph 3 of the Amended Statement of Claim and paragraph 3 of the Amended Defence. Paragraph 3 of the Amended Statement of Claim is as follows:

“ 3. The defendant was and is not a descendant in the male line nor the full brother of any Paramount Chief who has previously been

recognised as a Paramount Chief of the Bonkolenken Chiefdom or of one or other of the Bonkolenken Yele, Masakong, Mayopo and Poli Chiefdom which were by an act of Union dated the 15th day of December, 1956, amalgamated to form the present Bonkolenken Chiefdom and therefore does not descend from a ruling house within the Chiefdom."

Paragraph 3 of the Amended Statement of Defence is as follows:

" 3. The defendant admits paragraphs 1 and 4 of the plaintiffs' Statement of Claim and contends as regards paragraph 3 of the Statement of Claim that he is a descendant in the male line of Bai Komp Othernip (deceased) who was recognised as Paramount Chief of the Bonkolenken Yele Chiefdom, which was by an act of Union dated the 15th day of December, 1956, amalgamated as set out in the said paragraph 3 of the Statement of Claim with the other Chiefdoms as set out therein, and therefore does descend from a ruling house within the Chiefdom."

The case was heard on the 14th and 15th July, 1960, and judgment was delivered on the 21st of the same month.

The learned Judge clearly considered the matter with great care and in great detail and at the end of his judgment he expressed his conclusions thus:

" I have approached this case in the expectation that every witness called would tend to be prejudiced in favour of the side calling him and I have come to the conclusion that the defendant and Alhaji " (one of the defendant's principal witnesses) " are truthful witnesses. They gave their evidence in a manner which seemed to display that they had nothing to conceal. The plaintiffs' witnesses on the other hand appeared to be evasive. I am left in no doubt that the defendant is descended from the house of Othernip. The fact that he has spent much of his life away . . . may have disposed persons to regard him as something of an alien but this action is nothing but a plot to establish false grounds for his removal.

I therefore refuse to grant to the plaintiffs the relief which they claim and I shall enter judgment for the defendant with costs."

From this judgment (albeit dealing with matters eminently within the province of the trial judge) the plaintiffs appealed to the Court of Appeal for Sierra Leone. They raised in the first instance five grounds of appeal of which in the end one only became effective. That ground was stated in these terms:

" II. That the learned trial judge wrongly admitted in evidence the evidence of the second defence witness Alhaji Souri in so far as it purported to prove that the defendant was the direct grandson of Bai Komp Othernip."

On this part of the case their Lordships prefer the views contained in the dissenting judgment of Ames P.Ag.J. to those adopted in the judgments of the majority of the Court (Marke J. and Luke J.), which give (as it seems to their Lordships) an unduly restrictive effect to the *Berkeley Peerage Case* [1811] 4 Campbell 402, on which they are based—see also *Monkton v. A.G.*, 2 R. & M. 147 at p. 156 which was held open to criticism on similar grounds.

It is, however, to be observed that the plaintiffs (now respondents) have not thought fit to appear or to be represented in the present appeal, and although Mr. Dean presented the respondents' side of the argument as fairly as possible their Lordships cannot regard this *ex parte* hearing as an appropriate occasion for saying more than is strictly necessary for the purpose of disposing of the actual case now in hand. As to that, it seems to their Lordships to be plain on the facts that there was amply sufficient evidence (including, be it observed, the oral evidence of the defendant and other witnesses who were alive and present at the trial) to make good the appellant's case, whether the *Berkeley Peerage Case* is or is not applicable to native titles.

For these reasons their Lordships are of opinion that this appeal should be allowed and the judgment of the trial judge should be restored, and would humbly advise Her Majesty accordingly. The respondents must pay the costs of this appeal and of the appeal to the Court of Appeal for Sierra Leone.

ALHAJI D. S. ADEGBENRO APPELLANT

AND

CHIEF S. L. AKINTOLA RESPONDENT

SIR ADESOJI ADEREMI RESPONDENT PRO FORMA

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1963] 3 W.L.R. 63; (1962) 1 All N.L.R. 465;
[1963] A.C. 614; [1963] 3 All E.R. 544.

1963 May 21

Viscount Radcliffe, Lords Jenkins,
Guest, Devlin and
Sir Kenneth Gresson

Nigeria—Legislative Assembly—Governor's power to dismiss Premier—Regional Constitution—Construction—Governor's power of dismissal not limited by majority vote on floor of House that Premier no longer enjoys support—"It appears to him"—Judgment as to support left to Governor's own assessment on any material and from any source—Constitution of Western Nigeria (Nigeria Constitution) Order in Council, 1960 (S. 1. 1960 No. 1652), Sched. IV, s. 33 (10).

Nigeria—Appeal to Privy Council—Federal Supreme Court of Nigeria—Competency—Discretion on question as to interpretation of Regional Constitution "Final" decision of Supreme Court—Applicable as of right—Constitution of the Federation of Nigeria, Sched. II, s. 114 (1) (c).

Parliament Prime Minister—Removal from office—Conventions of British constitution.

Crown—Minister, determination by—Whether subject to review by courts—If "it appears to him"—Right of Governor to dismiss Premier if he no longer commands "the support" of a majority—Evidence of support.

By section 33 of the Constitution of Western Nigeria: "(10) . . . the Ministers of the Government of the Region shall hold office during the Governor's pleasure provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; . . ."

By section 114 of the Constitution of the Federation of Nigeria: “ (1) Subject to the provisions of this Constitution, an appeal shall lie from decisions of the Federal Supreme Court to Her Majesty in Council as of right in the following cases: . . . (c) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution or the Constitution of a Region; . . . ”

The Governor of the Western Region of Nigeria, following upon the receipt of a letter signed by 66 members of the House of Assembly which was composed of 124 members, stating that they no longer supported the Premier, the present respondent, removed him from office and appointed the appellant in his place. There had been no vote adverse to the respondent in the House prior to his removal. Thereafter, in proceedings instituted by the respondent challenging the Governor's right to remove him, the following issues were referred by the High Court of the Western Region to the Federal Supreme Court of Nigeria pursuant to section 108 of the Constitution of the Federation:

“ (1) Can the Governor validly exercise power to remove the Premier from office under section 33, subsection (10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House? (2) Can the Governor validly exercise power to remove the Premier from office under section 33 (10) . . . on the basis of any materials or information extraneous to the proceedings of the House of Assembly? ”

The Federal Supreme Court answered the first question in the negative, thus holding that the respondent had not been validly removed from office, and found it unnecessary to answer the second question. On appeal by the appellant, when a preliminary objection was taken by the respondent to the competency of the appeal:

Held, (1) that the Federal Supreme Court had given a decision on question as to the interpretation of the Regional Constitution, and while the decision might not be “ final ” in the proceedings before the High Court from which the reference came, it was “ final ” so far as the Federal Supreme Court was concerned—it had finally disposed of the matter referred to it. Accordingly an appeal lay as of right to the Board under section 114 of the Federal Constitution.

(2) There was nothing either in the scheme or provisions of the Constitutions of Western Nigeria which legally precluded the Governor from forming his opinion on the basis of anything but votes formally given on the floor of the House. By the use of the words “ it appears to him ” in section 33 (10) the judgment as to the support enjoyed by a Premier was left to the Governor's own assessment and there was no limitation as to the material on which he was to base his judgment or the contracts to which he might resort for the purpose. Accordingly, both the questions referred to the Federal Supreme Court should be answered in the affirmative.

Decision of the Federal Supreme Court of Nigeria reversed.

The following cases, in addition to those referred to in the judgment, were cited in argument:

Tata Iron and Steel Co. v. Chief Revenue Authority, Bombay [1923] L.R. 50 I.A. 212;

Rai Radha Kisben v. Collector of Jaunpore [1900] L.R. 28 I.A. 28;

C. T. Cogstad & Co. v. H. Newsum, Sons & Co. [1921] 2 A.C. 528; 37 T.L.R. 995, H.L.;

Re Arbitration between Holland Steamship Co. and Bristol Steam Navigation Co. [1906] 95 T.L. 769; 23 T.L.R. 59, C.A.;

Bozson v. Altrincham Urban District Council [1903] 1 K.B. 547; *sub nom.*

Boyson v. Altrincham U.D.C., 19 T.L.R. 266, C.A.;

Salaman v. Warner [1891] 1 Q.B. 734; 7 T.L.R. 484, C.A.

APPEAL (No. 5 of 1963) from a decision of the Federal Supreme Court of Nigeria (Ademola F.C.J., Taylor and Bairamian F.J.J., Brett F.J. dissenting).

(July 7, 1962) pursuant to section 108 of the Constitution of the Federation of Nigeria whereby the court held in favour of the present

respondent on an issue referred to it by the High Court of the Western Region sitting at Ibadan.

The following introductory statement is taken from the judgment of the Judicial Committee: This appeal concerned the right of the Governor of the Western Region of Nigeria to remove a Premier from office on the ground that it appeared to him that the Premier no longer commanded support of a majority of the members of the House of Assembly, although there had been no adverse vote in the House.

The proceedings commenced by a writ of summons, dated May 21, 1962, by the first respondent, Chief Akintola, against the second respondent, the Governor of Western Nigeria, in which a declaration was claimed that the Governor had no right to remove the Premier from office in the absence of a prior resolution of the House of Assembly reached on the floor of the House to the effect that the Premier no longer commanded the support of the House. There was a subsidiary claim for injunction which in the events which occurred was spent.

After writ was issued the Governor removed Chief Akintola the Premier from office and appointed the appellant, Alhaji Adegbenro in his place. The appellant was then joined as a defendant.

In removing the Premier from office the Governor acted upon receipt of a letter, dated May 21, 1962, signed by 66 members of the House of Assembly in which it was stated that they no longer supported Chief Akintola. The House of Assembly was composed of 124 members.

When the case came before the Chief Justice of the Western Region it was agreed by counsel for all parties that the following issues be referred to the Federal Supreme Court pursuant to section 108 of the Constitution of the Federation of Nigeria.

“(1) Can the Governor validly exercise power to remove the Premier from office under section 33, subsection (10), of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House.

(2) Can the Governor validly exercise power to remove the Premier from office under section 33 (10) of the Constitution of Western Nigeria on the basis of any materials or information extraneous to the proceedings of the House of Assembly?”

After overruling preliminary objections the Federal Supreme Court by a majority answered the question in the following terms:

“The answer to the first question, therefore, is that the Governor cannot validly exercise power to remove the Premier from office under section 33 subsection (10) of the Constitution of Western Nigeria except in consequence of proceedings on the floor of the House whether in the shape of a vote of no-confidence or of a defeat on a major measure or of a series of defeats on measures of some importance showing that the Premier no longer commands the support of a majority of the members of the House of Assembly.”

The court found it unnecessary to answer the second question. Brett F.J. dissented and would have answered the first question in the affirmative.

The appellant applied for conditional leave to appeal to Her Majesty in Council against the answer given by the Federal Supreme Court, and on July 19, 1962, the Federal Supreme Court, after overruling an objection that the opinion was not a final judgment, granted conditional leave to appeal.

The Constitution of Western Nigeria was contained in the Fourth Schedule to the Nigeria (Constitution) Order in Council, 1960. The following were the relevant provisions of the Constitution.

“ 1. (1) There shall be a Governor of the Region, who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in the Region.

(2) The Premier shall consult the Prime Minister of the Federation before tendering any advice to Her Majesty for the purposes of this section.

32. (1) The executive authority of the Region shall be vested in Her Majesty.

(2) Subject to the provisions of this Constitution, the executive authority of the Region may be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him.

(3) Nothing in this section shall prevent the Legislature of the Region from conferring functions on persons or authorities other than the Governor.

33. (1) There shall be a Premier of the Region, who shall be appointed by the Governor.

(2) Whenever the Governor has occasion to appoint a Premier he shall appoint a member of the House of Assembly who appears to him likely to command the support of the majority of the members of the House.

(3) There shall be, in addition to the office of Premier, such other offices of Minister of the Government of the Region as may be established by the Legislature of the Region or, subject to the provisions of any Regional law by the Governor, acting in accordance with the advice of the Premier.

(4) Appointments to the office of Minister of the Government of the Region other than the office of Premier shall be made by the Governor, acting in accordance with the advice of the Premier.

Provided that at least two Ministers shall be appointed from among the members of the House of Chiefs . . .

(8) The office of the Premier shall become vacant—(a) when, after any dissolution of the Legislative Houses of the Region, the Premier is informed by the Governor that the Governor is about to re-appoint him as Premier or to appoint another person as Premier; or (b) if he ceases to be a member of the House of Assembly otherwise than by reason of a dissolution of the Legislative Houses.

(9) The office of a Minister of the Government of the Region other than the Premier shall become vacant if the office of Premier becomes vacant.

(10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure:

Provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and (b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier.”

the reference of questions as to the interpretation of the constitution of the Region in the following terms:

“ 108. (1) Where any question as to the interpretation of this Constitution or the constitution of a Region arises in any proceedings in any court of law in any part of Nigeria (other than the Federal Supreme Court, the High Court of a territory or a court-martial) and the Court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court having jurisdiction in that part of Nigeria and the High Court shall—(a) if it is of opinion that the question involves a substantial question of law, refer the question to the Federal Supreme Court; or (b) if it is of opinion that the question does not involve a substantial question of law, remit the question to the court that made the reference to be disposed of in accordance with such directions as the High Court may think fit to give.

(2) Where any question as to the interpretation of this Constitution or the constitution of a Region arises in any proceedings in the High Court of a territory and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so request, refer the question to the Federal Supreme Court.

(3) Where any question is referred to the Federal Supreme Court in pursuance of this section, the Federal Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.”

When the appeal, came before the Board, the first respondent took a preliminary objection that the decision of the Federal Supreme Court was not appealable as of right, that the leave purported to be given was not competent and that the Board had no jurisdiction to entertain the appeal. Section 114 of the Constitution of the Federation of Nigeria which governed appeals to Her Majesty in Council was in the following terms:

“ 114. (1) Subject to the provisions of the Constitution, an appeal shall lie from decisions of the Federal Supreme Court to Her Majesty in Council as of right in the following cases:

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of five hundred pounds or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of five hundred pounds or upwards, final decisions in any civil proceedings; (b) final decisions in proceedings for dissolution or nullity of marriage; (c) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution or the constitution of a Region; and (d) such other cases as may be prescribed by Parliament.”

1963. April 23, 24, 25 and 29. *Dingle Foot Q.C.* and *T.O. Kellock* for the appellants.

John Foster Q.C. and *S. N. Bernstein* for the respondent.

T. O. Elias Q.C., *A.-G. of the Federation of Nigeria*, *S. D. Adebisi*, *S.-G. of the Federation of Nigeria*, and *Mervyn Heald* for the intervener, the Attorney-General of the Federation of Nigeria.

The pro-forma respondent, who was the Governor of Western Nigeria

when the respondent was dismissed, did not appear and was not represented.

May 27. The judgment of their Lordships was delivered by VISCOUNT RADCLIFFE, who stated the facts set out above and continued: The answer to the preliminary points depends upon a proper construction of section 114 of the Federal Constitution. The respondent argued that an appeal as of right did not lie to Her Majesty in Council on question as to the interpretation of the Constitution until a final decision had been reached in the proceedings. "The proceedings," it was said, were the suit before the Chief Justice of the Western Region, and the reference in these proceedings under section 108 to the Federal Supreme Court was interlocutory and the decision upon the question referred was not final. He asked the Board to read the word "final" in the sense in which it is normally understood as finally disposing of the rights of the parties in regard to the whole suit. The cases of *Abdul Rahman v. D. K. Cassim & Sons* [1932] L.R. 60 I.A. 76 and *Ramchand Manjimal v. Goverdhandas Vishindas Ratanchand* [1920] L.R. 47 I.A. 124 were referred to. It was further argued that section 114 (1) (c) must be read as if it had provided "final decisions in any civil proceedings on questions involving the interpretation of this Constitution or the Constitution of a Region." Reference was made to *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235, 65 T.L.R. 633; [1949] 2 All E.R. 755, P.C.

If section 114 had stood alone, there might be great force in those observations, but in their Lordships' opinion the provisions of this section must as far as possible be read so as to provide for the cases which arise out of section 108. That section provides for the reference to the Federal Supreme Court of questions as to the interpretation of the Constitution and by sub-section (3) where a question is referred "the Federal Supreme Court shall give its decision upon the question." Now the Federal Supreme Court has given a decision in civil proceedings on a question as to the interpretation of the Constitution. Is it a final decision? The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned it is final. The court has finally disposed of the matter referred to them, namely, the question as to the interpretation of the Constitution. This construction accords with that adopted by Brett Ag. C.J.F. in *Dr. Chike Obi v. Director of Public Prosecutions* F.S.C. No. 56 of 1961. Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court of the reference under section 108 was a final decision and that an appeal lies as of right to Her Majesty in Council under section 114.

This interpretation of section 114 in relation to section 108 provides a highly convenient method on which questions as to the Constitution can be determined. It enables parties, if they so desire, to obtain the decision of Her Majesty in Council upon constitutional questions which arise in the course of civil or criminal proceedings before the case is finally determined. The construction contended for by the respondent might result in wholly abortive procedure if at the end of the day the interpretation of the Constitution by the Federal Supreme Court was held to be wrong upon an appeal to Her Majesty in Council.

For these reasons their Lordships are of opinion that the objection to the competency of the appeal is not a good one and they will now address themselves to the merits of the appeal.

The question to which an answer has to be found is of obvious

importance, but it lies, nevertheless, within a very small compass. Its decision turns upon the meaning to be attached to the wording of section 33 (10) of the Constitution of Western Nigeria, read, as it should be, in the context of any other provisions of the Constitution that may legitimately influence its meaning.

It is clear, to begin with, that the Governor is invested with some power to dismiss the Premier. Logically, that power is a consequence of the enactment that Ministers shall hold office during the Governor's pleasure, for, subject to the saving conditions of provisos (a) and (b) that follow, the Governor has only to withdraw his pleasure for a Minister's tenure of office to be brought to an end. Where the Premier's office is concerned it is proviso (a) that limits the Governor's power to withdraw his pleasure constitutionally, for by that proviso he is precluded from removing the Premier from office "unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly." By these words, therefore, the power of removal is at once recognised and conditioned: and, since the condition of constitutional action has been reduced to the formula of these words, for the purpose of the written Constitution, it is their construction and nothing else that must determine the issue.

What, then, is the meaning of the words "The Premier no longer commands the support of a majority of the members?" It has been said, and said truly that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed that, so long as the elected House of Representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

It is said, too, that the "support" that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think, however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm, dividing line between votes and other demonstrations where the issue of "support" is concerned.

This, indeed, is the crux of the question that has now been raised. The respondent maintains, and it is implied in the decision that he has obtained from the Federal Supreme Court, that the Governor cannot constitutionally

take account of anything in the matter of "support" except the record of votes actually given on the floor of the House. Consequently, it is said, his action in removing the first respondent from the Premiership on the strength, it appears, of the letter addressed to him by the 66 members of the House referred to and without waiting until there had been an adverse vote in the House itself was not within the powers conferred upon him by the Constitution.

The difficulty of limiting the statutory power of the Governor in this way is that the limitation is not to be found in the words in which the makers of the Constitution have decided to record their description of his powers. By the words they have employed in their formula, "it appears to him," the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him if it had been intended to do so. For instance, he might have been given power to act only after the passing of a resolution of the House, "that it has no confidence in the Government of the Region," the very phrase employed in an adjoining section of the Constitution (see section 31 (4), proviso (b) to delimit the Governor's power of dissolving the House even without the Premier's advice. According to any ordinary rule of construction weight must be given to the fact the Governor's power of removal is not limited in such precise terms as would confine his judgment to the actual proceedings of the House, unless there are compulsive reasons, to be found in the context of the Constitution or to be deduced from obvious general principles, that would impose the more limited meaning for which the respondent contends.

Their Lordships have not discovered any such reasons. It is one thing to point out the dangers of a Governor arriving at any conclusion as to his Premier's support in the House except upon the incontrovertible evidence of votes recorded there on some crucial issue. There are indeed such dangers. Expressions of opinion, attitude or intention upon such a delicate matter may well prove to be delusive. He may judge the situation wrongly and so find himself to have taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or of the electorate. Again, if he is not to rely on his Premier for advice as to the balance of support in the House, he is likely to find that he is in effect consulting indirectly the views of Opposition leaders who may turn out in the event to be more than an opposition: or he will find himself backing the political judgments conveyed to him by his own private advisers against the political judgment of the Premier himself.

All these are real dangers, which any Governor proposing to act under his power of removal would need to bear in mind, since, if he ignores them, he would run the risk of placing the constitutional sovereign power, whose representative, he is, in conflict with the will of the elected House of Representatives whose majority is for the time being expressed in the person of the Premier. Any one familiar with the constitutional history and development of the United Kingdom would naturally dwell upon these aspects of the Sovereign's position, if he was invited to advise a Governor as to the circumstances and occasions upon which he could wisely exercise his power of removal.

But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and

propriety which it is for him to weigh on each particular occasion: they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. To sum up, there are many good arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes.

Another argument has been advanced to the effect that the Nigerian Constitutions are modelled on the current constitutional doctrines of the United Kingdom, and, since the British Sovereign would not be regarded as acting with constitutional propriety in dismissing a Prime Minister from office without the foundation of an adverse vote on a major issue in the House of Commons, so the Governor in Western Nigeria must similarly be treated as precluded from exercising his power of removal in the absence of a vote of the same kind. This approach to the matter appears to their Lordships to have had some influence upon the view taken by the majority of the Federal Supreme Court in this case, and, since it seems capable of conveying an implication that could be misleading in other situations apart from the present one, their Lordships wish to make two observations upon it.

The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal, an exercise of which is not treated as being within the scope of practical politics. In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility; and the right of removal which is explicitly recognised in the Nigerian Constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.

The second observation is perhaps only another way of making the same point. It is true that the Western Nigerian Constitution, allowance made for the federal structure, does embody much of the constitutional practice and principle of the United Kingdom. That appears from a study of its terms. There are identifiable differences of scheme to be found in certain sections, but no one, it seems, questions the general similarity or the origin of many of its provisions. But, accepting that, it must be remembered that, as Lord Bryce once said, the British Constitution "works by a body of understandings which no writer can formulate;" whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be

traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

Their Lordships have not been able to find any indication either in the general scheme or in other specific provisions which would enable them to say that the Governor is legally precluded from forming his opinion upon the basis of anything but votes formally given on the floor of the House. It is plain that in any event he is invested with responsibilities that on occasions will require of him a delicate political judgment: the provisos attached to section 31 (4) dealing with the power to refuse a Premier a dissolution or to dissolve the House without his advice make that clear. When one turns to section 33 itself, the same kind of phrase "appears to him likely to command the support of the majority of the members of the House." (See sub-section (2)) is employed with regard to the Governor's selection of a Premier as is employed in sub-section (10), "appears to him that the Premier no longer commands the support of a majority of the members," with regard to the Governor's power or removal; and yet no one has suggested in the course of argument that a Governor exercising the power of selection is under any legal restriction as to the persons he may consult or the material to which he may turn in aid of his decision.

Certainly, it is to be noted that this power of appointment is listed in section 38 (1) as one of the functions in exercising which a Governor is free to use his "deliberate judgment"; whereas the power of removal is not included as one of the items in this list. The circumstance, which is perhaps one of the curiosities of the drafting of the complicated provisions of the Constitution, has given rise to the suggestion that it amounts to a recognition that the Governor's power of removal in section 33 (10) is not to be the product of his own judgment and, by a somewhat questionable step in the argument, is therefore to be understood as confined to an observation of votes recorded in the House. Their Lordships however would regard such a deduction as inadmissible. The explanation of the fact that the power of removal is not included in the functions mentioned in section 38 (1) appears to them to be the simple one that the only purpose is listing these functions is to except them from the statutory direction with which the sub-section opens to the effect that in exercising his functions under the Constitution the Governor must act in accordance with the advice of the Executive Council. As the Executive Council is a Cabinet formed by the Premier and a group of his Ministers recommended by him it could hardly have occurred to the draftsmen of the Constitution that the Governor, in removing a Premier, would have to consult and act on the Executive Council's advice. The idea of his doing so is a contradiction. If so, it could hardly have been felt that there was any need to make an exception of a function that was not regarded as capable as being affected by section 38 (1) at all.

For the reasons that have been set out their Lordships have been unable to arrive at the same conclusions with regard to the two questions submitted as that reached by the Supreme Court. While appreciating the force of much that is said in the judgment of the Chief Justice and the propriety of his constitutional doctrine, they do not find that the scheme or provisions of the Constitution of Western Nigeria enable a court of law to restrict the Governor's power or removal in the way imposed by the Supreme Court's answer to the first question; nor do they think that a different answer would

produce a result contrary to the basic assumption of such democratic constitutions that the Government of the territory cannot in the end be conducted without the support of a majority of members of the elected House.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the answer of the Supreme Court given on July 7, 1962, should be reversed: and that in lieu thereof it should be declared that the answer to the first question is Yes and that the answer to the second question is Yes also, and that the costs of the defendant Alhaji Adegbenro of the proceedings in the Supreme Court should be his costs in this cause. His costs of this appeal and of his motion before the Board on March 6, 1963, must be dealt with in the same way.

[NOTE: This judgment was nullified by the Western Region Constitution (Amendment) Law 1963.]

Solicitors: *Hatchett Jones & Co.; A. L. Bryden & Williams; Charles Russell & Co.*

SIR ABUBAKAR TAFAWA BALEWA . . . APPELLANT

AND

CHIEF T. ADEBAYO DOHERTY AND OTHERS . . . RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1963] 1 W.L.R. 949

1963 July 3

Viscount Radcliffe, Lords Jenkins, Devlin, Guest, and
Sir Kenneth Gresson

West Africa—Nigeria—Commissions and Tribunals of Inquiry Act 1961—Constitutional validity—Partially invalid in respect of compulsive powers in matters “within Federal competence anywhere within the Federation”—Exclusion of jurisdiction of court void—Commissioners’ power to impose fine or imprisonment invalid—Commissions and Tribunals of Inquiry Act 1961 (Federal Statute) ss. 3(1) (4), 8 (a), (b) (c) and (d) 15 (a), 18 (1) (b)—Constitution of the Federation of Nigeria, 1960, S.I. 1960, No. 1652, Sched. II.

By section 3 (1) of the Commissions and Tribunals of Inquiry Act, 1961, of the Federation of Nigeria the Prime Minister may appoint a commission to inquire into “. . . any matter or thing within Federal competence anywhere within the Federation . . .”

The appellant, the Prime Minister of the Federation of Nigeria pursuant to his powers under the Commissions and Tribunals of Inquiry Act, appointed a tribunal to inquire into the affairs of the National Bank of Nigeria. The first respondent, a director of the Bank, applied to the High Court of Lagos for an injunction to restrain the tribunal from proceeding with the inquiry, and that court, pursuant to section 108 of the Federal Constitution, referred to the Federal Supreme Court a number of questions raising issues as to the constitutionality of the Act of 1961, in particular whether in so far as it applied to the whole Federation of Nigeria it exceeded the power of Parliament under the Constitution, and whether sections 3 (4), 8 (c) and (d), 15 (a) and 18 (1) (b) were valid or contravened certain sections of the Federal Constitution:

Held, (1) that the Act of 1961 was valid in so far as it authorised tribunals or commissions of inquiry of any sort within the Federal territory and tribunals or commissions of inquiry without compulsive powers into Federal matters, but

that it was not within the competence of the legislative power of the Federal Parliament in so far as section 8 (a) to (d)—which included the giving of compulsive powers to the commissioners to take evidence on oath, to compel the attendance of witnesses and the production of documents—purported to have effect in relation to matters and things “within Federal competence anywhere within the Federation” as defined by section 3 (1) of the Act, and the power to direct any inquiry into banking fell into that category.

(2) Section 3 (4) of the Act—which provided that “neither the commission itself nor any action of the Prime Minister in relation thereto shall be inquired into in any court of law”—was invalid and void.

(3) Section 8 (c)—which gave power to require the attendance of witnesses and the production of documents—was valid in so far as it purported to have effect in relation to matters or things within or affecting the general welfare of the Federal territory. Sections 8 (d), 15 (a) and 18 (1) (b) were void to the extent that they empowered the commissioners to impose a sentence of fine or imprisonment.

Attorney-General for Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. [1914] A.C. 237; 30 T.L.R. 203; P.C. considered.

Judgment of the Federal Supreme Court of Nigeria affirmed with variations.

The following cases, in addition to those referred to in the judgment, were cited in argument:

M'Culloch v. State of Maryland [1819] 4 Wheaton 316;

Rex v. Kidman [1915] 20 C.L.R. 425;

Macleod v. Attorney-General for New South Wales [1819] A.C. 455; 7 T.L.R. 703, P.C.;

Gallagher v. Lynn [1937] A.C. 863; 53 T.L.R. 929; [1937] 3 All E.R. 598, H.L.(N.I.);

Barratt v. Kearns [1905] 1 K.B. 504; 21 T.L.R. 212, C.A.;

Racecourse Betting Control Board v. Secretary for Air [1944] Ch. 114; 60 T.L.R. 147; [1944] 1 All E.R. 60, C.A.;

Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] 28 C.L.R. 129;

Ex parte Walsh and Johnson, in re Yates [1925] 37 C.L.R. 36;

Le Mesurier v. Connor [1929] 42 C.L.R. 481;

Baxter v. Ah Way [1909] 8 C.L.R. 626.

APPEAL (No. 13 of 1962) from a decision of the Federal Supreme Court of Nigeria (Ademola C.J. of the Federation, Mbanefo C.J. of the Eastern Region, Brett, Unsworth and Taylor F.JJ.) (October 27, 1961) given in the exercise of its powers under section 108 of the Federal Constitution. That section allowed questions of law as to the interpretation of the Constitution which arose in an inferior court to be referred to the Supreme Court so that it might give its decision upon them. The appeal was brought before the Board by leave of the Supreme Court given under section 114 (2) of the Constitution.

The questions arose in the course of proceedings before the High Court in Lagos and concerned the constitutionality of the Commissions and Tribunals of Inquiry Act 1961, which was a Federal statute. In pursuance of his powers under that statute the appellant, the Prime Minister of the Federation, on July 21, 1961, appointed a tribunal to inquire into the affairs of the National Bank of Nigeria. The first respondent (the only one who appeared before the Board) was a director of the bank and on July 25, 1961, the day on which the tribunal held its first meeting, he applied to the High Court of Lagos for an injunction to restrain the tribunal from proceeding further. The High Court ordered that the following three questions should be referred to the Supreme Court.

“ 1. Whether or not the Commissions and Tribunals of Inquiry Act,

1961 is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal Competence anywhere within the Federation.

2. Whether or not section 3 (4) of the said Act is constitutional and valid or contravenes sections 21, 31 and 108 of the Constitution of the Federation of Nigeria.

3. Whether or not sections 8 (c), 8 (d), 15 (a) and 18 (1) (b) of the Commissions and Tribunals of Inquiry Act 1961 (or any of them), are constitutional and valid, or contravene section 20 or 21 of the Constitution of the Federation of Nigeria."

The Federal Supreme Court answered the three questions referred to them as follows:

" 1. The Commissions and Tribunals of Inquiry Act, 1961, is not within the competence of the legislative power of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.

2. Section 3 (4) of the said Act is void.

3. Section 8 (c) is valid. Sections 8 (d), 15 (a) and 18 (1) (b) are void to the extent that they empowered the commissioners to impose a sentence of fine or imprisonment."

1963. April 30; May 1, 2, *T. O. Elias Q.C., A.G. of the Federation of Nigeria, S. D. Adebisi S.G. of the Federation of Nigeria, and Mervyn Heald* for the appellant.

Dingle Foot Q.C. and Dick Taverne for the first respondent.

July 3. The judgment of their Lordships was delivered by LORD DEVLIN, who stated the facts set out above and continued: Before considering the answers which the Supreme Court gave to those questions, it is convenient to refer to previous legislation on tribunals of inquiry and to some of the provisions of the Constitution—the earlier Constitution of 1954 as well as the present one of 1960—in relation to that subject. In 1940, when Nigeria was still a unitary state, there was enacted an ordinance empowering the Governor-General to set up commissions of inquiry. This ordinance was of the same sort as the Tribunals of Inquiry (Evidence) Act, 1921, in force in Great Britain. The Act of 1961 is a repetition with minor alterations of the Ordinance of 1940.

The Constitution of 1954 established the Federation out of the three regions of Nigeria, Northern, Western and Eastern, and South Cameroons (which for the purposes of this appeal their Lordships can ignore) and the Federal Territory of Lagos. The Federal legislature was given complete power in the Federal Territory of Lagos, but in the regions the legislative power was divided between the Federal legislature and the legislatures of the Regions. The Constitution specified two legislative lists, one called the Exclusive and the other the Concurrent. The Federal legislature alone could legislate with respect to any matter on the Exclusive list. Both the Federal and the appropriate Regional legislature could legislate on any matter on the Concurrent list. The Regional legislature alone could legislate on matters not specified on either list. All this is to be found in section 51 of the Constitution. So that, as was said in the principal judgment delivered in the Supreme Court in the present case by the Chief Justice of the Federation, the Chief Justice of Eastern Nigeria and Unsworth F.J., " the Nigerian

Constitution is a truly federal constitution in which the residual powers are vested in the regional government."

In the 1954 Constitution "Commissions of Inquiry" was a subject specified in the Concurrent list. The result of this would appear to be that either the Federal or a Regional legislature could set up a commission to inquire into any subject, even one that was within the exclusive competence of the other legislature. This was evidently not what was intended, and it is natural to suppose that neither legislature would want to inquire into matters on which it could not legislate. Consequently, an alteration was made in 1957 by Order in Council, S.R. & O. 1530. The change was effected by deleting "Commissions of Inquiry" from the Concurrent list and introducing it into Part IV of the Schedule, which is headed "interpretation." This method of dealing with the matter was retained in the 1960 Constitution which is what their Lordships will have to construe. The broad effect of the change in 1957 was that the establishment and regulation of tribunals of inquiry for the purpose of any of the matters specified in each list was deemed to be "an incidental matter," and so brought within the general item covering incidental matters, with which each list concludes. Their Lordships will have to consider later what exactly the result is of changing a subject from one that is separate and specified to one that falls within a general and incidental category. The first respondent contends that the change makes a significant difference to the legislative power.

The 1960 Constitution by section 64 retains with some alterations the Exclusive and Concurrent lists and the division of legislative powers initiated by section 51 of the 1954 Constitution. But the 1960 Constitution also gives power directly to Parliament, that is, the Federal legislature, to make laws on a number of matters specified in separate and independent sections. These additional powers are categorised in two different ways. Some of them are gathered together in the independent sections enumerated in Item 43 of the Exclusive list. The effect of this is the same as if they were each made an independent item in the list. One of these is Banks and Banking, in respect of which Parliament is directly empowered by section 72 of the Constitution to make laws. The rest are gathered together in section 64 (3) of the Constitution where they are described as "matters not included in the legislative lists" and a general power to Parliament to make laws on such matters is conferred or repeated by that sub-section. This second category, which their Lordships will term the section 64 (3) category, contains such matters as emergency powers, implementation of treaties, administration of trusts and estates, film censorship and evidence.

The Schedule to the 1960 Constitution is headed "The legislative lists" and is divided into three parts—the Exclusive list, the Concurrent list and a third part headed "Interpretation" which is common to both. The interpretation is concerned entirely with the amplifications of the general and incidental item which concludes each list item 44, the last item on the Exclusive list, is in the following terms:

- " 44. Any matter that is incidental or supplementary—
 (a) to any matter referred to elsewhere in this list; or
 (b) to the discharge by the Government of the Federation . . . of any function conferred by this Constitution."

Article I of Part III (Interpretation) is in the following terms:

- " 1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality—

- (a) offences;
- (b) the jurisdiction, powers, practice and procedure of courts of law;
- (c) the compulsory acquisition and tenure of land; and
- (d) the establishment and regulation of tribunals of inquiry."

Since banking is a subject within Item 43 of the Exclusive list, it must be beyond doubt that Parliament has power to provide for an inquiry in some form into banking. But their Lordships do not have to decide whether if Parliament had authorised directly an inquiry on the same terms as the Prime Minister did on July 21, 1961, by Government Notice No. 1446, the legislation would have been good or bad. It is difficult to see what objection could be taken at any rate to paragraph 5 of the terms of reference, namely, whether the affairs of the bank have been conducted in accordance with the Banking Ordinance, 1958. But their Lordships are not considering any specific legislation. They are concerned with a statute which confers upon the appellant, the Prime Minister of the Federation, wide powers to set up commissions or tribunals of inquiry generally. It is upon the validity of that statute that the appellant's action in ordering an inquiry into the affairs of the Bank of Nigeria depends. That is why their Lordships have not been content simply to note that banking is a Federal subject but have had to study the general law-making powers which the Constitution gives to Parliament.

The Act of 1961 cannot be declared invalid as a whole. Much of it is unobjectionable. For the purpose of a broad analysis it can be looked at from three aspects. There is, first of all, a group of provisions which provide for the setting up of commissions of inquiry and for the procedure which they are to follow, and which deal with such matters as the use of interpreters and representation by counsel. The Act refers to commissions of inquiry where the constitution speaks of tribunals. But there is nothing in this beyond nomenclature, since section 2 (2) of the Act provides that a commission is to be treated as a tribunal. With one exception, these provisions cannot in their Lordships' opinion be directly attacked. Apart from any question on the spending of public money (and no objection was raised before their Lordships on that score) there is nothing in the constitution to prevent the Prime Minister with or without legislative authority from authorising such inquiries as he thinks fit and that is all that section 3 (1) taken by itself gives him power to do. It might offend against the comity of legislature if one body were formally to inquire into subjects within the exclusive competence of another, but it is not forbidden by the Constitution. The sole provision in this category that is vulnerable in section 3 (4) which provides that neither the commission itself nor any action of the Prime Minister in relation thereto shall be inquired into in any court of law. The validity of this provision is the subject of the second question addressed to the Supreme Court. Their Lordships agree with the answer given to this question by the Supreme Court and with the reasoning by which it is supported. They hold this provision to be invalid.

The second aspect reveals a number of provisions scattered over the Act but contained principally in section 8, which give to the commissioners powers which may conveniently be described as compulsive powers. They are powers to take evidence on oath and to compel the attendance of witnesses and the production of documents. They are to be distinguished from merely procedural powers, such as those which involve the use of interpreters and the appearance of counsel. The characteristic of the compulsive power is that it involves an interference with the liberty of the

subject. Not all the powers in section 8 are compulsive. The section contains, for example, powers to exclude the public and press and powers to award costs, payable presumably out of public money. The compulsive powers which have been attacked are those contained in section 8 (a) to (d).

The third aspect reveals provisions, also in various parts of the Act, that are supplementary to the compulsive powers and introduce sanctions in support of them. The validity of these provisions depends of course on the validity of the compulsive powers. But an additional objection has been raised to them, which is the subject of the third question addressed to the Supreme Court. The answer to that question is now agreed, so that their Lordships can dispose of this objection briefly at this stage. There are provisions which enable the commission itself to fine or imprison for disobedience to its orders; and there are provisions which make such disobedience an act of contempt punishable by an ordinary court of law. Provisions in the former category, it is agreed, offend against certain sections of the Constitution which it is now unnecessary to enumerate. Provisions in the second category are agreed to be valid in so far as the grant of compulsive powers is valid.

Thus the fundamental question which their Lordships have to determine is to what extent the grant of compulsive powers is valid. It has not been attacked as wholly invalid. There is no question of section 8 (a) to (d) being struck out of the Act. What is contended is that, while Parliament has power to set up an inquiry into any subject, it can equip with compulsive powers only a tribunal which is inquiring into a limited range of subjects; and that section 3 (1), which defines the range of subjects into which tribunal may inquire is too wide. Thus section 3 (1) is brought back into the arena, not, so to speak in its own defence, but because it is relevant to the attack on section 8.

Section 3 (1) defines four categories of subjects and the first is to be sharply distinguished from the other three. The first covers "any matter or thing within or affecting the general welfare of the Federal Territory." In respect of such matter there is no division of legislative power and the Federal Parliament can legislate with full sovereign authority, so it is not disputed that it can equip with compulsive powers any inquiry that comes within the first category. The other three relate to matters on which the legislative power is divided.

Section 8 begins with the words "Subject to the provisions of this section the commissioners shall have and may exercise all or any of the following powers"; and there follow in sub-sections (a) (b) (c) and (d) the compulsive powers which are in question here. It might conceivably have been argued that if it could be shown that compulsive powers could not be granted in respect of any one of the categories in section 3 (1), section 8 (a) to (d) would be wholly invalid but that has not been contended. Section 8 (a) to (d) has been treated, rightly in their Lordships' opinion, as separate and distinct in its application to each of the four categories in section 3 (1). Since section 8 (a) to (d) is unquestionably good in its application to the first category, the question for the Board is whether it is valid in its application to any or all of the other three categories.

The attack is made in two ways. Both start from the basis that the Federal power to legislate on tribunals of inquiry is restricted by the fact that it is not a separate and independent matter in the legislative lists but one that is incidental or supplementary. First it is said that Parliament has no power to equip with compulsive powers any tribunal of inquiry into any subject whatsoever because the conferment of compulsive powers is incapable of

being an incidental or supplementary matter. Secondly, it is said, that if it can grant such powers, it can do so only to commissions of inquiry into subjects or matters which are incidental or supplementary to matters specified in the legislative lists. It is contended that the second, third, and fourth categories are described so as to cast the net much wider than that.

If either attack succeeds, the appellant will fail and the first question addressed to the Supreme Court must be answered adversely to him. But it is plain that the first attack is more dangerous and far-reaching than the second. If the second alone is successful, the government may still achieve its object by presenting to Parliament an amended version of section 3 (1) with a narrow and more precise description of the categories of subjects into which inquiries can be authorised. But if the first attack is successful, Parliament cannot authorise any really effective inquiry into the affairs of the National Bank or into any other subjects, because it can never authorise the use of compulsive powers.

Their Lordships will deal first with the first head of attack which succeeded before the Supreme Court and was the chief reason for their answering the first question adversely to the appellant. In the principal judgment it is said:

“ We are of the view that the legislation is too wide to come within paragraph (a) of Item 44. This paragraph would permit of legislation providing for tribunals of inquiry and matters incidental thereto, but it is not wide enough to provide generally for the attendance of witnesses, the disclosure of information and the production of documents as this is not incidental to legislation establishing or regulating tribunals or commissions of inquiry, as was held in the *Sugar Refining case* [1914] A.C. 237; 30 T.L.R. 203, P.C.).”

Brett F.J. said:

“ . . . the power of Parliament in relation to tribunals of inquiry remains a power in relation to a matter incidental or supplementary to other matters. The submission that when an ancillary power of this kind is conferred it is not to be exercised in such a way as to interfere with personal rights independently of the exercise of the power to which it is incidental or supplementary, seems to me to be well founded.”

Before examining this reasoning their Lordships will consider the case on which the Supreme Court relied, *Attorney-General for Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd.* [1914] A.C. 237; 30 T.L.R. 203, P.C. This case has some marked similarities to the present one. It involved the interpretation of the Constitution of the Australian Commonwealth which, like the Nigerian, is a truly Federal Constitution. Like the Federation the Commonwealth has power to legislate only on specified subjects and on what is incidental to them. The Act with whose validity the Board was concerned was the Royal Commissions Act, 1902–12, which authorised the Governor-General to direct inquiries into any matter “ which relates to or is connected with the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth.” The Act gave to the commissioners compulsive powers. What was in issue was not the validity of the Act as a whole but only the compulsive powers, as Fullagar J. later pointed out. He said in *Lockwood v. The Commonwealth* [1954] 90 C.L.R. 177 at p. 182:

“ Apart from a possible objection, based on section 81 of the Constitution, to the application of public moneys of the Commonwealth to matters outside the powers of the Commonwealth, I can think of no sound reason why the Commonwealth should not make an inquiry into any subject matter which it may choose. Where, however, the subject matter of the inquiry lies outside, the field of Commonwealth power, the Commonwealth cannot constitutionally confer compulsive powers on any body set up to make the inquiry.”

Viscount Haldane L.C., who delivered the opinion of the Board in the *Colonial Sugar* case, started from the basis that power to impose under penalties new duties on persons residing in the individual states was *prima facie* vested in the legislature of the states to whom the residual power belonged. None of the specific subjects on which the Commonwealth had power to make laws for peace, order and good government, Viscount Haldane said ([1914] A.C. 237 at p. 255)

“ relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth. It is of course true that under the section the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Act purports to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making.”

The general power permitting legislation on matters incidental to the execution of any specific power did not, Viscount Haldane said, carry the question further, for it covered only matters which are incidents in the exercise of some actually existing power. He continued (*ibid.* 257.)

“ . . . until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct.”

Although it will be necessary to give effect to some differences in the phraseology on this point between the Australian and the Nigerian Constitution there is much in the opinion of the Board in the *Colonial Sugar* case (*ibid.* 237) which their Lordships now find of great assistance to them as they address their minds to the problems in the present case. It is especially so in relation to the conception of a power or matter that is incidental to another power or matter. That is something their Lordships will have to consider later. But the case lends no support to the argument that the provision of compulsory powers can never be regarded as an incidental or supplementary matter. The Board stated plainly that in certain circumstances it could be. What was condemned was the provision of compulsory powers for inquiries which were still hypothetical.

If the argument stopped at this point, the *Colonial Sugar* case [1941] A.C. 237 could be cited as an authority for the view that compulsive powers can be granted to tribunals of inquiry into specific matters about which Parliament is actually legislating or has legislated. But it does not stop there, because the Nigerian Constitution, differing in this respect from the Australian, specifically enacts that the establishment of tribunals of inquiry is to be deemed an incidental or supplementary matter. The question which their Lordships are now considering, that is, whether Parliament can ever grant compulsive power, cannot in their opinion be answered one way or another by reference to the *Colonial Sugar* case [1914] A.C. 237 as their Lordships have just pointed out, the incidental power was held in certain circumstances to be exercisable for this purpose. But interpretation provisions can limit as well as amplify. If by interpretation the "incidental and supplementary matters" are expressly expanded to include bodies of inquiry without compulsive powers, it would be difficult to argue that such matters could without the aid of the interpretation provisions include bodies with such powers. If, on the other hand, "tribunal of inquiry" means a body with compulsive powers, then the first and comprehensive attack on section 8 (a) to (d) is repelled.

In their Lordships' opinion the tribunal of inquiry referred to in the Schedule means a body with compulsive powers. They hold this opinion for two reasons. The first is that a tribunal of inquiry as a body equipped with compulsive powers was already known to Nigerian law. Their Lordships have referred to the Ordinance of 1940. Section 7 of that Ordinance, which contains the powers with regard to the obtaining of evidence, is in almost exactly the same terms as section 8 of the Act of 1961. This suggests very strongly to their Lordships that when the framers of the Constitution of 1960 referred to a tribunal of inquiry, they intended a body that could be equipped with such powers.

The second reason is that if they had not intended such a body, there would have been no need to have made any constitutional provision at all. It does not require a provision of the Constitution to enable anyone, whether a minister or a private citizen, to set up a body to seek information from anyone else who is willing to give it. The appointment of a committee of that sort is an ordinary ministerial act; it is not legislative in character. It is impossible to suppose that Parliament was given expressly the power to establish by legislation and to regulate tribunals of inquiry if all that was contemplated was bodies without inquisitorial powers, for the creation of a powerless body is something that any individual can do. Their Lordships therefore respectfully disagree with the views of the Supreme Court on this point and do not think that the 1961 statute can be attacked successfully on this ground.

Their Lordships will not consider the other head of attack. The second, third and fourth categories defined by section 3 (1) as subject of inquiry are as follows:

(2) Any matter or thing within Federal competence anywhere within the Federation,

(3) the conduct of any chief, and

(4) the management of any department of the public service.

The Attorney-General was unable to point to any provision which gave to the Federal Parliament or Executive general control over the conduct of a chief. Nor could he justify the extent of the fourth category, which is not confined to the Federal public service but is wide enough to cover the public service of a Region. In their Lordships' opinion compulsive powers cannot

be attached to inquiries in these two categories. It is, however, the second category which is the important one in this case, for the power to direct an inquiry into banking comes within it.

It is clear from what their Lordships have already said that there are matters "within the Federal competence" which are not referred to in the legislative lists. These are the matters within the section 64 (3) category. The power to establish a tribunal depends upon it being "incidental or supplementary to any matter referred to elsewhere in this list"; that is a quotation from Item 44 of the Exclusive list, and Item 28 of the Concurrent list is to the same effect. There is therefore no power to establish a tribunal with compulsive powers to inquire into any matter within the section 64 (3) category. The definition "within Federal competence" is too wide. It is not for their Lordships to speculate as to why the framers of the Constitution drew a distinction between Item 43 subjects and section 64 (3) subjects, putting the former into the legislative list and leaving the latter outside. It is not a distinction drawn in the 1954 Constitution; see First Schedule, Part I, Item 43. But it is clearly introduced into the 1960 Constitution and in the face of it their Lordships cannot accept the argument of the Attorney-General that the legislative power to establish tribunals of inquiry applies equally to both. Nor can they accept his argument that the additional subjects in section 64 (3) category are for this purpose unimportant and can be ignored.

This leads to the most difficult question in the case. Can the definition "within Federal competence" be read down so as to cover only matters referred to in the legislative lists; and if so read down, would the attachment of compulsive powers to inquiries in this category be valid?

In their Lordships' opinion the definition cannot be read down. There is no special provision in the Constitution giving to the court any power of interpretation greater than that which flows from the ordinary rule of construction. The question is, therefore, whether the good can be served from the bad and so survive. Clearly, it cannot here be done under the "blue pencil" rule. There is no excess which can be struck out. Nor can their Lordships be confident that if Parliament had been made aware that compulsive powers could not be validly given in section 64 (3) subjects, it would still have wished to have given them in Item 43 subjects. The object of the Act is to confer a blanket power on the Prime Minister to direct to inquiries into any matters within Federal competence instead of having to come to Parliament for specific authorisation in each case. If Parliament had been told that it could give a blanket power of inquiry only into some matters within Federal competence and not into others, it might very well have said that half a blanket was better than none and have amended the Bill accordingly. But it is possible that it might have said that if the Prime Minister could not be given the complete power he wanted, it would be better that he should ask for specific powers as and when he wanted them. It may be that the former is much more likely to have happened than the latter. But where there is the slightest doubt about what Parliament would have intended, their Lordships cannot speculate. They have themselves no legislative power and they cannot re-write the Act.

This conclusion makes it unnecessary for their Lordships to determine whether, if the second category could be re-written as "any matter specified in the Legislative lists," compulsive powers could validly be attached. But as that may be a question of great importance if further legislation on this topic is contemplated and as their Lordships have listened to much argument about it, they think it would be useful if they expressed

an opinion. It would indeed be quite natural for the Constitution to give to Parliament the power to establish a tribunal of inquiry into any matter about which it could legislate. But the simple and obvious way of doing that would be to add to the end of each legislative list an item such as "the establishment and regulation of tribunals of inquiry into any of the above matters." If there were an item in that form, a general Act authorising the establishment of tribunals of inquiry into any matter on the list might well be valid.

But that is not the way that was chosen. Under the Schedule as it is framed, it is not enough that the inquiry should be into one of the listed matters; it is necessary also that the establishment of the tribunal should be incidental or supplementary. The function of Part III (Interpretation) is to dispose of the possible argument that the establishment of a tribunal is something that of its nature is incapable of being classed as incidental or supplementary. If it was sought without the aid of Part III to argue that any of the matters specified in Part III was incidental to some listed matter and could be provided for accordingly, the answer might have been made that things such as the creation of offences, the compulsory acquisition of land and the establishment of tribunals were subjects too important in themselves to be introduced simply as incidents. Part III excludes that possible answer. But it does not elevate the four things it enumerates into separate items. They are not to be treated as if they were Items 45 to 48 of the Exclusive List and also Item 29 to 32 of the Concurrent List. They are confined within the limits of Items 44 and 28 respectively. So no offence can be created, no court of law regulated, no land compulsorily acquired and no tribunal established unless the creation, the regulation, the acquisition or the establishment is incidental or supplementary to some other matter. Some connection must be shown between the two matters; and when shown, it must be examined to see whether the one matter is sufficiently close to the other to be called incidental or supplementary to it. Now, one cannot talk sensibly of an offence being incidental or supplementary to banks or banking, or to railways (Item 37) or to trunk roads (Item 39). But if there has been legislation about trunk roads, one can ask oneself whether the creation of the particular offence can properly be called an incidental or supplementary part of that legislation.

In short, their Lordships take the same view of the legislative power conferred by Item 44 as the Board took of the similar power considered in the *Colonial Sugar* case [1914] A.C. 237. The power is not wide enough to authorise inquiries into subjects about which Parliament might legislate in the future and Part III does not in this respect widen it. There must be actual legislation in being or a function of the Federal Government actually being discharged; only then can the connection between the two matters be examined to see whether it is sufficiently close. It can, their Lordships think, readily be appreciated that a statute authorising the Prime Minister to create any offence in relation to any subject on the legislative lists would be too wide; it would enable him to remodel the criminal law. Likewise, it can be seen that a statute authorising the Prime Minister to acquire compulsorily any land that might be needed if there were in future to be legislation on any subject in the legislative lists would be too wide; it would be tantamount to giving him power to nationalise the land. The establishment of tribunals is by comparison innocuous but the reasoning must be the same. If section 3 (1) of the Act of 1961 were to be amended to cover only matters in the legislative lists, it would still in their Lordships' opinion for the purposes of section 8 (a) to (d) be too wide.

Their Lordships have therefore in the end reached fundamentally the same conclusions as the Supreme Court. They therefore answer the questions addressed to the court in the same way except for some slight variations to give effect to their view that the Act is valid in so far as it authorises tribunals or commissions of inquiry of any sort within the Federal territory and tribunals or commissions without compulsive powers into Federal matters. It might of course be argued that since section 3 (1) sets up tribunals and since tribunals are of their nature bodies with compulsive powers, section 3 (1) must stand condemned quite apart from section 8. Their Lordships would not accept this argument. They have not said that wherever the phrase "tribunal of inquiry" is used, it inevitably means a body with compulsive powers. It may or may not mean that; its meaning in any case must be taken from its context. In its context in the Constitution their Lordships hold for the reasons they have given that it means a body with compulsive powers. In its context in section 3 (1) of the Act it does not mean that, for, if it did, section 8 would be superfluous.

In their Lordships' opinion the answers should be varied to read as follows, the varied parts being in italics:

1. The Commissions and Tribunals of Inquiry Act 1961, is not within the competence of the legislative power of the Federal Parliament in so far as *section 8 (a), (b) (c) and (d)* purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.
2. Section 3 (4) of the said Act is void.
3. Section 8 (c) is valid, *in so far as it purports to have effect in relation to matters or things within or affecting the general welfare of the Federal territory.* Sections 8 (d), 15 (a), 18 (1) (b) are void to the extent that they empowered the commissioners to impose a sentence of fine or imprisonment.

Except so far as it is required to effect these variations, their Lordships will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the first respondent's costs of the appeal.

Solicitors: *Charles Russell & Co.; Hatchett, Jones & Co.*

G. O. LAJA APPELLANT

AND

M. A. OKUPE RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1963 July 23

Viscount Radcliffe, Lords Morris of Borth-y-Gest,
Guest, Pearce and Sir Kenneth Gresson

Contract—Non-delivery of logs—Total failure of consideration—Tripartite agreement.

The action arose out of an agreement made by the respondent with the appellant for the purchase by the respondent from the appellant of 10,000 logs,

delivery to be made to one Ligali—a business associate and friend of the appellant. The respondent testified that Ligali was present when the contract of purchase was entered into and that Ligali agreed to export the logs on respondent's behalf to Europe, and having sold them there, to account to respondent for the proceeds. The appellant informed the respondent from time to time that deliveries had been made, whereupon the respondent made payments to the appellant totalling £10,047 5s. In fact no logs ever had been delivered as the respondent later ascertained.

Held: (1) Inasmuch as the logs had in fact never been delivered and could not therefore have been sold it was wrong to hold that the respondent "had received and still holds £62,000 as being the alleged proceeds of the resale of those logs."

(ii) The payment of £62,000 concerned the obligations of Ligali to the respondent and any discharge by Ligali of his obligations to the respondent could not avail the appellant.

SIR KENNETH GRESSON. This appeal is from a judgment of the Federal Supreme Court of Nigeria allowing an appeal from the judgment of the High Court of Lagos in which judgment had been given in favour of the defendant in an action in which the respondent had claimed from the appellant an amount of £10,047 5s. 0d. as money paid by the respondent to the appellant in regard to which it was alleged there had been a total failure of consideration.

The action arose out of an agreement made by the respondent with the appellant for the purchase by the respondent from the appellant of ten thousand tons of logs delivery to be made to one Ligali—a business associate and friend of the appellant. The respondent testified that Ligali was present when the contract of purchase was entered into, and that Ligali agreed to export the logs on respondent's behalf to Europe, and having sold them there, to account to respondent for the proceeds. The appellant informed the respondent from time to time that deliveries had been made whereupon the respondent made payments to the appellant, altogether five in number to a total amount of £10,047 5s. 0d. In fact no logs ever had been delivered as the respondent later ascertained. These facts were not in dispute, nor that the respondent had received from Ligali an amount of £62,000 but it was not clear when, or upon what basis, the amount had been paid. The only evidence given in the action was that of the plaintiff (respondent) and it is upon his evidence and such inferences as can properly be drawn therefrom that the validity of the respondent's claim can be assessed.

The Statement of Claim comprised chiefly a recital of the facts related save that no reference was made therein to the payment of £62,000 by Ligali to the respondent. The Statement of Defence was for the most part a general denial save that it admitted that the appellant did not deliver any logs at all. In the High Court of Lagos de Lestang C.J. held that there had not been a total failure of consideration in that the respondent had received from Ligali £62,000 "purporting to be the proceeds of the sale of the logs or some of them" and this notwithstanding there being no evidence "where the money came from." The Federal Supreme Court of Nigeria reversed this decision holding, upon an examination of the evidence, that the £62,000 paid by Ligali to the respondent concerned the obligations of Ligali to the respondent and had no relevance to the appellant's obligations to the respondent.

The evidence was very scanty indeed consisting as it did only of the evidence of the respondent together with two letters written by him to Ligali in April, 1957, demanding an account in respect of the sale of the logs. At

the time he wrote these letters the respondent believed that delivery of the logs had been made to Ligali.

In argument before their Lordships it was contended by counsel for the appellant that inasmuch as Ligali was present when appellant and respondent made the contract for the sale and purchase of logs he was involved in such a way as to constitute a kind of tripartite agreement, and that accordingly any payments made by Ligali to the respondent would operate to negative there having been a total failure of consideration. In the opinion of their Lordships this contention cannot be upheld even though the respondent did say in the course of his evidence: "Out of the transaction concerning the 10,000 tons of logs I have received from Ligali £62,000 approximately." It was no doubt this statement which led to de Lestang C.J. in the High Court of Lagos holding that the respondent "had received and still holds £62,000 as being the alleged proceeds of the resale of those logs." But inasmuch as "those logs" had in fact never been delivered and could not therefore have been sold, this finding cannot be supported upon the evidence considering it in its entirety. In their Lordships' opinion the Federal Supreme Court of Nigeria rightly held that the payment of £62,000 concerned the obligations of Ligali to the respondent and that any discharge by Ligali of his obligations to the respondent could not avail the appellant; nor indeed was there any such allegation in the Statement of Defence of the appellant. In their Lordships' opinion the judgment of the Federal Supreme Court allowing the appeal and entering judgment for the respondent for £10,047 5s. 0d. with costs was a proper judgment upon the evidence. Accordingly their Lordships humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs of the appeal.

FREDDIE A. SHORT APPELLANT

AND

ATTORNEY GENERAL OF SIERRA LEONE RESPONDENT

[ON APPEAL FROM THE SIERRA LEONE AND THE GAMBIA COURT OF APPEAL]

[1963] 1 W.L.R. 1427; [1964] 1 All E.R. 125 P.C.

1963 Nov. 18

Viscount Radcliffe, Lords Evershed
and Devlin

West Africa—Sierra Leone and the Gambia—Appeal to Court of Appeal—Dismissal for failure to comply punctually with conditions—Application to Court of Appeal to restore appeal dismissed—Power of Privy Council to interfere with exercise of court's discretion—When to be exercised—West African Court of Appeal Rules, rr. 16 (4), 17, 23.

Privy Council—Jurisdiction—Discretion, review of exercise by court below—When substantial injustice has been effected.

By rule 23 of the West African Court of Appeal Rules:

- " (1) If the appellant has complied with none of the requirements of rules 16 (4) and 17 the Registrar of the Court below shall certify such facts to the Court, which may thereupon order that the appeal be dismissed . . .
(3) An appellant whose appeal has been dismissed under this rule may

apply by notice of motion that his appeal be restored and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit."

An appeal by the appellant, a member of the Bar and a solicitor of the Supreme Court of Sierra Leone, to the Sierra Leone and the Gambia Court of Appeal from an order of the Supreme Court of Sierra Leone requiring him to pay a fine of £10 and suspending him from practice for three months following charges of professional misconduct, was dismissed on the ground of failure to comply punctually with conditions of appeal laid down by the acting registrar of the Court of Appeal pursuant to rules 16 (4) and 17 of the West African Court of Appeal Rules which required that an appellant should "within such time as the Registrar directs" make certain payments in connection with the proposed appeal. The appellant thereafter applied under rule 23 (3) of the Rules to the Court of Appeal (which consisted of the same three judges who had dismissed his substantive appeal) for an order to restore the appeal. That court dismissed his application. On appeal, on the ground that the Court of Appeal had wrongly exercised its discretion under rule 23:

Held, that while the Board would assume that it might review an exercise of discretionary power by a court within the British Commonwealth, it would only do so where the question involved was one of real public significance and where the Board was fully satisfied that the exercise of the discretion had affected a substantial injustice to one or other of the parties; and the Board would be most reluctant to review an order made by the Supreme Court of a Dominion or Colony in regulating its own business.

Maxwell v. Keun [1928] 1 K.B. 645; 44 T.L.R. 100, C.A., *Evans v. Bartlam* [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L. (E.) and *Kojo Pon v. Atta Fua* [1927] A.C. 693, P.C. considered.

Here, the appellant had failed fairly to comply with the acting registrar's conditions; nor had it been suggested that the charges against the appellant's professional conduct were without any justification. Further, questions affecting the professional conduct of legal practitioners in Sierra Leone were essentially for determination by the local courts who must be peculiarly acquainted with the standards, conditions and character of the legal profession in that country. It would not, therefore, be in accordance with the Board's duty to review the exercise of its discretion by the Court of Appeal.

Judgment of the Sierra Leone and the Gambia Court of Appeal affirmed.

The following cases in addition to those referred to in the judgment were cited in argument:

Fugah v. Tamakloe [1938] 4 W.A.C.A. 172;

Bhandari v. Advocates Committee [1956] 1 W.L.R. 1442; [1956] 3 All E.R. 742, P.C.

APPEAL (No. 3 of 1962) from a judgment of the Sierra Leone and the Gambia Court of Appeal (Ames P., Benka-Coker C.J. of Sierra Leone and Marke J., Sierra Leone) (April 4, 1961) dismissing an application for an order to restore an appeal from a decision of the Supreme Court of Sierra Leone (October 12, 1960) which had been dismissed on the ground of failure by the appellant to fulfil punctually some of the conditions of appeal laid down by the acting registrar of the Court of Appeal. The decision of the Supreme Court, which was made under the Legal Practitioners (Disciplinary Committee) Ordinance, imposed penalties on the appellant for alleged professional misconduct. The application to restore the appeal was made under rule 23 (3) of the West African Court of Appeal Rules, which gives the court power "for good and sufficient cause" to order that an appeal dismissed on such a ground as aforesaid be restored.

The facts appear from the judgment of the Judicial Committee.

1963. October 8, 9 and 10. *Ralph Milner* for the appellant.

Joseph Dean for the respondent.

1963. November 18. The judgment of their Lordships was delivered by LORD EVERSHED. The appellant before the Board in this case is a legal

practitioner, that is to say, a member of the Bar and a solicitor of the Supreme Court of Sierra Leone. The appeal is from a decision of the Sierra Leone and the Gambia Court of Appeal dated April 4, 1961, whereby that court refused to restore an earlier appeal on the part of the appellant (which had been dismissed on March 21, 1961) from an order of the Supreme Court of Sierra Leone dated October 12, 1960.

The order last mentioned had been made upon three charges of professional misconduct preferred against the appellant as a legal practitioner; and by the order the appellant had been required to pay a fine of £10 and had been suspended from practice as a legal practitioner for three months.

Having regard to the view which the Board had taken upon the appeal, in light of what appears to their Lordships to be the duty of the Board in a case where it is of the essence of the appellant's case that the Court of Appeal had wrongly exercised a discretion, it is not necessary to go at length into the nature of the charges of unprofessional conduct or into the circumstances from which they arose; and not the less so since no argument was in fact addressed to the Board to the effect that the decision of the Supreme Court upon the charges was unjustifiable in any case. Suffice it then to say that the charges were in relation to the conduct of the appellant when he had been instructed to act on behalf of one Christopher Alphonso Hollist in a claim arising out of a motor accident, which claim was ultimately settled (according to the instruction of Hollist) by payment to him or his representatives of the sum of £110, plus £26. 5s. 0d. in respect of costs. At the material time the appellant was acting in the place of another and a senior legal practitioner, one Berthan Macaulay, who was absent from Sierra Leone at the time when the instructions were given to the appellant and when the action in question came before the court and was settled. The appellant was charged with unprofessional conduct and Mr. Berthan Macaulay was also similarly charged at the same time. The charges rested upon complaints made by Hollist, the main complaint relating to the retention out of the total sum above-mentioned of £136 5s. 0d., received by way of settlement, of £58 5s. 10d. in respect of alleged fees and disbursements. In respect of this retention, Mr. Macaulay was charged with having improperly retained such sum "as solicitor" for Hollist, and the appellant was charged with concurring with Mr. Macaulay to improperly retain the sum of £58 5s. 10d. out of the sum of "£136 5s. 0d. received by him . . ." The appellant was also charged with having failed to give a proper receipt in accordance with the Legal Practitioners' Ordinance for Sierra Leone for a sum of £10 paid to him (as admittedly it was) on March 19, 1960, as counsel's fee by Hollist and for having later (namely, on April 29, 1960) issued or caused to be issued a receipt back-dated to March 19 for the same sum as "fee for disbursements."

It is necessary to refer briefly to the relevant Ordinances of Sierra Leone in order to make clear how cases of complaints of professional misconduct are dealt with and how this matter came eventually before the Court of Appeal for Sierra Leone and Gambia. By the Legal Practitioners (Disciplinary Committee) Ordinance of Sierra Leone, a committee consisting of the Attorney-General and the Solicitor-General as ex-officio members together with three practising members of the local Bar has the duty laid upon it of investigating any complaint of professional misconduct on the part of a legal practitioner. By section 20 of the Ordinance the committee (if satisfied that the charge is well founded) has to make a report to the Supreme Court supplying to the court at the same time a note of the

evidence given and any documents produced. It is then the duty of the Supreme Court itself to hear the matter.

In the present case, the Disciplinary Committee reported to the Supreme Court, and before that court both Mr. Macaulay and the appellant were represented by counsel and the Acting Attorney-General appeared for the Disciplinary Committee. The Supreme Court is, by the Ordinance, empowered, if it thinks the charges made out, to suspend from practice the practitioner against whom the complaint has been made; but (by section 27 of the Ordinance) a decision of the Supreme Court upon such a matter is appealable to the Court of Appeal in the same way as a decision of the Supreme Court is appealable in an ordinary civil suit.

As regards the fine imposed upon the appellant it is, by what is now section 14 of the Legal Practitioner's Ordinance, the obligation of a legal practitioner to give a receipt for any fees or other sums received and to keep a counterfoil receipt book for such purpose; and it is further provided by that Ordinance that failure to comply with section 14 renders a practitioner liable to a fine. As already indicated, the Supreme Court by its order of October 12, 1960, imposed a fine upon the appellant in respect of his failure to give a receipt on March 19 and further suspended him from practice for three months upon both the other charges made against him, such periods, however, to run concurrently. By the same order the Supreme Court also found the charges against Mr. Macaulay to have been made out and suspended him from practice for 12 months.

Their Lordships do not forget that the order of suspension made against Mr. Macaulay was upon the hearing of his appeal subsequently discharged on the ground that Mr. Macaulay never in fact acted as a solicitor for Hollist—the appellant having, as already noted, in the absence of Mr. Macaulay carried on professional business for him. It was the appellant and not Mr. Macaulay who was originally instructed by Hollist and who subsequently appeared for him when his case was settled. The Board therefore ventures to note that the reversal of the order made against Mr. Macaulay on the ground stated does not by any means necessarily involve (nor was it so argued) that the charge against the appellant in respect of the receipt and retention of the sum of £58 5s. 10d. thereby became unsustainable.

On October 31, 1960, the appellant gave notice of appeal together with grounds of his appeal in accordance with rule 12 of the West African Court of Appeal Rules; that date (October 31, 1960) being also the date on which notice of appeal was given by Mr. Macaulay. It is, by rules 16 (4) and 17 of the West African Court of Appeal Rules, provided that an appellant should "within such time as the Registrar directs" deposit with him sums fixed to cover the expense of making up and forwarding the record of appeal and also to cover the payment of any costs which may be ordered to be paid by the appellant, the registrar, as regards the latter sum, being empowered to require security by bond to his satisfaction in lieu of payment of cash. In pursuance of the rules last mentioned, the acting registrar of the Court of Appeal on January 18, 1961, wrote a letter to the appellant sending a copy to the Attorney-General. By that letter the appellant was required to deposit "forthwith" two sums amounting to £21, to "pay in advance" the hearing fee of £4 and a further £1 for the registrar's certificate to the effect that the terms of rules 16 (4) and 17 had been complied with (no precise date for payment being stated in either of the last two cases); and also (again without any stated limitation of time) to deposit £20 in the court to provide for the costs of the appeal or to give security therefore by bond. As was

pointed out in the judgment of the Court of Appeal, which is the subject of the present appeal to the Board, the form of the acting registrar's letter was "undesirable" both because of the absence of time limits in certain of the cases and because the word "forthwith" did not sufficiently indicate the actual time within which the payments should be made. In fact, however, it was not until as late as March 13, 1961, that the appellant paid the several sums for which payment was required, and two days later, on March 15 (which was the date on which the Appeal Court sittings began), he filed a bond to give security for the costs of the appeal as contemplated by the acting registrar's letter. Although, therefore, the use of the word "forthwith" was, as the Court of Appeal pointed out, "undesirable" as lacking in definition. It was thought by the court that payment after so long a period as that which elapsed between January 19 and March 13 could not sensibly be regarded as having been made "forthwith."

The appellant's appeal came on for hearing on March 21, 1961, and the Board's attention was drawn to the fact that of the three judges then composing the court (being the same three judges who composed the court on the further hearing from which the present appeal is made) two had been members of the court which had earlier allowed Mr. Macaulay's appeal.

At this stage it is necessary to set out the terms of rule 23 of the West African Court of Appeal Rules. They are as follows:

"(1) If the appellant has complied with none of the requirements of rules 16 (4) and 17 the Registrar of the Court below shall certify such facts to that Court, which may thereupon order that the appeal be dismissed with or without costs. (2) If the respondent alleges that the appellant has failed to comply with a part of the requirements of rules, 16 (4) or 17 the Court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case may require. (3) An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit."

From the note which the Board has of the argument before the Court of Appeal on March 21, the only question debated appears to have been the fact of the appellant having been so late in complying with the terms of the acting registrar's letter of January 18, 1961. It does not indeed appear from the note that there had in fact been any certificate by the registrar such as indicated in sub-rule (1) of rule 23, and no copy of any such certificate was included in the documents, before their Lordships. Nevertheless, in a further certificate dated March 22, 1961, and signed by the acting registrar, it is stated that the appellant's appeal was dismissed under sub-rule (1) of rule 23. Moreover, in the course of the recorded judgment of Ames P. on April 4, 1961, being the judgment upon the appellant's application to restore his appeal under sub-rule (3) of rule 23 (that is, the judgment from which the appellant now appeals to the Board), it is stated that there was in fact such a certificate.

However that may be, it is quite clear that the appellant did apply under sub-rule (3) of rule 23 that his appeal should be restored and that application as already stated, came before the said three judges who had, on March 21, 1961, dismissed his substantive appeal. Again it seems clear from the note of the argument before their Lordships that no point was taken on the appellant's behalf that his appeal had been wrongly dismissed under

sub-rule (1) of rule 23 on the ground that there had been no such certificate as the sub-rule indicated.

Their Lordships further note that the appellant has not appealed against the first judgment of the Court of Appeal dated March 21, 1961. The present appeal is against the refusal of the court to restore his earlier appeal; but it is, of course, true that if such application were allowed and the original appeal were restored the effect would be that the Court of Appeal's judgment of March 21, 1961, would then cease to be finally effective. Nevertheless, it is quite clear that the present appeal before the Board must be treated as one against the exercise by the Court of Appeal of the discretion conferred upon it by rule 23 of the West African Court of Appeal Rules.

What, then, is the duty of the Board in such a case? Their Lordships were referred to the well-known statement by Atkin L.J. (as he then was) in *Muzwell v. Khan* [1928] 1 K.B. 645; 44 T.L.R. 100, C.A.) of the principle upon which appellate courts in England will review the exercise of a discretionary power by a judge (in the case cited the refusal of the Lord Chief Justice to postpone the hearing of the action); that is to say, when it appears to the appellate court ([1928] 1 K.B. 645) "that the result of an order refusing such an adjournment will be to defeat the rights of the applicant altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties." The principle was accepted as regards English courts by the House of Lords nine years later in *Evans v. Barnham* [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L. in which case Lord Wright expressly adopted in his opinion ([1937] A.C. 473 at p. 487) the statement of Atkin L.J. in the earlier case. Their Lordships were also referred to the judgment of the Board written by Lord Haldane in *Kojo Pon v. Atta Fua* [1927] A.C. 693 P.C. where the Board did review the exercise of a discretionary power by the court of the Gold Coast. Their Lordships will therefore assume that the Board may review an exercise of a discretionary power by a court within the British Commonwealth; but in their Lordships' view the Board will only do so where the question involved is one of real public significance and where the Board is fully satisfied that the exercise of the discretion has effected a substantial injustice to one or other of the parties; and the Board will be most reluctant to review an order made by the Supreme Court of a dominion or colony in regulating its own business.

In the present case, although the form of the acting registrar's letter of January 19, 1961, was not entirely satisfactory, nonetheless it is impossible to say (as Ames P. in the Court of Appeal observed) that the appellant did not fail to comply with its purpose and terms. Rules such as those of the West African Court of Appeal Rules which have been involved in the present case are, after all, necessary for the proper functioning of the appellate court, and it seems to the Board that that court reasonably took the view that it is particularly incumbent upon members of the legal profession (who must well understand the rules and appreciate their necessity) properly to observe them.

Their Lordships do not forget that the Attorney-General did not oppose the appellant's application for the restoration of his appeal—and that fact is, perhaps, the most significant in the appellant's favour. It was also conceded before their Lordships on the Attorney-General's behalf that the order of the Supreme Court, the subject of the present appeal, was somewhat "stringent." On the other hand, it has not been suggested that the appellant did not in fact fail fairly to comply with the terms of the acting

registrar's letter nor has it been suggested that the charges made against the appellant's professional conduct were without any justification. Finally, questions affecting the professional conduct of legal practitioners in Sierra Leone are, in the Board's view, essentially questions for determination by the local courts who must be generally acquainted with the standards, conditions and character of the legal profession in that country. In the result, it has not seemed to their Lordships that the present is a case in which it would be properly in accordance with the Board's duty to review the exercise of its discretion by the Sierra Leone and the Gambia Council of Appeal. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the respondent.

Solicitors: T. L. Wilson & Co.; Hackett, Jones & Co.

OSELE AND OTHERS FOR THEMSELVES AND ON BEHALF
OF THE PEOPLE OF ONICHA-IBABU

APPELLANTS

AND

OLISEDOZIE NWOKELEKE AND OTHERS FOR
THEMSELVES AND ON BEHALF OF THE PEOPLE OF
ISELEGU

RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 Jan. 14

Viscount Radcliffe, Lords Manton of Henryton
and Glyn

Res judicata—Estoppel—Tenant cannot deny landlord's title.

VISCOUNT RADCLIFFE. This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 24th February, 1958, which allowed in part the respondents' appeal from a judgment of Onyeama J. dated the 30th April, 1956, and given in the High Court of Justice, Western Region, Warri Judicial Division.

The action in which these judgments were given was one instituted by the respondents, on behalf of the people of Iselegu, in which they claimed against the appellants as representing the people of Onicha-Ibaba certain relief consisting of a declaration of title to some land called Mbuboagbala, damages for trespass on the land, forfeiture of possession as against three of the appellants, and an injunction against entering the said land without the permission of the Iselegu people. It will be convenient to refer to this action as "the present action" and to the Mbuboagbala land as "the disputed land."

The trial Judge, after hearing the evidence as to title called on behalf of the respondents, dismissed their action with costs. He was not satisfied that they had proved their case. The grounds of his judgment are expressed in the following extract from its concluding passage:

"Before the plaintiffs can get a declaration of title in their favour they must prove acts of ownership numerous and positive enough and of sufficient duration to warrant the inference that they are exclusive owners . . . From the evidence before me all I can say is that both parties are in occupation of some portions of the area in dispute and

farm the area . . . The plaintiffs having failed to discharge to my satisfaction the onus placed on them, I dismiss the claim, with costs assessed at 20 guineas."

This judgment was reversed on the appeal to the Federal Supreme Court to the extent that the respondents were granted a declaration of title to the disputed land, the action was remitted to the Court below for further investigation of their claim to forfeiture, and the appeal was dismissed so far as concerned the claims for trespass and injunction. The ground upon which the Federal Supreme Court reversed the trial Judge on the question of title was that they thought that he had wrongly rejected or refused to be bound by certain findings of fact or conclusions of law which had been arrived at by the Courts in the course of earlier litigation between the same parties. This earlier litigation consisted of two consolidated actions instituted in 1953, in which the appellants had been asking for a declaration of title against the respondents and the respondents had been claiming damages for trespass against some of the appellants. These consolidated actions will be referred to as "the 1953 action."

The appellants have now appealed to this Board on the question of the admissibility and force of the findings made in the 1953 action. The Federal Supreme Court, they say, were wrong in law in allowing these findings to be imported into the present action, whether as constituting estoppel *per rem judicatam* or in any other form. The respondents were not represented to argue their case before the Board. The point itself is a short one, not admitting of any lengthy exposition, and their Lordships, although they have given their critical scrutiny to the views of the Supreme Court, would differ from their conclusion with regret, since they are well aware how difficult it is in many cases to ensure that the application of the rules of estoppel, while admitting a fair ascertainment of the real facts, does not leave determined suitors altogether too free to fight again and again over issues that, in substance, have been decided before.

It is necessary now to turn to the 1953 action and explain what it was about. It was stated by Abbott F.J. in giving the judgment of the Federal Court that it was common ground that "the land and parties concerned in the earlier law suits are the same as those concerned in this appeal." Their Lordships then proceeded to consider the matter on the same basis and they would not feel entitled to adopt another one, even if they saw any good reason for doing so.

The 1953 action accordingly was an action in which the Ibabu people were suing the Iselegu people for a declaration of title to the disputed land and the Iselegu people on the other hand were claiming damages against some Ibabu people for trespass on at any rate part of that land. To take first the hearing of the action in the Supreme Court of the Warri Judicial Division, the presiding Judge was Mbanefo J. On the 10th December, 1953, he delivered his judgment in the consolidated suits, in which, after a detailed review of the evidence called before him, as to tradition, boundaries and user, he ended by saying

"I am satisfied that the land in dispute was farmed extensively by Iselegu people and that if any Ibabu farmed it before this dispute began, he did so with the permission of Iselegu. I find that the plaintiffs' claim in W/16/53 [the Ibabu action] fails and is dismissed with costs and I find for the plaintiffs (Iselegu) in W/18/53 and award £5 damages against each defendant. The plaintiffs in W/18/53 will have an injunction against the defendants."

The Ibabu therefore lost and failed to get a declaration of their title. The Iselegu got damages for trespass. There are however two points that have been stressed on behalf of the appellants as limiting the import of this judgment for the purposes of estoppel. The Iselegu had not counter-claimed, as they might have done, for a declaration of their title, and, as the learned trial Judge observed in the present action, in refusing a declaration to the Ibabu Mbanefo J. had not by inference conferred a title on the Iselegu. Secondly, he had stated explicitly in his judgment that on the evidence before him he could not find that the Iselegu had title. There was a third possible claimant, a tribe known as Umuokpala. "Whether the land," he said, "where Iselegu live belongs to Umuokpala or Iselegu or to both of them I am not prepared to say. The fact is that Iselegu has been on the present site of their town for a long time and I am unable to accept Peter Nwaka's evidence of the boundary between Ibabu and Umuokpala."

The Ibabu parties appealed to the West African Court of Appeal, and judgment in the consolidated suits was delivered on the 15th November, 1954. Their appeal against the dismissal of their action for declaration of title was dismissed. The Court, whose judgment was delivered by De Comarmond, Ag.C.J., held that there was no ground for interfering with the decision of the trial Judge to the effect that the Ibabu had not made out their title. On the other hand, they allowed the appeal against the judgment in trespass against the Ibabu farmers. In the Court's view the Judge's findings regarding the position of the Ibabu farmers on the land in dispute was not consonant with a decision that they were trespassers. He had, apparently, accepted evidence that they were there as tenants of the Iselegu people, farming what parts they occupied with Iselegu permission, and on that basis they could not be treated by the Iselegu as unlawfully on the land and liable to pay damages for trespass.

The point raised by the plaintiffs (the Iselegu) in the present action was that the 1953 action had concluded the issue of title between themselves and the Ibabu. The trial Judge rejected this proposition, holding that the issues before him (as to the Iselegu title) were at large and there was no estoppel operating against the Ibabu. It is not clear to their Lordships from the terms of his judgment just how the Iselegu case was presented to him on this point. It could hardly have been based on the mere dismissal of the Ibabu action in the earlier proceedings, for this by itself would not have shown that the Iselegu had a good title. Neither side might have had what was needed. There was, of course, the cross-action, in which the trial Judge's decision giving damages for trespass against the Ibabu farmers was reversed on appeal. The Court of Appeal's decision on that appeal might well be said to have decided between the two parties that the Ibabu people had been allowed on the disputed land as tenants or at any rate in some permissive capacity by the Iselegu and that they were, as Counsel argued, "estopped from denying their tenancy": but such a decision is not in itself the same thing as an objective decision that the Iselegu are the people who have title to the land.

It seems however to be clear that the Federal Court, in reversing the trial Judge in the present action, accepted the proposition that the 1953 action really involved a decision between the two parties as to the Iselegu title. Their judgment, as has been said, was delivered by Abbott F.J. The Court's view was that the effect of the decision of the West African Court of Appeal in favour of the Ibabu in the trespass action was that they were tenants of the Iselegu. Further, they held, the reversal on appeal of the trial Judge's judgment on that issue "did not wipe out the findings of fact in that suit

but in fact reinforced them." It was on this point that they effectively differed from the view of the trial Judge, who seems to have thought that the success of the Ibabu on the cross-appeal had annulled all adverse findings against them. Dealing then with the evidence in support of the Iselegu claim to have a declaration of title in the present action, the learned Federal Justice proceeded:

" I am in agreement . . . that, in the absence of the evidence provided by the 1953 litigation and had this been the first attempt of either party to obtain a declaration of title to the land the evidence produced by the Iselegus before Onyeama J. might well have failed to discharge the onus lying upon them as claimants to title. But when one takes the 1953 decisions into account the position is greatly changed. Concurrent findings by two Courts, that the Ibabus are tenants of the Iselegus is very cogent evidence indeed of the ownership of the latter. A very large part of the onus is, in my view, discharged by these decisions and such additional evidence as the Iselegus desired to adduce need be little (if anything) more than formal."

The Federal Supreme Court accordingly allowed the Iselegus' appeal so far as concerned the declaration of title, dismissed it in respect of the claim for damages for trespass and injunction, and remitted the case to the Court below for investigation and decision of the forfeiture claim, which had not been fully considered.

It was argued that the Federal Court had illegitimately introduced the evidence in the 1953 action into the evidence in the present action. Their Lordships do not accept this. Despite a possible ambiguity in the language used, they are sure that the Court did not regard the evidence given in the 1953 action before Mbanefo J. as being in itself capable of being imported into and used as evidence in the hearing of the present action by Onyeama J. What the Court must have had in mind was that the judgment or judgments in the earlier action were sufficient to set up an estoppel *per rem judicatam* between these two parties on certain points which, taken with the other evidence, entitled the Iselegu to a declaration of title for which otherwise they would have had insufficient evidence.

Now it is true that Mbanefo J. did not decide in terms that the Iselegu owned the disputed land. But that was because he could not determine what the position was as between them and the Umuokpala people. If an action for a declaration of title as between A and B could ever properly be regarded as an action *in rem*, judgment in which would establish A's title against C and others, there would be force in the appellant's contention that no estoppel as to the Iselegu's title could arise from the 1953 action. In their Lordships' opinion however it would be contrary to all precedent to treat such an action as the 1953 action as an action *in rem*. If so, the position of the Umuokpala is not prejudiced and the present action is simply a dispute between Iselegu and Ibabu as to which of them has title to the land against the other.

From that point of view there is much force in what the Federal Court have said. It was certainly settled in the 1953 action that the Iselegu could not treat as wrongful the presence of Ibabu farmers on their land because, as between those two parties, the Ibabu were there with the status of tenants or licensees of the Iselegu. Their Lordships agree that that finding necessarily implies that the Iselegu possessed the superior ownership, and, since it is the accepted principle that a tenant cannot deny his own landlord's title, they see nothing to object to in the Federal Court's view

that the estoppel, which could be treated as a binding admission for the purposes of the present action, sufficiently supplements the other evidence to justify the Iselegu in getting their declaration of title against the Ibabu.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs (if any) of this appeal.

IKEBIFE IBENEWEKE AND OTHERS APPELLANTS

AND

PETER EGBUNA AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 219

1964 Jan. 23

Viscount Radcliffe,
Lords Guest and Upjohn

Practice—Declaratory judgment—Title to land—Declaration of right—Notwithstanding refusal of consequential reliefs—R.S.C., Ord. 25, r. 5, applicable by statute—Construction—Wide discretionary power—No unqualified rule of practice precluding declaration in absence of some interested persons—R.S.C. Ord. 25, r. 5.

West Africa—Nigeria—Land—Declaration of title—Without consequential reliefs—Discretionary power of court—Statutory applicability of English R.S.C., Ord. 25, r. 5—Construction.

By Orders 25, r. 5 of the English Rules of the Supreme Court (made applicable in the Eastern Region of Nigeria by sections 14 and 15 of the High Court Law, 1956) the court has power to make "binding declarations of right, whether any consequential relief is or could be claimed or not."

The respondents, on behalf of themselves and in a representative capacity on behalf of the Ukwu family, Onitsha, claimed, *inter alia*, a declaration of title to an area of land and consequential reliefs, but the appellants, who by their defence, *inter alia*, set up the title of the Obosi people to the disputed land, denied that they were the persons to represent the Obosi people. The trial judge was of opinion that although the suit was against the appellants in their personal capacity in substance it was the Obosi community who were standing behind the appellants. He held that there was no proof of trespass or of being in possession of any of the appellants who were sued in a personal capacity, and that an injunction would not lie against unlawful interference by them and they could not be evicted, but as they raised in their defence the title of the Obosi people to the land in dispute, and had failed to substantiate it, the respondents, who had proved their title, were entitled to a declaration against the appellants.

Held, that the power under R.S.C. Ord. 25, r. 5, was in wide and general terms and what was conferred was a discretion to be exercised according to the facts of each individual case. Beyond the fact that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there were circumstances that called for their making, there was no legal restriction on the award of a declaration.

Dictum of Lord Sterndale M.R. in *Hanson v. Rodeliffe Urban District Council* [1922] 2 Ch. 490, 507; T.L.R. 667, C.A. considered.

There had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the court. Where, as here, the appellants had

decided to make themselves the champions of the rights of those not represented—the Obosi people—and had fought the case on that basis, and where, as here, the trial judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the judge from making a declaration of title in the respondents' favour.

London Passenger Transport Board v. Moscrop [1942] A.C. 332; 58 T.L.R. 120; [1942] 1 All E.R. 97, H.L.(E), and *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101; 40 T.L.R. 430, C.A. considered.

Order of the Federal Supreme Court of Nigeria affirmed.

The following cases, in addition to those referred to in the judgment, were cited in argument:

Kodilinye v. Anatogu [1955] 1 W.L.R. 231 P.C.;

Adebite v. Lawal [1948] 12 W.A.C.A. 398;

De Lisle v. Union Bank of Scotland [1914] 1 Ch. 22; 30 T.L.R. 72);

Earl of Dysart v. Hammerton & Co. [1914] 1 Ch. 822; 30 T.L.R. 379, C.A.; [1916] 1 A.C. 57; 31 T.L.R. 592, H.L.(E).;

Venables v. Baring Brothers & Co. [1892] 3 Ch. 527;

Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95; [1957] 3 W.L.R. 830; [1957] 3 All E.R. 559, P.C.;

Dyson v. Attorney-General [1912] 1 Ch. 158; 28 T.L.R. 72, C.A.

APPEAL (No. 42 of 1961) from a judgment and order of the Federal Supreme Court of Nigeria (Ademola F.C.J., Abbot F.J. and Hubbard Ag.F.J.) (June 24, 1960) dismissing an appeal from a judgment of the High Court of the Eastern Region of the Federation of Nigeria (Onitsha Judicial Division) (Betuel Ag.J.) (May 16, 1958) whereby a declaration of title to certain land in Onitsha was made in favour of the present respondents (plaintiffs).

The question on this appeal was whether the courts below were right in holding that the respondents were entitled to a declaration of title to the land in question notwithstanding that their claims of other relief, namely, damages for trespass, and injunction and recovery of possession were dismissed.

The facts appeared from the judgment of the Judicial Committee.

1963. December 16, 17. *E. F. N. Gratiaen Q.C.* and *R. K. Handoo* for the appellants.

Alun T. Davies Q.C. and *Ralph Milner* for the respondents.

1964. January 23. The judgment of their Lordships was delivered by VISCOUNT RADCLIFFE. This is an appeal from an order of the Federal Supreme Court of Nigeria, dated June 24, 1960, dismissing an appeal from an order of the High Court, Eastern Region, dated May 16, 1958. The only question raised by the appeal is as to the propriety of the course taken by the trial judge, Betuel Ag.J., in making a declaration of title in favour of the respondents at the conclusion of his hearing of the suit. It is not argued for the appellants that he had no jurisdiction to make such an order, even though, as happened here, he decided that the respondents were not entitled to any other form of relief. It is admitted that he had a discretion whether or not to make the order; what is said is that in making it he exercised his discretion contrary to accepted legal principles. The Federal Court have rejected this argument, and it does not commend itself to their Lordships. In their view the case rests wholly upon its peculiar facts, to which the judge's exercise of his discretion was related, and no identifiable issue of legal principle is involved in it. That being so, they will deliver their opinion without elaboration.

The facts are as follows. The respondents (there has been some substitution of parties owing to death) were the plaintiffs in the suit and

they sued both on behalf of themselves and in a representative capacity on behalf of "the Ukwá Family of Umuasele, Onitsha." Originally they joined 16 persons as defendants, stating in paragraph 2 of their statement of claim that these persons were natives "of Obosi village and were sued on behalf of themselves and as representing the people of Obosi village." Subsequently the names of four of these defendants were struck out, as deceased, and no substitution of new names was made. On the other hand, on the plaintiff's application, five more persons were added as co-defendants before the hearing of the suit. These persons were joined in their personal capacity only, the plaintiffs' motion to sue them as representing "the people of Obosi town" being rejected by the court (Savage Ag.J.) on the ground that they had not been authorised by the people of Obosi to defend on their behalf and, failing such authorisation, the court could not admit them to the suit in any representative capacity.

The statement of claim disclosed a dispute as to the title of an area of land which can be called "the disputed land." It and the reply set out a number of allegations, including decisions in other suits, which were said to establish the title of the Ukwá family and to disprove the title of the Obosi people. It was then pleaded that the Obosi people had recently entered on the disputed land by force and violence, had begun to farm the land, to put up temporary structures and to interfere with the plaintiffs' tenants of the land. The acts of the defendants "and other Obosi people," it was said, had deprived the plaintiffs of the benefit of exclusive user of their property. The relief claimed was a declaration of title to the disputed land, damages for trespass, an injunction against unlawful interference, and recovery of possession.

The defendants filed a defence and a further defence. These documents contained a large number of pleas and allegations, but it is sufficient to notice that (1) the defendants denied that they were the persons to represent the Obosi people, a Chief Kodilinye being, according to them, the proper person for this purpose; (2) they denied the plaintiff's title as claimed and put them to strict proof of it; (3) they set up the title of the Obosi people to the land in dispute and claimed that that people had right of ownership. Although paragraphs 13 to 19 of the defence, which traced the origins and history of the alleged Obosi title, were withdrawn with the leave of the court during the hearing of the suit, there is no doubt that enough remained on the pleadings to show that the defendants were actively supporting the Obosi title. Indeed, the defendants' counsel, when applying for leave to withdraw paragraphs 13 to 19, stated that their real defence rested on paragraph 3 and 4 of the further defence, pleas which asserted that the Obosi people had a long-established right to occupy and farm the disputed land.

The suit went for trial in this state of affairs and is stated to have occupied 20 days, though not full days, in hearing. It would have been more satisfactory, having regard to the issue of representation raised by the pleadings and to the fact that the plaintiffs were seeking relief against the Obosi community to have determined as a preliminary point whether the plaintiffs had brought the right parties before the court to achieve their purpose. However, this was not done. Evidence was called on both sides. It is sufficient to notice two things in connection with the hearing. First, it has not been suggested in argument that the evidence for the plaintiffs was insufficient to support a declaration of their title to the disputed land, given the presence of defendants against whom such a declaration could properly be made. Secondly, the defendants' evidence did include some matter in

support of the alleged Obosi title.

The trial judge gave his judgment on May 16, 1958. So far as concerned trespass, he held that not one of the defendants had been shown to have farmed or trespassed or built houses on the disputed land or been in possession of it. The trespass that was proved, he found, was "community trespass." But then he could not treat the defendants as representing that community: most of them, he thought, were not of the standing that would have made it likely that they would have been chosen for this purpose, although three of the more recently joined ones, who were members of the Obosi Land Council, might well have been selected for representation. In fact, however, they had not been, and the judgment proceeded as follows:

"The defendants deny that they have any authority to do so or do represent the Obosi community, they claim that Chief Kodilinye was alive when proceedings were instituted and should have been sued as representing the community. The plaintiffs say that is false, that he was dead at the time, and that the defence is *mala fide*, as it enables the Obosi community by availing themselves of a procedural subterfuge, on the one hand, to allow the defendants to deny their representative capacity, and on the other hand to deny the plaintiffs' title and assert the Obosi title to the land without incurring the consequences of defending the suit communally. It is reasonably clear that the Obosi community are aware of this suit and its implications, and are supporting the defendants and defending the suit under cover of the non-representative character of the defendants.

The form of action is a suit against the defendants in their personal capacity, but in substance it is the Obosi community who, standing behind the defendants, will accept, if it comes, a decision in their favour, but if it goes against them will say that it is not binding on the community (*Ezeaka v. Obasogwu* [1952] 14 W.A.C.A. 178; *Nana Ofori Atta II v. Nana Abu Bonsra II* [1958] A.C. 95; [1937] 3 W.L.R. 830; [1957] 3 All E.R. 559, P.C.).

Nonetheless I do not think that the authorities as they stand go as far as to permit me to regard the defendants as being sued in their representative capacity so as to permit me to grant the remedies prayed for against them as a community."

After a further reference to the attitude of the Obosi community, "In this case the defence of title of the Obosi community is not supported by any evidence of tradition . . . As the community hides behind the defendants in their personal capacity, so also they shift their defence in the course of the trial . . . treating this litigation as a game of chess in order to preserve at whatever cost interest in the land in dispute," the judge made a detailed survey of the evidence and then concluded in the following terms:

"In Exhibit 75, Ademola J. as he then was, expressed strong views on the attitude of the Obosi community. I have come to the same conclusion. The Obosi community have not only farmed on the land in dispute without permission, but since this series of litigation started and since this case was begun, have erected buildings on the land, e.g. Mr John says he saw no buildings on the land when he surveyed it, there are buildings there now and have been for some time since the survey.

The Obosi community are flooding the land with their people and putting tenants on it, and building on it, because of course they do not

recognise the Onitsha family's title, and will take any action in order to retain some interest in the land and be in a position to plead, if necessary, the hardship of being evicted.

In this case there is no proof of trespass or of being in possession by any of the defendants who are sued in a personal capacity but as they raise in their defence the title of the Obosi community to the land in dispute, and have failed to substantiate it, I am entitled, I think, to give the plaintiffs, who have proved their title, a declaration of title against them.

As they are not individual trespassers and deny any intention to trespass, I do not think that any injunction would or should lie; and, as they are not in possession as individuals they cannot be evicted.

In so far as the triangular portion of the land is Crown land, I grant a declaration of the title against the remaining defendants, *i.e.* all those not struck out of the case, of the portion of land called Nkitaku, Akpriku and Okpoko, as shown in Exhibit 5, with the exception of the small triangular portion shown to be Crown land."

Did the judge violate any legal principle in thus disposing of the suit? Generally speaking, the rules of law and practice that he had to follow were those "for the time being observed in England in the High Court of Justice" (High Court Law 1956, ss. 14 and 15). These rules include the power under Order 25, r. 5 of the Rules of the Supreme Court which enables the court to make "binding declarations of right, whether any consequential relief is or could be claimed or not." Much has been said in various reported judgments about the nature of the power thus vested in the court, but none of these observations detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case.

The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised "sparingly," with "great care and jealousy," with "extreme caution," with "the utmost caution." These are indeed counsels of moderation, even though as Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration. "In my opinion," said Lord Sterndale M.R. in *Hanson v. Radcliffe U.D.C.* [1922] 2 Ch. 490 of p. 507; 38 T.L.R. 667, C.A. "under Order 25, r. 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide."

The circumstances in which the present declaration was made were certainly unusual. It was a declaration of title in favour of plaintiffs against defendants who, until the suit was instituted, had apparently done nothing to dispute that title. Such persons would not, *prima facie*, be "proper

contradictors" to use the phrase employed by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 A.C. 438; 37 T.L.R. 919, H.L.(E), in that they would not appear to have any true interest to oppose the declaration sought. But then, if that were really so, why did they put the plaintiffs to the proof of their title and defend the suit on the basis that they had none? The trial judge thought that they did this because they were being used as what are sometimes called "front men" for the Obosi community as a whole; and if he, in charge of the proceedings and aided by local knowledge, formed the impression that this was so, it is not for an appellate court, Federal Court of Appeal or this Board, to act upon any different view of the situation.

Again, if the defendants were not capable of representing the Obosi community as such, it was an exceptional action to make a declaration against them in the absence of someone who could represent the community upon a matter of title in which the community itself was primarily interested. The appellants have, naturally, dwelt upon this circumstance as showing that no declaration at all should have been made. It may certainly be conceded to them that generally speaking, a court is not disposed to make declarations of right about matters of law when it is apparent that the declaration asked for concerns other interested parties who are not presently before the court. Where the judgment is *inter partes*, as most judgments are, persons not formally before the court will not be bound in law by such a declaration, but it is inconvenient and, sometimes, embarrassing for them to have such declarations pronounced in their absence. In England any difficulty of this kind can normally be avoided through the exercise of the power which the court possesses to make representation orders affecting the interests of classes of persons, even though some of them have no actual representation. In Nigeria the court can make such orders only where the person nominated has in fact been authorised for that purpose by the persons interested. This difference between the two systems could warrant some difference in their practice and lead to a rather freer use of the powers of the court in Nigeria than in England. However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court, see *London Passenger Transport Board v. Moscrop* [1942] A.C. 332 at p. 345; 58 T.L.R. 120; [1942] 1 All E.R. 97, H.L.(E); ("except in very special circumstances") *New York Life Assurance v. Public Trustee* [1924] 2 Ch. 101; 40 T.L.R. 430, C.A. Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is in their Lordships' opinion, no principle of law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs Solicitors: *T. L. Wilson & Co.; Rexworthy, Bonser & Simms.*

ABUDU GBADAMOSI IJALE

APPELLANT

AND

B. A. SHONIBARE

RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 Feb. 25

Viscount Radcliffe, Lords Evershed
and Upjohn

Contract—Issue of fact—Whether money advanced—Credibility of witnesses—Failure of judge to review evidence in detail.

The sole issue in the action was whether the sum of £1,500 was paid to the respondent as an advance for the purchase of produce in the future or was in payment for produce already supplied. This was purely a question of fact, and the learned trial Judge preferring the evidence of the appellant found that the respondent received the sum of £1,500 by way of advance to himself and his co-defendants for the purchase of produce in the future, and therefore gave judgment in favour of the appellant against the respondent for £1,500. The respondent appealed to the Federal Supreme Court, who reversed the decision of the trial Judge on the ground that he had not properly directed his mind to some of the evidence.

Held: When there is complete conflict of evidence on an issue of primary fact such as the existence of a ledger, where the proper conclusion can only be reached after estimating the credibility of witnesses on oath, a trial Judge is not to be criticised for a failure to review the evidence in detail and he may properly only state his conclusion of fact.

LORD UPJOHN. This is an appeal from the decree dated 25th July, 1960, of the Federal Supreme Court of Nigeria which allowed the appeal of the first defendant, the respondent before the Board, from the judgment of Dickson J. on the 23rd April, 1959, in the High Court of Lagos who had entered judgment for the plaintiff (the appellant before the Board) for £1,500 against the respondent.

The action relates to a business transaction as long ago as the month of February 1952. The appellant was a produce buyer for A. G. Leventis and Company, and, as the learned trial judge found, there was no doubt that he from time to time had transactions with each of the defendants, in selling produce to him.

On 22nd February, 1952, the appellant paid to the first defendant (the respondent) the sum of £1,500 and the respondent wrote out and signed a receipt in these terms " I received £1,000 myself and Y. L. Goodluck; also £500 for S. O. Hassan to-day, 22nd February, 1952."

This payment and receipt was always admitted by the respondent.

Goodluck and Hassan were respectively the second and third defendants, but the learned judge held that on the evidence it was a matter of conjecture whether either of them received any monies from the respondent and he dismissed the action as against them. From that part of the judgment there has been no appeal.

The sole issue in the action was whether this sum of £1,500 was paid to the respondent as an advance for the purchase of produce in the future or was in payment of produce already supplied. This was purely a question of fact, though upon the evidence extremely controversial; and the learned trial judge, preferring the evidence of the appellant, found that the

respondent received the sum of £1,500 by way of advance to himself and his co-defendants for the purchase of produce in the future, and therefore gave judgment in favour of the appellant against the respondent for £1,500.

The respondent appealed to the Federal Supreme Court who reversed the decision of the trial judge on the ground that he had not properly directed his mind to some of the evidence. Accordingly the appeal was allowed and the appellant's action was dismissed with costs.

There were many issues of fact before the trial judge but only one relevant to this appeal namely an important issue as to the existence of a ledger or produce book alleged to belong to the appellant which the respondent said, would contain entries relating to the transaction and would establish his case. The appellant denied the existence of any such book and the trial judge decided this issue in his favour. The Federal Supreme Court differed from the trial judge fundamentally in holding that this ledger or produce book must be in existence. Therefore it followed, as the appellant had not produced it, that the inference must be drawn that its production would prove unfavourable to him. On this ground they allowed the appeal.

In these circumstances some review of the evidence by their Lordships is necessary but they propose only to review the pleadings and evidence relating to this question and in no wise to cover the many other matters which were in controversy before the trial judge, but did not arise on the appeal before the Federal Supreme Court or before their Lordships.

The appellant's case relied naturally on the receipt of the £1,500 (the terms of which have already been stated), and an allegation that the payment was in respect of an advance for future purchases. The amended defence of the respondent, however, among other defences contained this averment in paragraph 8: "The defendant states that the whole transactions between him and the plaintiff are contained in the latter's produce buying books and ledgers which had always remained in his (plaintiff's) possession."

The hearing occupied a number of days over a long period of time. In October, 1958, the appellant gave evidence and he produced the receipt as Exhibit A which was pasted into an account book Exhibit B. He also produced an account book Exhibit D. These books, together with Exhibit E later mentioned, have been produced to their Lordships and it is fair to say that neither Exhibit B nor D bear any resemblance to what is ordinarily understood by the use of the word "Ledger."

The appellant was cross-examined and swore that Exhibits B and D were the only books kept by him in his business, and that he had no other ledger book except B. During the course of his cross-examination it is quite plain from the following extract of the judge's note of the evidence that he was suspicious of the appellant's story: "I wrote down the advances made to the first defendant in the ledger (now he says he wrote down the advances on a slip of paper) and when the account closed would tear it out from the file and give it to the first defendant."

Then the appellant's clerk, Ambali Jaji, gave evidence partly in October 1958 and partly at an adjourned hearing in January 1959 which in general supported the appellant's story. He kept the books as it was his duty to do and gave evidence about that. During a lengthy cross-examination as to his method of keeping books a ledger Exhibit E admittedly belonging to the appellant was put to him by counsel for the third defendant. This ledger appeared to cover the material period but there was no trace of the transaction sued upon. The witness said that all the entries in the book were in his handwriting and in answer to the learned judge explained that this

ledger had just been started. He further stated that he had made no entry relating to the alleged advance of £500 to the third defendant in 1952 as he had not checked that account.

The case was further adjourned and in February 1959 the respondent gave evidence to the effect that there were ledgers and account books kept by the appellant other than those that had been disclosed. He stated that he had seen these books and from time to time had in accordance with the normal practice signed entries in them. Immediately after that evidence one Ayanbanjo, who had been the appellant's clerk at the relevant period in 1952, was called on the respondent's behalf. His evidence was to the effect that there was in use at the material time a ledger which the appellant had not produced. The second and third defendants then gave evidence tending to support the view that the appellant had a ledger which should have contained entries relating to the transaction now under appeal.

In addition there was some evidence before the court as to the books of account kept by such companies or firms as Leventis, John Holt and United Africa Company.

At the conclusion of the evidence counsel for the second and third defendants addressed the learned judge and quite properly put in the forefront of his argument the failure of the appellant to produce the relevant ledger or produce books. The judge's note of his argument reads: "Plaintiff has kept the real ledger out of the way" and later, "When the party is in possession of a document and fails to produce, it is presumed against him."

Counsel for the respondent following, according to the judge's note, submitted: "There is a book which customers signed every month. It has not been produced; suppressed."

The learned judge delivered a reversed judgment on 23rd April, 1959. He dealt in great detail with matters which do not concern their Lordships in this appeal, save that he stated: "I have approached the consideration of this case with anxiety and much concern in order to ascertain in so far as I can where is the truth. There has been lying by everyone who gave evidence" and a little later "The plaintiff appears to be slightly literate and does not impress me as a shrewd business man."

He then dealt with the question of the appellant's books of account and said:

"It has been shewn that as a rule when advances are made to produce buyers by the defendant they are recorded in a book like Exhibit B; the record taking the form of a receipt which is signed by the buying agent receiving the loan. It has also been shewn that it is the system of the plaintiff to enter the loans from Exhibit B into a ledger and when this is done the folio of the ledger is noted against the appropriate receipt in Exhibit B. Comment has been made as to the practice of keeping books amongst produce buyers and it has been suggested as the plaintiff has not followed the recognised practice his claim against the defendants cannot succeed.

In the first place, I should think that a man is entitled to keep his books as he pleases and is not bound to follow the practice of others in every detail. Standards and methods of keeping books vary with the educational standard and may be culture of the proprietor of a business. The system adopted by Messrs. John Holt or U.A.C. would not necessarily be the criterion for the less articulate.

In the instant case, it is alleged by the plaintiff that he made three

advances in all to the 1st defendant at his (the plaintiff's) house; the receipt of which in each case was acknowledged by the 1st defendant on a slip of paper. The plaintiff says when two repayments were made he returned the respective receipts to the 1st defendant. The third receipt is the subject matter of this case. He gives as his reason for adopting this method that the transactions took place at his home as it were after office hours. In my view there is nothing wrong with that. Is it being seriously contested that because a receipt is not made out in an office and in a particular book, it is not effective? Indeed, the 1st defendant is saying that it is effective in so far as it acknowledges payment for money made to him for produce supplied. Neither is the receipt in question nor the two others recorded in Exhibit B or the ledger. The fact that Exhibit A has not been recorded in either book would not prohibit the plaintiff from recovering on it."

And then omitting an immaterial paragraph, the learned judge continued:

"The issue to my mind is this: was the receipt Exhibit A an acknowledgment of monies received by the 1st defendant for himself and his co-defendants as advances and not in payment of produce? The point has been made that the ledger Exhibit E is not the real ledger of the plaintiff. It appears that Exhibit E has been recently posted from Exhibit B; but the fact remains that Exhibit B is not of recent origin. The question of the ledger has only been brought in as a 'red herring' across the trail.

It is my judgment that the 1st defendant received the sum of £1,500 as set out in Exhibit A as advances to himself and his co-defendants. I believe the plaintiff on this aspect. The defence of the 1st defendant is a subtle attempt to deprive the plaintiff of his money."

So he gave judgment for the appellant.

The respondent appealed, and the only ground of appeal with which the Federal Supreme Court of Nigeria dealt was in these terms: "The learned trial judge erred in law by failing to consider that the failure or refusal of the plaintiff to produce the Ledger Book or buying book (showing the indebtedness of the first defendant to him as claimed) which he admitted was in existence, was in evidence that he was hiding material fact which was against his case."

Their Lordships note that this paragraph seems to be inaccurate in that so far as the record is concerned there was no admission, apart from a certain hesitation on the part of the appellant in cross-examination which has been quoted already, that any ledger or buying book was in existence other than those produced. The Federal Supreme Court in which the leading judgment was delivered by Sir Adetokunbo Ademola C.J. with whom Hubbard Ag.F.J. and Taylor Ag.F.J. agreed, pointed out that a subpoena had been served upon the appellant to produce the ledger or produce book. In his judgment the learned Chief Justice examined the evidence relative to this matter and very properly referred to the very late production of Exhibit E. He also mentioned the fact that the learned judge had pressed for production of the ledger which was not forthcoming. He then quoted the evidence of Ayanbanjo the former clerk of the appellant to which reference has been made. Then the learned Chief Justice stated "In his judgment the learned trial judge gave no consideration to all this evidence about the ledger or buying book." He then referred to an entirely different transaction which it is true tended to throw suspicion upon the evidence of

the appellant. Then the learned Chief Justice referred to the following observations of Lord Somervell in the House of Lords in *Benmax v. Austin Motorcar Co.* [1955] A.C. 370 at p. 377:

“ On the other hand there are sentences in his judgment which indicate very probably but not certainly that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness which he has relied on, or his general conclusions . . . ”

He continued:

“ The learned Judge in the Court below in the present appeal having found that the parties to the action told lies, he did not, it appears advert his mind to whether the plaintiff’s lies related to the existence or otherwise of the ledger or produce book which was the basis of the defence. Had he directed his mind to it, he would undoubtedly have asked himself why such document was not produced by the plaintiff. ”

Continuing a little later, the learned Chief Justice said:

“ If there was in fact a ledger showing the transactions between the parties, as all the evidence pointed to, and it was not produced by the plaintiff/respondent, the only conclusion to be inferred is that the production of it would be unfavourable to him and this would have materially affected the outcome of the case. It appears to me that the learned Judge was on the facts, by virtue of section 148 (d) of the Evidence Ordinance, entitled to draw unfavourable conclusions against the plaintiff/respondent had he addressed his mind to the fact that he kept away the ledger or produce book which clearly from the whole evidence must be in existence. ”

Their Lordships agree that the absence of any ledger referring to the transaction was a highly suspicious circumstance. It is clear that the learned trial judge was at one stage himself highly suspicious of the appellant’s story and he might well have taken the view that a material ledger had been suppressed; on that footing he would most certainly have been entitled both at common law and under section 148 (d) of the Evidence Ordinance to draw unfavourable conclusions against the respondent and have dismissed the action.

The question however whether the ledger was being suppressed, that is fraudulently, as there was no suggestion that it had been lost, was essentially a matter for the trial judge, especially where he has found that “ there has been lying by everyone who gave evidence. ”

Thus the sole question for their Lordships is whether the Federal Supreme Court was justified in taking the view that the learned trial judge gave no consideration to the evidence about the ledger or buying book and that he did not advert his mind to whether the appellant’s lies related to the existence or non-existence of that book. Their Lordships regret that upon this question they have not had the assistance of counsel for the respondent, and their Lordships have given most anxious consideration to it.

Their Lordships have set out at some length the pleadings, evidence and arguments to show that this question of the existence or non-existence of the ledger was at all stages in the forefront of the issues between the parties and could hardly have been overlooked by the trial judge. In his judgment the judge dealt with the appellant’s book-keeping methods and with the point that Exhibit E was not the real ledger of the appellant. Thus whatever his

earlier suspicions of the appellant's evidence he reached the ultimate conclusion in his judgment (as he was entitled to do after seeing all the witnesses) that the appellant was not of a high standard of education and kept but few books but that he should be acquitted of fraud in this particular respect, though he may have lied in other ways.

It is quite true that the learned trial judge did not review the oral evidence as to the existence of an unproduced ledger, much of it no doubt supporting the view that there was such a ledger, but in the end he reached the conclusion that the question of the ledger had been brought in as a "red herring;" in other words he accepted the appellant's story as to the non-existence of another ledger and disbelieved the evidence given by and on behalf of the respondent. Their Lordships cannot agree that it is proper to infer from the language used by the learned trial judge that he overlooked the important evidence of Ayanbanjo which was given much later in the trial than that of the appellant and his clerk. Indeed when there is a complete conflict of evidence on an issue of primary fact such as the existence of a ledger where the proper conclusion can only be reached after estimating the credibility of the witnesses on oath a trial judge is not to be criticised for a failure to review the evidence in detail and he may properly only state his conclusion of fact. This he did in the sentence about the "red herring."

Consequently with regret their Lordships are unable to agree with the Federal Supreme Court that the proper conclusion is that the trial judge either overlooked any oral evidence or failed to bring his mind to bear upon this question of the alleged suppression of the ledger.

On that footing their Lordships do not think in a matter such as this involving issues of credibility on primary questions of fact that the Federal Supreme Court would dissent from the view that there would be no proper ground for disturbing the finding of the trial judge. In the result their Lordships are unable to agree with the Federal Supreme Court that another ledger was in existence and feel bound to accept the finding of the trial judge who reached the conclusion, surprising perhaps to those who have not had the opportunity of observing the attitude and demeanour of the witnesses on this acute controversy of fact, that he believed the appellant that the sum of £1,500 was paid by way of advance to the respondent.

For these reasons their Lordships will humbly advise Her Majesty that the appeal of the appellant be allowed, the Judgment of the Federal Supreme Court of 25th July, 1960, reversed with costs to the appellant and the judgment of Dickson J. restored. The respondent must pay the costs of this appeal.

JOHN KHALIL KHAWAM AND COMPANY
(TRADING AS JOHN KHALIL KHAWAM)

APPELLANT

AND

K. CHELLARAM & SONS (NIG.) LIMITED

RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 711

Nigeria—Patent—Design—Textile piece goods—Registration—Infringement—Damages—Innocent infringement, proof of—Onus—United Kingdom Designs (Protection) Ordinance, Laws of the Federation of Nigeria and Lagos, 1958 Rev., c. 204, s. 3—Registered Designs Act, 1949 (12, 13, & 14 Geo. 6, c. 88), s. 9 (1).

Patent—Design—Innocent infringement—Textile piece goods—Infringement of registered design—Damages—Innocent infringement, proof of—Onus—Nigeria.

Damages—Appeal on quantum—Principles applicable—Privy Council Infringement of copyright—Design.

By section 3 of the United Kingdom Designs (Protection) Ordinance, c. 204 of the Laws of Nigeria, 1958, Rev.: "The registered proprietor of a design shall not be entitled to recover any damages in respect of any infringement of copyright in a design from any defendant who proves that at the date of the infringement he was not aware nor had any reasonable means of making himself aware of the existence of the registration of the design . . ." (The corresponding provisions of the Registered Designs Act, 1949, appear in s. 9(1) of that Act.)

The appellant was the proprietor of a design for textile piece goods registered in the Manchester branch of the Design Registry of the Patent Office. The respondents, who had an office in Manchester, sold in Nigeria, where the appellant also sold his cloth, 500 pieces of cloth of an inferior dye and quality bearing the appellant's design, and at a price substantially lower than that of the appellant. The result was a spectacular fall in the appellant's sales and he had eventually to sell at a loss and finally to close down on those particular goods with a quantity still in hand. On his claim for damages for infringement of his registered design he was awarded £2,000 (increased on appeal to £2,500). He now appealed on the quantum of damages, and the respondents cross-appealed, contending *inter alia*, that they were innocent infringers and entitled to the protection of section 3 of the Ordinance:

Held, (1) that there was no ground for interfering with the quantum of damages.

Principles in *Nance v. British Columbia Electric Railway Co. Ltd.* [1951] A.C. 601, 613; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448 P.C. applied.

(2) That the inference was that the respondents must have known of the phenomenal sale of goods bearing the appellant's design and as a result of the extent of their own sales were put on inquiry as to whether the design was registered. They had an office in Manchester, where the branch of the Design Registry was situated, and failed to make there the necessary investigation which a prudent man of business would have made in the same circumstances and which would have disclosed the existence of the registration. Accordingly, they had failed to prove—and the onus was on them—the defence available under section 3 of the Ordinance.

Judgment and order of the Federal Supreme Court of Nigeria affirmed.

The following cases, in addition to those referred to in the judgment, were cited in argument:

Pneumatic Tyre Co. Ltd. v. Puncture Proof Pneumatic Tyre Co. Ltd. [1898] 15 R.P.C. 405; [1899] 16 R.P.C. 209, C.A.;

A. G. Spalding & Bros. v. A. W. Gamage Ltd. [1918] 35 R.P.C. 101 C.A.;

Juggi Lal-Kamlapat & Juggilal-Kamlapat Mills of Cawnpore v. Swadeshi Co. Ltd. [1928] 46 R.P.C. 74, P.C.;

Aktiebolaget Manus v. R. J. Fullwood & Blanda Ltd. [1954] 71 R.P.C. 243;

P. B. Cow Ltd. v. Cannon Rubber Manufacturers Ltd. [1961] R.P.C. 236;

Leeds Forge Co. Ltd. v. Deighton's Patent Flue Co. Ltd. [1907] 25 R.P.C. 209;

Wilderman v. F. W. Berk & Co. Ltd. [1925] Ch. 116; 41 T.L.R. 50.

APPEAL and cross-appeal (No. 26 of 1961) from a judgment and order of the Federal Supreme Court of Nigeria (Ademola Fed.C.J., Mbanefo C.J. (Eastern Region) and Brett F.J.) (March 8, 1960) dismissing the cross-appeal by the present respondents from a judgment of the High Court of

Lagos (Coker J.) (February 16, 1959) and allowing the present appellant's appeal by increasing the damages awarded from £2,000 to £2,500.

The following facts are taken from the judgment of the Judicial Committee: This was an appeal from a decision of the Federal Supreme Court of Nigeria allowing an appeal from a decision of the High Court of Lagos. The appellant was the registered proprietor of a design for textile piece goods under the Registered Designs Act 1949, as applied to Nigeria by the provisions of the United Kingdom Designs Protection Ordinance (Cap. 204) of Nigeria. The registration of a design under the Act gave to the proprietor the copyright in the design for a period of five years from the date of registration. The copyright could be extended by the registrar upon application for a second and third period of five years each. According to the findings of Coker J., the trial judge, there was an infringement by the respondents of the appellant's design. Coker J. granted an injunction against the respondents from selling or importing any textile piece goods bearing the appellant's design. He also awarded to the appellant £2,000 damages for infringement of the appellant's registered design and ordered the respondents to deliver up to the appellant all cloths of the design in their custody. The Federal Supreme Court of Nigeria dismissed a cross-appeal by the respondents and allowed the appeal by the appellant to the extent of increasing the damages to £2,500.

The only question which came before the Board was the amount of damages to which the appellant was entitled.

The design in question was described in detail by the trial judge and consisted of lines, rosettes, stars, circles and zigzag lines which were reproduced horizontally as many times as the width of the material permitted. The design was registered by the appellant on January 4, 1957, in the Manchester branch of the Design Registry of the Patent Office in Manchester. The cloths bearing the design were manufactured for the appellant in Japan by Goshō Company Ltd. and the first consignment of 1,000 pieces arrived in January, 1957. Between January and December 1957, the appellant imported about 10,000 pieces of 10 yards each and sold them at 50s. a piece. The respondents commenced to sell pieces of inferior cloth bearing the appellant's design in November, 1957. A customer of the appellant complained to him in November, 1957, about the sale of spurious goods by the respondents at £1 18s. a piece and called the appellant a cheat. The respondents' goods were of inferior dye and quality. Between November 18 and 27 they sold 500 pieces in all. Thereafter there was a spectacular fall in the appellant's sale of these pieces of cloth, and he had to reduce the price of a piece which originally had been 50s. to 43s. and later to 34s. At this price he was selling at a loss and ultimately as a result he was unable to repeat his orders for the material and he had at the date of the trial in December, 1958, about 500 pieces of the material left. At 50s. per piece the appellant said he made an average profit of 15s. having paid 35s. for the goods from the manufacturer.

1964. Jan. 28, 29, 30; Feb. 3, *R. G. Lloyd Q.C.* and *S. N. Bernstein* for the appellant.

Raymond Walton Q.C. and *Joseph Dean* for the respondents.

March 2. The judgment of their Lordships was delivered by LORD GUEST, who stated the facts set out above and continued: The appellant's particulars of claim were for £50,000 damages based upon his loss of profit for the life of the design at 15s. per piece. The appellant's counsel did not before the Board contend for this figure, but contended himself with a claim for about £20,000 calculated at the same rate of profit but upon a

more modest basis. Their Lordships have no hesitation in rejecting this extravagant claim. The appellant produced no books to justify such a claim nor any supporting evidence.

His purported rate of profit rested upon his *ipse dixit*. He had not even checked his stock at any stage in the proceedings and consequently no accurate figures were given as to the stock at any given time. It is true that the trial judge found as a fact that cloth of the design had a phenomenal sale and a very good market and that the appellant finally had to close down on these particular goods with 500 pieces left over. While mathematical accuracy is not possible, the burden was on the appellant to prove the damage which he had sustained and there is no evidence in their Lordships' opinion to support a claim of any figure in the region of £20,000. In particular, the appellant produced no evidence to show what might in Nigeria have been the expected life of a design of such a character nor of the relative popularity of this line.

The respondents in their cross appeal submitted that there was no evidence to justify even the figure of £2,000 damages awarded by the trial judge. The principles upon which an appellate court will act in reviewing an award of damages were stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.* [1951] A.C. 601 at p. 613; [1951] 2 T.L.R. 137, [1951] 2 All E.R. 448, P.C.:

“(1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell* [1935] 1 K.B. 354; 51 T.L.R. 127 C.A.) approved by the House of Lords in *Davis v. Powel Duffryn Associated Collieries Ltd.* [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657, H.L.). The last-named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly ‘out of all proportion’.”

Their Lordships are unable to affirm that the courts below either applied a wrong principle of law or that the amount awarded is so inordinately low that it must be a wholly erroneous estimate of the damage. The approach made by Coker J. to the question of damages, subject to one exception, was correct. He took the number of pieces sold by the respondents—500 in all—which but for the respondents' infringement would have been sold by the appellant and he accepted the appellant's evidence of his supply in 1957 being about 10,000 pieces. Upon these figures he awarded a round sum of £2,000 damages in respect of the first five-year period. It is true that he fell into error in failing to consider the two renewals of the period of the copyright of five years each. But this error was corrected by the Federal

Supreme Court when they added £500 to the damages in respect of the last two periods of renewal. The Federal Supreme Court made a more detailed calculation of the figure for the first-five year period upon which they found that the trial judge was justified in his award of £2,000. Here again their Lordships cannot say that the Federal Supreme Court arrived at this figure upon a wrong principle of law or that the award of £500 is inordinately high for the last two five years periods. Owing to the respondents infringement of his design the appellant lost the monopoly value which could have persisted for this latter period of 10 years. In their Lordships' opinion the cross-appeal on damages must therefore fail.

An alternative argument was submitted for the respondents that they were in any event innocent infringers and were entitled to the protection of section 9 of the Registered Designs Act, 1949, or section 3 of the United Kingdom Designs (Protection) Ordinance of Nigeria. Section 9 (1) of the Act of 1949 provides as follows: " 9 (1) In proceedings for the infringement of copyright in a registered design damages shall not be awarded against a defendant who proves that at the date of the infringement he was not aware, and had no reasonable ground for supposing, that the design was registered . . ."

Section 3 of the Ordinance provides as follows: " 3. The registered proprietor of a design shall not be entitled to receive any damages in respect of any infringement of copyright in a design from any defendant who proves that at the date of the infringement he was not aware nor has any reasonable means of making himself aware of the existence of the registration of the design."

Without entering into the history of section 9 of the Act of 1949 their Lordships are satisfied that section 3 of the Ordinance is the relevant section for consideration for the reason that section 2 which applies the 1949 Act to Nigeria, commences with the words " Subject to the provisions of the Ordinance:" this clearly preserves the Ordinance as the ruling provision if there is any inconsistency between the two.

Turning now to the provisions of section 3 of the Ordinance, the respondents have a finding in their favour that they were unaware of the existence of the registration of the design. They however, have concurrent findings in fact in the courts below that they failed to prove that they had no reasonable means of making themselves aware of the existence of the registration of the design. The practice of this Board is not to disturb concurrent findings of fact unless there is a miscarriage of justice or a violation of some principle of law or procedure. The question whether there is evidence on which the courts could arrive at their finding is a question of law (*Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 of p. 521; 62 T.L.R. 549, P.C.). In their Lordships' opinion there was evidence on which the trial judge was entitled to hold that the respondents, on whom was the onus, had failed to prove the defence available to them under section 3. The respondents had an office in Manchester where the branch of the Designs Registry of the Patent Office is situated and, if they had made a search there, they could have discovered the existence of the registration. It may well be that an ordinary individual may be excused from making such a search. But the respondents were traders in Lagos and elsewhere in Nigeria engaged in the selling of textile goods. The only witness from the respondents' firm was Naraindas Ladharam who said he had never seen the appellant's design before the court proceedings and that the design was offered to his firm by Goshō Company in Japan, the firm who manufactured the appellant's cloth. This witness was disbelieved by Coker

J. The only reasonable interference is that the respondents must have known between January and November, 1957, of the phenomenal sale of goods bearing the appellant's design and that no other firm in Lagos was marketing goods of this design. When the respondents put their inferior goods on the market they sold 500 pieces within a matter of 10 days. They were thus put upon their inquiry as to whether the design was registered. As Coker J. put it, the respondents " failed to make the necessary investigation which a prudent man of business in the same circumstances would have made." Their Lordships conclude that the courts below were right in rejecting the respondents' defence of innocent infringement. The cross-appeal on this aspect must also fail.

Their Lordships will therefore humbly advise Her Majesty that the appeal and the cross-appeal be dismissed. The appellant must pay two-thirds of the costs of the appeal.

Solicitors: *Halsey, Lightly & Hemsley; Bell, Brodrick & Gray.*

AMINU AKINDELE AJANI OJORA AND OTHERS . . . APPELLANTS

AND

LASISI AJIBOLA ODUNSI RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 Apr. 7

Lords Evershed, Guest
and Donovan

Constitutional Law—Federal constitution section 158 (4)—Chieftaincy question—Abatement of proceedings on October 1, 1963.

Section 158 (4) of the Constitution of the Federal Republic of Nigeria 1963, reads as follows: " Where immediately before the date of the commencement of the Constitution " (that is on October 1, 1963) " any proceedings on appeal from a decision of the Federal Supreme Court are pending . . . the proceedings . . . shall abate on that date in so far as any question for determination in the relevant proceedings is (a) a chieftaincy question . . . "

Held: The terms of this subsection are perfectly plain and their effect must be that so far as these proceedings involve the question of the validity of the plaintiff's appointment and installation as chief they abated on 1st October, 1963. On the other hand, the question who is entitled to deal with the family property is unaffected by the section even though it may involve the question, what is the effect of the plaintiff's appointment, as distinct from its validity.

LORD EVERSHERD. A reading of the cases of the appellants and of the respondent before their Lordships (to whom they will hereafter respectively refer as the defendants and the plaintiff) upon the face of them appears to show that there were two distinct issues raised before the Board, namely (1) whether the plaintiff had been duly appointed Chief Ojora of the Ojora Idejo Chieftaincy Family and (2) who was now entitled to deal with the Family property. For reasons which will later appear their Lordships are satisfied that under the terms of the Act of the 1st October, 1963, establishing and making provision for the Constitution of the Federal Republic of Nigeria (and section 158 of that Act in particular) it is now not competent for their Lordships to entertain or express a judgment upon the

first of the above questions. It may be added that when the case came before the Federal Supreme Court (which it did in June 1961) it appeared not then to have been disputed on the defendants' part that the plaintiff had in fact been capped and had therefore the title of jchief Ojora. It was not however suggested before the Board on the plaintiff's part that the Board had thereby no jurisdiction to entertain the second question above stated in some form. It was indeed on the plaintiff's part very naturally contended that the order made by the Federal Supreme Court which had the effect of restraining the defendants from any dealings with the Family property and of making them accountable to the plaintiff for anything which they had received from such dealings on their part ought to be affirmed. One of the great difficulties with which, however, the Board has been faced, has been the proper form of this second question—and it may indeed be that, stated as their Lordships have deliberately stated it in very general language, more than one question is in truth involved. In the circumstances, it has seemed necessary for their Lordships to narrate in some detail the history of the present proceedings and the steps taken in them including the nature of the plaintiff's original claim and of the defendants' defences.

The proceedings were commenced by writ of summons dated as long ago as the 30th January, 1956. In the title to the action the plaintiff expressly sued as "Chief Ojora of Lagos for himself and on behalf of the Ojora Chieftaincy." The defendants were sued in their respective individual capacities. The claim upon the writ was as follows:

"The Plaintiffs' [*sic*] claim against the Defendants jointly and severally is for:

1. An injunction restraining the Defendants their servants and/or Agents from selling, leasing and/or alienating any portion of the family lands and properties without the consent of the Plaintiffs. [*sic*]
2. An account of all monies received by the Defendants in respect of family property sold or leased by them.
3. Payment over of all amount found due on the taking of such account to the Plaintiffs [*sic*]."

By his statement of claim the plaintiff alleged that he was the duly capped Chief Ojora of Lagos; that as such Chief he was the accredited representative and trustee of the Family properties; but that the defendants had, in spite of warnings, dealt with and threatened to continue to deal with Family properties. By their defence the defendants denied that the plaintiff was the Chief Ojora, claiming that the first defendant was the head of the Family and president of the Ojora Family Council as created by the Terms of Settlement in another action, Suit No. 11 of 1947; that the first defendant had been installed Chief Ojora "by more than 90 per cent. of the people having the right to elect and install him according to native law and custom and the practice and usage of the Ojora Chieftaincy Family"; and that the plaintiff not being a member of, or recognised by the Chieftaincy Family Council, could not sustain the action. Their Lordships add that after the close of pleadings upon an *ex parte* motion made by the plaintiff in the month of May 1956 an order was made by the High Court (which was not however included in the record before the Board) giving to the plaintiff the right to sue in a representative capacity in the form expressed in the writ. Their Lordships further add that (as they were informed by the learned Counsel before them) a receiver had on 23rd April, 1956, been appointed for the purpose of collecting the rents of the Family properties and that such

receiver was still so acting; and further, that a sum of £7,000 which had been received by the defendants (or one or more of them) upon a lease by them of certain Family property in favour of a body called in the evidence " Total Oil " had been paid into Court and such money still stands in court pending (presumably) directions in regard to it by the court.

The action came on for trial in the High Court of Lagos before Bennett J. nearly three years later mainly in the month of March 1959. As appears from the judgment of the Federal Supreme Court delivered by Sir Lionel Brett the hearing of the evidence took no less than fifteen days in March and July 1959. The arguments appear also to have been of very considerable length and the record before their Lordships includes notes both of the evidence and of the arguments.

At the time of the hearing before Bennett J. and the Federal Supreme Court the Constitution of Nigeria Act had not of course been passed or come into operation; but there appears to have been (and their Lordships deliberately use that language for reasons which are not for present purposes material) in operation an Ordinance of 1948 or an Ordinance replacing it of 1959 which prevented any court in Nigeria from entertaining " any civil cause or matter instituted for the determination of any question relating to the selection, appointment installation . . . of a chief "; but both Bennett J. and the Federal Supreme Court were of opinion that the prohibition contained in such Ordinance or Ordinances did not apply to the present case since the purpose of the suit was to establish who of the contending parties had the right to deal with the property of the Ojora Chieftaincy Family to which the question of the appointment or installation of the plaintiff (or the first defendant) as Chief was but incidental.

It cannot in their Lordships opinion be in doubt that when the action came to be tried the burden, indeed the overwhelming burden, of the evidence (and of the arguments) on each side was in fact directed to the question whether the plaintiff had ever effectively been installed as Chief Ojora. In the course of the arguments before him Bennett J. had indicated what in his view were the issues to be determined by him and in his most careful judgment (containing a full analysis of the evidence of every witness) the learned judge thus formulated those issues: (1) was the plaintiff properly appointed Chief Ojora according to native law and custom? and (2) if he was, is he compelled to administer the affairs in conjunction with the Family Council as constituted by the Terms of Settlement already mentioned? It was the view of the learned Judge that the capping of the plaintiff as Ojora Chief by the Oba of Lagos had been obtained improperly by a very small section of the family and was therefore contrary to native law and custom, and (consequently) void and of no effect. In the view therefore of the learned Judge the plaintiff's action inevitably failed and in the circumstances he regarded it as unnecessary for him to express any view whether the Terms of Settlement already mentioned continued to be in operation although he cited a previous decision of the Federal Supreme Court in 1955 as authority for the view that such Terms of Settlement were in truth still in effective operation.

It is in the circumstances right and pertinent to note first that Bennett J. after attending carefully to all the witnesses whose evidence, as already stated, he summarised in his judgment, came to the clear conclusion that the plaintiff himself and the majority of his witnesses (unlike those called on the defendants' side) had not given truthful evidence; and, second, that the capping of the plaintiff as Chief Ojora had been obtained by a small section of the Family of which 90 per cent. were adverse to the plaintiff and

supporters of the defendants. In this connection it is also made clear by the terms of the judgment of the trial judge and the other papers in the record, that the Ojora Family has unfortunately for many years suffered from serious disunity and that one section of the Family now represented by the plaintiff and formerly represented by the plaintiff's predecessor as Chief, Bakare Faro, has been sharply severed from the rest (and the great majority) of the family. It was by reason of these circumstances that the former action, Suit No. 11 of 1947, had been commenced by the Chief Secretary of the Government as plaintiff against Chief Bakare Faro and another as defendants which action was settled by the Terms of Settlement already mentioned and to which their Lordships must presently refer at greater length.

The conclusion of Bennett J. adverse to the plaintiff was contained in the following passage which their Lordships think is useful to quote in full.

"It has, as I have said earlier, been long established that a family can through its Council or Committee of Elders under the Head of the family, continue to administer its affairs without its White Cap Chieftaincy being filed. *Aromire v. Oresanya*, XIV N.L.R. 116 is a case in point. There Graham Paul J. set that out quite clearly at page 118. There was, I consider, an unseemly haste about this whole affair and the reason is not difficult to find. Ojora lands are booming in value and the Faro faction which supports the Plaintiff has long sought absolute control over them, without success.

I repeat one portion of the Oba's evidence which I have referred to before. He said:

'If the majority of a family do not want a particular Chief they cannot be forced to have him.'

Other witnesses for the Plaintiff agreed with that opinion but unfortunately that is exactly what has been attempted in this case; to force the Ojora Family to have the Plaintiff as their Idejo White Cap Chief against the wishes of the majority, certainly of the leading members of the family.

In my opinion the capping of the Plaintiff was contrary to Native Law and Custom, and therefore void and of no effect, in so far as the administration of the Ojora Family property is concerned. I express no opinion on the Plaintiff's social status as a member of the Oba's Council of Chiefs.

This Court cannot, therefore, give him the relief he seeks."

Against this decision the plaintiff appealed to the Federal Supreme Court of Nigeria, the judgment of which Court Sir Lionel Brett delivered on the 8th June, 1961. At the beginning of his judgment the learned Federal Justice observed that one of the plaintiff's grounds of appeal, namely that the judgment of Bennett J. was against the weight of the evidence, was not argued before the Supreme Court. He continued: "it is possible to consider the points of law involved on the basis of the facts as found by Bennett J. except so far as native law and custom is a question of fact." As already observed the defendants before the Federal Supreme Court admitted that the plaintiff had been capped as Chief Ojora on the instructions of the Oba and was recognised by the Governor-General in 1956 as Chief for the purposes of the Lagos Local Government Law 1953. The learned Federal Justice then, after referring to the Ordinances already mentioned, stated the issue before the Court to be:

- (i) what is the effect of the capping?
- (ii) what is the effect of the recognition by the Governor-General?
- (iii) what is the effect of the settlement (that is the Terms of Settlement in the 1947 proceedings):

and he held that all these questions could be determined by the Court without any contravention of the Ordinances. The judgment then contained the following highly important paragraph.

“ I would go further and say that I do not regard it is necessary in any event to consider the effect of the settlement. If the Appellant is entitled to exercise the usual powers of the Chief or family head in the management of the family property, he is also entitled to the relief he asks for, since it is not pretended that the settlement enables the Respondents, or the family Council less the Chief, to dispose of the family property without the consent of the Chief. If on the other hand, the Appellant is not entitled to exercise any powers of management over the family property then he cannot obtain any relief, whatever the effect of the settlement may be. If this view is correct, the only question which the Court has to decide is whether the Appellant has the usual powers of the Chief or family head.”

The rest of the judgment of the learned Federal Justice may for present purposes be shortly stated. He came to the conclusion, partly upon the authority of two Nigerian cases, and partly as a matter of probability, that if in a case where admittedly one member of a family has been capped as White Capped Chief it is submitted that some other member of the family has the management of the family property it is for the party so submitting clearly to prove his allegation; and that notwithstanding the judgment of Bennett J. the defendants had failed to discharge the onus of proof. In his penultimate paragraph Sir Lionel Brett stated:

“ To summarise, I would hold that on the evidence the Appellant has established his right to the relief he seeks, and that it is unnecessary to express a view on the question whether the settlement is binding on the Appellant. It is to be hoped that the absence of an authoritative decision as to the effect of the settlement will not make further litigation necessary, but a view expressed as an *obiter dictum* would not be an authoritative decision and I think it is wiser not to express such a view.”

The learned Federal Justice however went on to observe that the judgment of the Federal Supreme Court in 1955 which had been cited by Bennett J. was delivered (as was the fact) in proceedings brought when Chief Bakare Faro was still alive, and could not therefore properly be said to cover the situation after Bakare Faro's death which occurred, as their Lordships were informed, at the beginning of the year 1955, but not (at any rate) until after the hearing of the suit in which such judgment was delivered.

The Federal Supreme Court therefore reversed the decision of Bennett J. and granted to the plaintiff all the relief sought by the terms of his writ of summons. There appears in fact from the record to have been no discussion or argument by counsel on the appropriateness or form of the particular relief claimed in the writ.

Their Lordships must observe two things which arise from the terms of this judgment. In the first place, they refer to the first of the passages

quoted from the judgment and particularly to the phrase "it is not pretended that the settlement enables the [defendants] or the Family Council less the Chief to dispose of the family property without the consent of the Chief." Their Lordships are of course under the serious disadvantage of not knowing exactly what were the arguments (and concessions) made on the defendants' part before the Federal Supreme Court. It was however most stoutly denied by Mr. Dingle Foot on the defendants' part that any such concession had ever in fact been made and this submission certainly appears to be borne out by the notes of the arguments which are found in the record.

In the second place, their Lordships note the view expressed by Sir Lionel Brett in the passage secondly quoted above from his judgment that "it is unnecessary to express a view on the question whether the settlement is binding on the appellant." As their Lordships understand it this conclusion proceeds upon the view that if the plaintiff be the duly capped Chief Ojora then at any rate the defendants cannot without his approval deal with the Family property and therefore that the plaintiff must be entitled to the relief claimed in the action—unless of course they clearly proved that some other person than the plaintiff had been appointed as Head of the Family with the exclusive right of dealing with the property.

Before setting out the Terms of Settlement in the 1947 proceedings which their Lordships feel it right for them to do, it is to be noted that what their Lordships have at the beginning of this judgment called the second question involved in the proceedings (where it was deliberately stated in very general terms) was stated in the Federal Supreme Court in terms different from those employed by Bennett J. According to Bennett J. the second question was—if the plaintiff had been properly appointed Chief Ojora according to native law and custom was he compelled to administer the affairs of the Family in conjunction with the Family Council as constituted by the terms of Settlement? As stated by the Federal Supreme Court the question (simply) was—what is the effect of the Terms of Settlement? Having regard to the terms of their judgment on the other issues both Bennett J. and the Federal Supreme Court found it unnecessary to answer this second question at all for the reasons already given; and so the question (in whatever form it is put and though it always appears to have been a vital issue in the proceedings) has never been determined by either of the courts in Nigeria.

It will be convenient at this point to deal with the Board's competence, having regard to the Act constituting the Federation of Nigeria and to the terms of section 158 of that Act in particular, to entertain and determine the first question posed at the beginning of this judgment namely whether the plaintiff had been duly appointed Chief Ojora. Their Lordships view upon this matter of competence has already been anticipated. Sub-section (3) of section 158 of the Act preserved for the period of one year from the 1st October, 1963, the competence of this Board to determine any proceedings by way of appeal from a decision of the Federal Supreme Court pending on the date mentioned, but the sub-section was expressed to be subject to the provisions of the sub-section next following, sub-section (4). That sub-section so far as material reads as follows:

"Where immediately before the date of the commencement of the Constitution" (that is on 1st October, 1963) "any proceedings on appeal from a decision of the Federal Supreme Court are pending . . . the proceedings . . . shall abate on that date in so far as any question for determination in the relevant proceedings is (a) a Chieftaincy question . . ."

The phrase " Chieftaincy question " is defined by section 165 (1) to mean " any question as to the validity of the selection appointment . . . recognition installation . . . of a Chief." It will be observed that there is a marked distinction between the terms of this Section and the terms of the Ordinances which were in operation at the dates when these proceedings came before the High Court and Federal Supreme Court in Nigeria. In the case of the Ordinances, as was pointed out by Sir Lionel Brett in delivering the judgment of the Federal Supreme Court, the question of the competence of the Courts in Nigeria depended upon the purpose for which the proceedings had been brought; so that if (as in the present case) the purpose of the proceedings was to determine proprietary rights the fact that the validity of any person's appointment as chief was involved did not take away the Court's right to determine the question of such validity since it was incidental only to the true purpose for which the proceedings had been instituted. The terms of section 158 (4) of the Act are however expressed much more widely: for by the terms of sub-section (4) it is stated that any pending proceedings shall abate " in so far as any question for determination " is a Chieftaincy question. The point was therefore taken by the Learned Counsel for the defendants as soon as the case was called on before the Board, that according to the plain sense and meaning of the words used in the sub-section the Board could not entertain " any question as to the validity " of the plaintiff's appointment, recognition or installation as Chief. With all respect to the argument presented to their Lordships by the Learned Counsel for the defendants including his reliance on the general rights given to Nigerian citizens by such sections as 22, 27, 32 and 53 and particularly the right conferred by the first of these sections to a " fair hearing " by any Nigerian in respect of his civil rights, their Lordships find the conclusion for which Mr. Lawson contended inescapable. The terms of the relevant sub-section appear to their Lordships perfectly plain and their effect must be that so far as these proceedings involve the question of the validity of the plaintiff's appointment and installation as Chief they abated on the 1st October last. On the other hand (as already indicated) the second question posed at the beginning of this judgment, namely who is entitled to deal with the Family property is unaffected by the section even though it may involve the question, what is the effect of the plaintiff's appointment as distinct from its validity. Nor indeed, as also already indicated, was the contrary submitted by Mr. Lawson.

Their Lordships now set out in full the Terms of Settlement made in 1949 and in the 1947 suit already so often referred to. They are as follows:

" WHEREAS consequent upon the many sittings of Ojora Family Council which have taken place over the matter of the dissension in the Ojora Family AND WHEREAS in view of the amicable settlement thereby effected by the members of Ojora Family Council composed of the representatives of all the sections of Ojora Family. AND WHEREAS the Chief Ojora Bakare Faro now agrees to co-operate with the Council in the management of the affairs of the Ojora Family Chieftaincy, the said Family Council therefore hereby resolves as follows:

1. The Council of the Ojora Family shall consist of twenty members with Chief Ojora as the President and shall administer the affairs of the family and be responsible to the general body of the family.

2. The following are the twenty members selected, namely:
 [Here follow the names of the twenty members which appear to include two of the Defendants and one of the Defendants' witnesses at the trial]
 and in the event of any member dying or the place of any member being rendered vacant due to any other cause whatever it will be proper for the other members to appoint a new one whose name will be submitted to the general body for approval.
3. The name last mentioned in paragraph 2 supra, that is the said Akinwunmi Esurombi-Aro is hereby re-appointed Secretary to Ojora Family Chieftaincy.
4. The Chief Ojora and his family Council shall be responsible to the general body of the family for the safety of the family properties—real and personal.
5. The Council shall appoint two or three members including the Chief Ojora to deposit and withdraw monies from the Bank as may be instructed by the Council.
6. The monies belonging to the family shall be deposited in any recognised Bank in Lagos.
7. The Court cases pending in the Supreme Court namely Suits Nos. 11/47 and 41/47 shall be withdrawn from the Court and be reported as 'settled out of Court.'
8. Suit No. 12/47 may be settled out of Court if parties so wish.
9. The money for compensation for lands acquired by Government shall be paid to Chief Ojora for and on behalf of the Ojora Family Council who are responsible to the general body of the family: But this provision shall not apply to matters of execution of Conveyance of the family lands.
10. The remuneration due to the Solicitors on both sides, namely, Messrs. Alakija and Alakija and L. B. Augusto in the Compensation case, that is, Suit No. 11 of 1947, payable by the Government shall be paid by the Chief Ojora and his Family Council.
11. Chief Ojora, the Family Council, and the general body of the family shall from the date of this document resume their customary and normal way of dealing with Family matters.
12. A copy of this Document shall be deposited in Court in both Suits Nos. 11 of 1947 and 41 of 1947.

IN WITNESS whereof the said Family Council in an assembly of the whole family which confirms the above resolutions hereunto set their hands (by signatures, pen-marks, and left thumb prints) this 19th day of February, 1949."

As already stated the Terms of Settlement disposed of an action brought against the former Chief Bakare Faro in 1947 to challenge his right to deal as he was doing with the Family property. As already also stated, notwithstanding these Terms of Settlement, a further action was later brought for similar purposes at the end of Bakare Faro's life, in which was delivered the judgment of the Federal Supreme Court already mentioned declaring that the Terms of Settlement still effectively subsisted.

In the circumstances as they appear from the full citation of the previous history of the case their Lordships have found themselves in the greatest difficulty in reaching a decision upon what order they should now make which order will so far as possible do justice between the plaintiff and the

defendants and the factions in the Family represented by them, and which will be reasonably likely not to lead to further dissension and further litigation. In considering the question their Lordships cannot put out of their minds the facts as found by the learned trial Judge—and not challenged still less reversed by the Federal Supreme Court—that the evidence given on the plaintiff's part was in large measure untrue and that the plaintiff and his supporters represent a small section only of the Family to which by far the greater part of it is opposed. Further, if under the order as made by the Federal Supreme Court any monies had to be handed over by the defendants to the plaintiff it is not at all clear to their Lordships' minds how such monies would in fact be disposed of: and in this connection their Lordships have in mind what Bennett J. said as regards the distribution by the plaintiff of some £8,000 received by him in 1956 from a transaction referred to as the "Biney lease." True it is that the plaintiff is suing in a representative capacity and should therefore deal with any monies received by him as trustee for the Family; but even so their Lordships feel no great confidence that monies in fact received by the plaintiff would be strictly so applied or so applied to the satisfaction of the rest of the Family as a whole: and indeed their Lordships feel that further litigation in such an event would be almost inevitable. In this connection their Lordships recall that the right of the plaintiff to sue in a representative capacity seems to have arisen during the hearing before Bennett J. That learned Judge, however, disposed of the matter by relying on an order which had previously been made *ex parte* as earlier stated. Their Lordships cannot help feeling that a valuable opportunity may then have been lost of getting the nature of the proceedings and the true issues involved more properly stated and defined.

It was pointed out to the Board that when the plaintiff's case at the trial had been closed there had been in fact no evidence whatever of any dealings with the Family property by any of the defendants. On the other hand it is true to say that in the course of the evidence given by and on behalf of the defendants the so-called "Total Oil" transaction emerged and it also appeared from the evidence of the third defendant that at some date (unspecified) the Family Council had appointed nine of their number to collect the rents from the Family properties and had appointed the second defendant (who did not appear as a witness himself) as Secretary of the Council to operate alone the Family account at some bank also unspecified. So far as the collection of rents is concerned, the existing receivership will provide no doubt present security: but their Lordships have no knowledge what has happened in regard to the bank account to which they have referred.

Another great difficulty with which their Lordships are faced concerns the relevant native law and custom. It will be remembered that on the one hand Bennett J. found that the capping of the plaintiff as White Cap Chief was contrary to native law and custom. On the other hand the Federal Supreme Court appears to have held that the capping of the plaintiff as White Cap Chief being conceded the effect of native law and custom would *prima facie* at any rate be to confer upon him (whether with or without the concurrence of the Council of his own creation) a right to deal with the Family property. Mr. Lawson for the plaintiff and Mr. Dingle Foot for the defendants referred to several passages in the notes of the evidence to which their Lordships have given their most careful attention. Nonetheless their Lordships have not been able to feel satisfied that they can properly express a conclusion upon any matters of native law and custom or of any special

family practice and custom. As earlier observed by far the greater part of the contest before the trial judge was related to the circumstances in which the plaintiff came to be capped as Chief. It is also true that to judge from the notes of evidence such questions as were directed, during the evidence given on the plaintiff's side, to the native law and custom relevant to the continuation of the Family Council created by the Terms of Settlement, seem upon the face of them to go only to the limited question whether such Council (or any Council appointed by a White Cap Chief in his lifetime) would cease to have any powers and duties on the death of him who was Chief when that Council was appointed, or would survive during what may be called the interregnum until a new Chief is capped. On the defendants' side the third defendant stated in his evidence that it was not true that when a new Chief is to be selected the old Council is discarded and a new set of people do the selection (see record page 82) but this was a different point: and he does not appear to have been cross-examined on the general rule in this regard on native law and custom, save to the extent that he said that "the Council continues after the death of the Chief" (record page 84). On the other hand, the fifth witness for the defendants one Sanusi Sule Oba (a member of the Olotu Chieftaincy Family) stated both on examination and under cross-examination that a newly appointed Chief works with the old Family Council and produced a document (called exhibit 25 but not before their Lordships) being apparently something comparable to the Terms of Settlement in the present case which the Chief of his own Family, that is the Olotu Family, had signed. The witness said that there was nothing in native law and custom to prevent a Chief signing such a document—though their Lordships do not think it to be at all clear what, as regards this witness's family council, would be the effect under native law and custom and any practice and usage of his Family if a newly capped Chief refused to sign such a document as exhibit 25.

Their Lordships have made the references which they have to the evidence to show that, as they venture to think, the evidence as to native law and custom generally including any special practice and usage of the Ojora Family, and (more particularly) in regard to the suggested persistence of the Terms of Settlement, is of a very slender character. If their Lordships' task were to construe the Terms of Settlement as though they were in an English document and without any regard to a background of native law and custom or family practice and usage, they would, to say the least, feel very great force in the argument that the terms were not intended to persist beyond the chieftaincy of Bakare Faro. But their Lordships do not feel it right to regard the document wholly divorced from native law and custom or the practice and usage of the Ojora Family.

What then in the circumstances is the proper order for their Lordships to make? In posing and answering this question their Lordships repeat that, as it is their duty so far as possible to do justice between the parties before them, so also (as they have already stated) they are not forgetful of the view of the learned trial Judge of the witnesses before him and no less are they anxious to reach a conclusion which will in the end assist as much as possible this unhappily divided Family. Mr. Lawson on behalf of the plaintiff was good enough to suggest that to this end the order granted under paragraph 3 of the writ should be qualified by staying its execution for a period of two months from the date of the transmission of the Board's judgment to the Supreme Court with liberty in the meanwhile for the members of the Family Council established by the Terms of Settlement to apply to the Court as to any payment to be made to the plaintiff—he

thereby not making any admissions as to their rights or title. Their Lordships have, however, in the end thought it right to go somewhat further. As it seems to them the question whether the Family Council established under the Terms of Settlement does still subsist (which was a question undoubtedly raised from the very start of the action) ought in the interest of the whole Family to be determined one way or the other, including in that regard the native law and custom and any practice and usage of the Family properly applicable. Their Lordships think therefore that the case should be referred back to such a judge of the High Court as the Supreme Court should think proper in order that that question should be determined. In the meantime the receiver already appointed will presumably continue to collect all rents and the monies in court will remain there subject to any application as to their disposal. Having regard however to the evidence about the banking account their Lordships think that the injunction ordered by the Federal Supreme Court should continue to operate until further order by the High Court (or the Supreme Court). Their Lordships do not however think in all the circumstances and on the evidence that there is sufficient justification for making now any order following the terms of paragraphs 2 and 3 of the writ of summons; though their Lordships suggest that it should be open to the plaintiff to apply for any such order to the High Court. Their Lordships add, however, that in all the circumstances, any order for an account should be for an account to be taken by the proper officer of the High Court. Their Lordships would also add finally a general liberty to either the plaintiff or the defendants to make such other applications as they may think fit to the High Court pending the final determination of the action on the case as remitted to the High Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed to the extent which they have indicated; that is to say that, in lieu of the order of the Federal Supreme Court dated the 8th June, 1961, the case should be referred back to such judge of the High Court as the Supreme Court think proper for the determination of the question whether and to what extent the Terms of Settlement dated the 19th February, 1949, of the action No. 11 of 1947 are still subsisting and effective and binding upon the respondent (plaintiff); that the injunction ordered by the Federal Supreme Court should continue until determination of the question above mentioned or until further order by the High Court (or the Supreme Court); that pending such determination the respondent and the appellants (the plaintiff and the defendants in the action) should have liberty to apply to the High Court (or the Supreme Court) for an account or otherwise as he or they may be advised; and that the costs of the respondent and the appellants of the hearing in the High Court in 1959, of the hearing in the Federal Supreme Court and of the further hearing pursuant to the order now proposed should be in the discretion of the judge of the High Court upon such further hearing. The respondent (plaintiff) must pay one-third of the costs before the Board of the appellants (defendants).

AZUIKE UME AND OTHERS APPELLANTS

AND

ALFRED EZECHI AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 701

1964 Apr. 7

Lords Evershed, Hodson
and Pearce

Nigeria—Practice—Non-suit—Representative action—Claim to land as family land—Case not established—Evidence of common user—Non-suit order—Discretion, interference with—Only if substantial error or real injustice effected—High Court Rules, 1955 (Eastern Nigeria), Ord. 48 (1)—County Court Act, 1846 (9 & 10 Vict. c. 95), s. 79.
County Court—Non-suit—Judicial discretion—Interference with—If substantial error or real injustice effected—County Court Act, 1846, s. 79.

By Order 48 of the Nigeria High Court Rules, 1955: "(1) The court may in any suit, without the consent of the parties, non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court."

The terms of the above order reflect a similar power in England now only remaining in the county court as first conferred by section 79 of the County Court Act, 1846.

A claim by the respondents as representatives of the Achina family against the appellants, representing the Akpo family, for a declaration of title to a strip of land lying between their respective family lands and consequential relief, was dismissed by the trial judge on the ground that the respondents on the evidence had wholly failed to prove their case. On their appeal the Federal Supreme Court, while concurring in the view that they had not proved their case, were of opinion that the trial judge had mis-directed himself in holding that an earlier suit in a Native Court in respect of part of the disputed land had been concerned with merely a personal claim to possession, whereas the claimants had in fact sued *virtute familiae*—as representing the Achina family—and that the effect of dismissing the present action would appear to conflict with the Native Court decision in that case. In the result the Federal Supreme Court substituted a non-suit for the order dismissing the action, and intimated that it might well be that in view of the evidence of common user the disputed land was communal to both families. On appeal by the appellants, seeking a restoration of the order of the trial judge dismissing the action (the respondents asking only that the non-suit order of the Federal Supreme Court should not be disturbed):

Held: that the power to order a non-suit both under the section of the English Act and the Nigerian Order was discretionary, and in the circumstances there was solid ground for the fresh exercise of the discretion conferred by Order 48 on the part of the Federal Supreme Court, and their order had not proceeded on any substantial error or effected any real injustice such as would justify the Board's interference. Injustice might be done to the respondent family and its members by the estoppel *per rem judicatam* to which they would be subjected by the dismissal of the action.

Dictum of Lush L.J. in *Payer v. Minors* (1881) 7 Q.B.D. 329 at p. 332, C.A.; *Kodilinye v. Odu* (1935) 2 W.A.C.A. 336 and *Ajetunmobi v. Omowunmi* (1961) 1 All N.L.R. 120 considered.

Judgment of the Federal Supreme Court of Nigeria affirmed.

The following cases, in addition to those referred to in the judgment, were cited in argument.

Witechurch v. East London Railway Co. (1872) L.R. 7 Exch. 24;

- Clack v. Arthur's Engineering Ltd.* [1959] 2 Q.B. 211; [1959] 2 W.L.R. 916; [1959] 2 All E.R. 503, C.A.);
Dau v. Kano Native Authority Police [1946] 12 W.A.C.A. 14;
Rex v. Jonathan Adebajo [1935] 2 W.A.C.A. 315;
Gbenedichie v. Awoshika [1952] 14 W.A.C.A. 101;
Nwakuche v. Azubuikwe [1955] 15 W.A.C.A. 46;
Duedu v. Yiboe [1961] 1 W.L.R. 1040, P.C.;
Kodilinye v. Anatogu [1955] 1 W.L.R. 231, P.C.;
Stool of Abinabina v. Chief Kojo Enyimadu [1953] A.C. 207; [1953] 2 W.L.R. 261, P.C.

APPEAL (No. 39 of 1962) from a judgment of the Federal Supreme Court of Nigeria (November 9, 1961) whereby a judgment of the trial judge (February 20, 1960) dismissing the respondents' action against the appellants was set aside and an order of non-suit substituted.

The following introductory statement is taken from the judgment of the Judicial Committee: In these proceedings the plaintiffs acted as representatives of an ancient family known as the Achina family and the defendants resisted the plaintiffs' claim on behalf of and representing another family known as the Akpo family. The issue in the proceedings was as to the family ownership of a strip of land which lay between other and larger pieces of land, that to the west of the disputed area being Akpo family land. The exact dimensions of the land in dispute were illustrated by plans exhibited before the trial judge by both sides. There was some divergence between the two plans but the divergence had no significance for present purposes. The disputed strip was a narrow one—that was from east to west—but appeared in length to be about four miles.

It was a point made in the courts below by the respondents before the Board (that is, the plaintiffs) that the western boundary of the disputed land consisted of natural features which (as the respondents contended) was a circumstance favourable to their submission.

By their claim in the action the plaintiffs sought a declaration of title in their favour to the whole disputed area with consequential relief. It may be noted that the proceedings had been transferred from the Mbemisi Native Court to the Nigeria Supreme Court as long ago as December, 1954, and in the order for transfer and by way of its justification the District Officer referred to the fact that there had already been many judgments of the Native Court concerning this land "apparently contradictory"; and that having regard to the strong local feeling about the land it was desirable to transfer the case to the Supreme Court.

The judgment of the Supreme Court was delivered in February, 1960, by Reynolds J., who concluded that the plaintiffs had upon the evidence before him wholly failed to prove their case; and by his order he dismissed the action granting to the defendants their costs at the figure stated in the order. The plaintiffs appealed to the Federal Supreme Court, and the judgment of that court was that of Taylor F.J. dated November 9, 1961, with which Ademola C.J. and Unsworth F.J. concurred.

Taylor F.J. expressed his entire concurrence with Reynolds J. in the view that the plaintiffs had not proved their case and so had not made good their claim to a declaration of title or other relief and he noted and took account of the view taken by Reynolds J. of the credibility of the plaintiffs' witnesses. In the circumstances, however, he thought that the just result was to substitute a non-suit for the order dismissing the action. The order of Reynolds J. as to the costs of the trial was not disturbed and no order was made as to the costs of either party before the Federal Supreme Court.

1964. March 2, 3 and 4. *Dingle Foot Q.C.* and *T. O. Kellock* for the appellants.

E. F. N. Gratien Q.C. and *R. K. Handoo* for the respondents.

April 27. The judgment of their Lordships was delivered by LORD EVERSHED, who stated the facts set out above and continued: The defendants in the action now appeal to their Lordships' Board by leave of the Federal Supreme Court and ask that the Board should restore the original order made by Reynolds J. dismissing the action. The plaintiffs have not sought by cross-appeal to make good their claim for a declaration of title to the disputed land but have asked only that the order made by the Federal Supreme Court should not be disturbed. It follows that their Lordships are now only concerned with this one point, namely, accepting the failure of the plaintiffs to make good their claim to the title of the disputed land, is the appropriate order in all the circumstances of the case one for dismissal of the action or one for a non-suit? Having so formulated the question it must be said at once that the question of the appropriate form of order being on the face of it (and particularly in the present case for the reason presently stated) a matter for the discretion of the Federal Supreme Court, their Lordships would not think it right to disturb the exercise of that discretion unless it were shown that the Federal Supreme Court's order had proceeded from some substantial error or would effect some real injustice. But in the present case it was strongly urged on the part of the defendants that the members of the Federal Supreme Court had in their turn overruled the discretion exercised by the trial judge and that it was therefore in the special circumstances of this case open (and proper) for their Lordships to reach their own independent conclusion as regards the order proper to be made—the plaintiffs having, as already stated, on any view failed to make good their claims in the action.

The power of the courts in Nigeria to order a non-suit is to be found in Order 48 (1) of the High Court Rules: "1. The court may in any suit, without the consent of the parties, non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court." The terms of the Order cited reflect the similar power vested some long time ago in the common law courts of this country but now only remaining in the county courts as first conferred by section 79 of the County Court Act 1846 (9 & 10 Vict. c. 95), the language of which section closely resembles that of the Nigerian Order above set out. That the power to order a non-suit under the English Act was and is discretionary is well established by English decisions (see *Poyser v. Minors* (1881) 7 Q.B.D. 329, 332, *per* Lush L.J.); and it has been similarly ruled as regards the Nigerian courts by judgments of African courts to which their Lordships were referred and to one of which (that of *Kodilinye v. Odu* [1935] 2 W.A.C.A. 336) a latter reference will be made in this judgment.

In the circumstances their Lordships pose what appears to them to be the question to which they must, as they think, be persuaded by the defendants to give an affirmative answer if they are to disturb the order made by the Federal Supreme Court—that is, has the order proceeded upon some substantial error or is some real injustice thereby done?

There is no doubt that the ownership and the right to possession of lands in Nigeria have unhappily been and are the subject of much litigation in that country. There is also no doubt that a sharp distinction must be drawn between rights of (or claims to) ownership of land, on the one hand, and, on the other hand, rights of (or claims to) possession merely. Broadly, as their Lordships understand, the ownership of land is vested in numerous families

(having originally in many cases been acquired by conquest) and family land can at best only be effectively disposed of by a chief or other persons acting on behalf of the family; whereas disputes as to possession are disputes between particular individuals, the determination of which would (normally at any rate) not at all affect the question of proprietorship. Having regard to the origin of family proprietorship, claims in such cases, that is, claims to ownership, must be made good either by strong traditional evidence or by "act of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference" of the exclusive ownership claimed. The words quoted are taken from the judgment of the trial judge, who thereby invoked well-established authority (see, e.g. the judgment of Webber J. in *Ekpo v. Ita* [1933] 11 N.L.R. 68).

The contest at the trial related to certain specific and well-defined pieces of land within the disputed area, namely, the land now occupied by the Church Missionary Society, the land now occupied by the Salvation Army, certain land associated with the name of Chiagu, and lands which had been the subject of suits brought before Native Courts and defined by the suit numbers 128/48, 131/48 and 128/52-53. Of these lands it was conceded before their Lordships that the Church Missionary Society and Salvation Army properties had been derived from the family of the defendants and that the Chiagu property lay to the east of the disputed area, being upon land of the plaintiffs' family. As regards all the lands, the subject of the native suits above mentioned, the trial judge concluded that in every case the suit had been between individuals involving only possessory rights. After stating that the findings in such suits were "far from being clear or conclusive of the rights of the communities" (that is, the families) Reynolds J. held that the plaintiffs had failed to prove any title *virtute familiae* over any part of the disputed area, that they had therefore wholly failed to discharge the burden of establishing a right to the declaration sought, and that the action must be dismissed. The judge did not in his judgment make specific reference to the discretion vested in him to order a non-suit, but since the matter had been discussed in argument their Lordships do not doubt that he had considered it and upon the premise of his findings the order for dismissal of the action was in accordance with the decision of the *Kodilinye* case (2 W.A.C.A. 336), in which the claimants had likewise wholly failed to establish any family title to any of the land there in question. Reynolds J. did, however, add that his decision would not, in his view, overrule those decisions of the Native Courts which had been in favour of members of the Achina family since they were decisions upon personal as distinct from family claims.

The Federal Supreme Court did not, as already stated, at all qualify or dissent from the view taken by Reynolds J. of the credibility of the witnesses before him. But the Federal Justices were able to show that in one respect Reynolds J. had misdirected himself; viz., in holding that the suit 132/48 had been concerned with merely personal claims; for, as they observed, the claimants in that suit had in fact sued *virtute familiae*—that is to say, their claim was as representing the Achina family to family land. It is further to be noted (as was pointed out by Taylor F.J.) that the subject-matter of that suit was also related to the user in common by both the Achina and Akpo families of the Oye market, and the common worship at the Ezeokolo Juju. Mr. Gratiaen also stressed before their Lordships that the claimant in the suits 128/48 and 128/52-53 (who was the defendant in suit 131/48), namely, one Simon Obiora, did invoke the Achina family title. As regards these suits, however, the Federal Justices did not dissent from the view of

Reynolds J. that they were, in truth, possessory or individual claims only. But as regards the subject-matter of the suit 132/48 it would appear to follow, as indicated by the Federal Justices (whose knowledge of such local matters their Lordships naturally respect), that the effect of dismissing the present action would at least in that case appear to conflict with the Native Court decision.

If the only error in the judgment of Reynolds J. was in his treating the suit 132/48 as concerned with purely individual or personal claims it might be said (and was urged on the defendants' part) that the Achina family had made out a good title to only one small piece of land out of the whole of the large area in dispute. Even so, however, the essential premise to the judge's conclusion has been displaced—the case is not longer one like the *Kodilinye* case (2 W.A.C.A. 336), in which the claimants have failed to prove any title at all to any of the disputed land. But the Federal Justices draw attention to another point which their Lordships have regarded as highly significant, namely, to the undoubted fact that there was clear evidence of a considerable degree of common user on the part of members of both families over the disputed area and also to the fact that both families, Achina and Akpo, appear to have been descended from a common ancestor—a fact which, as Taylor F.J. pointed out, might well explain the common user—illustrated as it was particularly by the facts relating to the Oye market and the Ezeokolo Juju and by the circumstance that the C.M.S. station is now called the "Achina-Akpo" station. In the circumstances, as Taylor F.J. pointed out, it might well be that the whole area was, or was in large measure, communal to both families and that the claim of the plaintiffs to the land as exclusive Achina family property had been misconceived.

In the circumstances which they have stated their Lordships feel satisfied that there was solid ground for the fresh exercise of the discretion conferred by Order 48 on the part of the Federal Supreme Court and that upon the general principle stated earlier in this judgment their Lordships ought not to interfere with that exercise. From the cases cited to the Board it seems clear that such discretion is, in cases of family disputes of this kind and other classes of case, not infrequently exercised by the Nigerian courts, if some injustice might otherwise be done. By way of example their Lordships refer to the decision of the present Chief Justice in the case of *Akadiri Akani v. Olubodan-in-Council* (Suit No. 1/120/49), recently cited to their Lordships' Board in *Moukarihm v. Coker* (P.C. App. No. 38 of 1962). See also *Ajetunmohi v. Omowunmi* [1961] 1 All N.L.R. 120, where de Lestang C.J. said that a non-suit should in justice have been ordered in an action by a moneylender on the ground that the plaintiff had not had legal assistance and therefore had not been aware of the requirements of the Moneylenders Ordinance for making good his claim for return of the money lent.

In all the circumstances of this case their Lordships accept, therefore, the view of Taylor F.J., that injustice might be done to the Achina family and its members by the estoppel *per rem judicatam* to which the family and its members would be subjected by the dismissal of the action, and in any case they have not been satisfied that the case is one in which the Board ought on principle to interfere with the exercise of its discretion by the Federal Supreme Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.

Solicitors: *Hatchett Jones & Co.; Rexworthy, Bonser & Simms.*

FAWEZE MOKARIHM

APPELLANT

AND

ABOLADE OLATUNJI COKER AND OTHERS

RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 Apr. 7

Lords Evershed, Hodson
and Donovan

Ownership of Land—Sufficiency of evidence to establish title—Traditional evidence—Acts of ownership—Land not included in previous plan.

The respondent claimed that the land originally belonged to the Balogun Ibikunle family of Ayeye, Ibadan, who sold it to one Rosiji on the 16th December, 1950; that Rosiji reconveyed the land to the Ibikunle Family in 1952 who on the 27th March, 1957, sold and conveyed it to the respondent. The main question was whether the evidence adduced by the respondent was sufficient to establish his title. He relied on traditional evidence to show that the vendors from whom he bought the land laid claim to the land over a long period, the land having been originally acquired by conquest by one of their ancestors. He sought also to prove that his family had exercised acts of ownership over the property prior to the date of the conveyance of the land to him.

Held: (1) (Citing Webber J. in *Ekpo v. Ita*, 11 N.L.R. 68) "In a claim for a decree of declaration of title the onus is on the plaintiffs to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact."

(2) The respondent had not by traditional evidence adduced on his behalf coupled with the evidence purporting to show acts of ownership by the Ibikunle family proved his right to a declaration of title to the land.

Held also: (with regard to the plan Exhibit C which was made by the respondent's brother with the assistance of the respondent on 6th January, 1950, shortly before the first conveyance of the disputed land to the respondent which demonstrated that the land in dispute lay outside the area claimed by the Ibikunle Family in a suit against the Native Authority in 1949. In fact it was shown as being Alapini land) that it is a matter of significance which carries weight against the respondent that in these early proceedings the family not only did not include the land in the area claimed as theirs but marked it as Alapini land.

LORD HUDSON. This is an appeal from the Federal Supreme Court of Nigeria at Lagos setting aside a judgment of Quashie-Idun J. (as he then was) given at Ibadan in the Ibadan Judicial Division of the High Court of Justice, Western Region of Nigeria, on 22nd April, 1960.

The issue in the appeal is as to the ownership of land situate at the junction of Onireke Street and Oke Padre Street, Ibadan. There is no dispute as to the identity of the land which is clearly shown on a plan which is the plaintiff's Exhibit "A," the land being verged pink thereon.

The first respondent A. O. Coker, referred to hereafter as the plaintiff, began the proceedings on the 13th December, 1957, by a summons issued against F. Moukarihm, referred to hereafter as the appellant, claiming a declaration of title to the land and an injunction to restrain the appellant from coming on the land, the position being that the appellant had been in possession since before the year 1953. He had built a concrete wall on the land in 1951 without anyone obstructing him in order to keep water from coming on to the land, but, when in 1957 he started to build a petrol station, the plaintiff brought his proceedings.

The appellant held under a lease from one Johnson Aina dated 16th November, 1953, with the consent of the traditional authorities under customary tenure to which the land is subject. Johnson Aina was joined as second defendant in the suit. He in turn alleged that in September 1951 the Ibadan Native Authority placed him in possession. This authority is the predecessor in title of the Ibadan District Council which was joined as third defendant in the suit. The Council alleged that they or their predecessors in title owned the land, having been in possession since 1916, and had become seized of it as a result of the surrender of part of the interest of one Seidu Williams to the Native Authority the predecessor in title of the Ibadan District Council, Seidu Williams having been granted the land by a memorandum of agreement drawn up in accordance with a report made by Chief Justice Speed on 10th April, 1916. They also alleged acquisition by reclamation.

The plaintiff claimed that the land originally belonged to the Balogun Ibikunle family of Ayeye, Ibadan, who sold it to one Rosiji on the 16th December, 1950; that Rosiji reconveyed the land to the Ibikunle family in 1952 who on the 27th March, 1957, sold and conveyed it to the plaintiff.

It appeared clearly at the end of the hearing that the second and third defendants had no interest in the land and ultimately they were dismissed from the suit although named in the subsequent appeal proceedings as persons affected by such appeals.

Mr. Justice Quashie-Idun gave judgment in the suit on the 22nd of April, 1960, dismissing the plaintiff's claim. He reviewed the evidence and was not satisfied that the Ibikunle family had any interest in the property to convey to the plaintiff at the time they purported to do so even though they might have been the owners of the adjoining lands. He himself made an inspection of the land and concluded that there was no doubt that it had been reclaimed with much difficulty. He accepted the evidence which had been given to prove the acquisition of the land by the Council.

The Federal Supreme Court reversed the decision of the trial judge. The judgment of the Court was delivered by Taylor F.J. with whom the other members of the Court concurred. This Court found certain misdirections of fact in the judgment of Quashie-Idun J. and felt itself able to arrive at a conclusion in favour of the plaintiff upon its own review of the evidence.

The main question is whether the evidence adduced by the plaintiff was sufficient to establish his title. He relied on traditional evidence to show that the vendors from whom he bought the land, the Ibikunle family laid claim to the land over a long period the land having been originally acquired by conquest by one of their ancestors. He sought also to prove that this family had exercised acts of ownership over the property prior to the date of the conveyance of the land to him.

The plaintiff in his evidence said that the land originally belonged to the Ibikunle family, that he was a friend of the family and their surveyor, that before 1953 people were selling boards on the land and paying rents to the family and that others planted vegetables on the land. In 1957 he saw that the appellant had fenced it. He said that he knew all the lands claimed by the family and had assisted his brother who had made a plan for the purpose of a suit in 1949 between that family and the Ibadan Native Authority.

The plaintiff's evidence was supported by that of Salami Eniayewu who said he obtained a grant of the land from the Ibikunle family about 50 years ago and planted on it sugar cane and vegetables. In cross-examination he said he left the land about 4 years ago (viz. about 1955) that it was marshy

some time ago and used as a rubbish dump by the public. He also said it was reclaimed after he had left the land and that it was the Sanitary Authorities who burnt the rubbish and reclaimed the land. Raji Oduola the next witness said that he was a great grandson of Balogun Ibikunle who had acquired the land including the land in dispute by conquest and that he had joined in the later of the two conveyances to the plaintiff. He however in contradiction of the witness Eniaiyewu said that the latter did not plant vegetables on the land in dispute but on a portion of other land belonging to the family separated by four plots of land from that which was in dispute. The learned judge concluded that there was no satisfactory evidence that 50 years ago Eniaiyewu had planted vegetables on the land in dispute. Raji Oduola said that the Ibikunle family had allowed a plank seller named Josiah Agbe, who had been asked only the night before to give evidence, said that use of the land was granted to him by the head of the Ibikunle family for 25 years, that he sold planks on it, that he left in 1954 and that at the time he was on the land it was marshy and that it had not been reclaimed when he left it. This evidence was inconsistent with the evidence of a later witness called on behalf of the appellant, Daniel Tayo Akinbiyi, a former councillor of the Ibadan Native Authority and a former judge of the Native Court. He gave evidence that the land which was swampy was reclaimed by the Ibadan Native Authority in 1934 by prison labour prior to its acquisition by the Authority. This acquisition will be referred to later. Raji Alapinti a member of the Alapinti family another witness, who had been asked to give evidence for the plaintiff the night before the hearing, said that the land in dispute belonged to the Ibikunle family but in disagreement with Raji Oduola denied that the Ibikunle family had ever granted the Alapinti family any lands.

Some years earlier, in 1949, the Ibikunle family had brought an action against the Native Authority the predecessor of the Ibadan District Council claiming a declaration of title in respect of land situate at Gbagi, Ibadan and shown on a plan which is the plan marked C to which their Lordships have been referred. In cross-examination the plaintiff admitted, as indeed the plan demonstrates, that the land in dispute lies outside the area claimed in that action by the family as Ibikunle land and is shown on the other hand as being Alapinti land. This plan is dated the 6th January, 1950, shortly before the first conveyance of the disputed land to the plaintiff; it was made by the plaintiff's brother and the plaintiff, who is a surveyor, assisted in the making of it. It is a matter of significance which carries weight against the plaintiff that in these early proceedings the family not only did not include the land in the area claimed as theirs but marked it as Alapinti land.

Curiously enough the learned trial judge did not when he gave his judgment remember that the disputed land was shown in plan C in the way in which it is in fact shown. He thought that it was part of the land to which the Ibikunle family were then claiming title. He drew therefrom an inference adverse to the family, thinking that, as the land was within that portion claimed in the action brought against the Ibadan Authority in 1949, they must have been aware that the land had been acquired by the Authority before they purported to convey it to the plaintiff. On the facts as now agreed the land was outside the area claimed in the previous action, and is described on the plan used in that action as Alapinti land so that the inference against the plaintiff may be said to be even stronger when he now claims that the land was and still is Ibikunle family land. In the Federal Supreme Court attention was drawn to the mistake of the learned judge and

to the adverse inference against the plaintiff which he had drawn. The Court regarded the misdirection as material and substantial, but their Lordships are of opinion that, notwithstanding the misdirection, the inference on the true facts is (as already indicated) stronger against the plaintiff than it was upon the mistaken view taken at the trial. The Federal Supreme Court also referred to the passage from the judgment of the learned trial judge in which he stated that he was not satisfied that the Ibikunle family had any interest in the property to convey to the plaintiff *at the time* they purported to do so even though they might have been the owners of the adjoining lands and drew the inference that the judge was holding that although they had some interest at some time before 1957 when they purported to convey to the plaintiff they had ceased to have an interest before conveying to the plaintiff. Their Lordships do not feel that the language used by the learned judge leads to this inference but appreciate the force of the Federal Supreme Court's comment that the trial judge had already held that the land had previously been acquired by the Ibadan Native Authority and his conclusion on that matter was affected by the mistake he had made as to the situation of the land in connection with the 1949 litigation where acquisition of Ibikunle land was the subject matter of the dispute.

Their Lordships do not however with all respect to the Federal Supreme Court agree that the decision of the trial judge as to the acquisition of the land in dispute depends on any mistaken view of the facts. The evidence of acquisition given at the trial is cogent. Daniel Akinbiyi, above referred to, who had been a councillor from 1936-1952 said that the land in dispute was acquired in 1937 by the Council, that a man went round with a bell to announce that the land was being acquired and that notices were placarded on the site and published in the official bulletin. He knew that compensation was claimed but did not know if any were paid. Sule Brimoh however, an employee of the Council, who had been employed in the Survey Section since 1933, said that some of the families were paid compensation, but that no claim was made on the part of the Ibikunle family. He made it clear that in 1937 the Council decided to acquire all the lands between Onireke Street and the Ogunpa Stream. All the lands so situate includes the land in dispute. It is true that no plan was tendered to show the area covered by the acquisition but no plan was necessary and the absence of a plan in the Council records does not outweigh the evidence of acquisition. The ringing of the bell and announcement by word of mouth are appropriate methods to convey to the notice of illiterate people that their land is being acquired. Placards were placed on the land for those who could read. The bulletin notice referred to by the Court instructed any person laying claim to ownership of the land lying between Onireke Street and Ogunpa Stream to inform the District Officer, or the Lands Registry Clerk, Oke Are, within 30 days. There seems therefore to their Lordships no reason sufficient to reverse the trial judge on his finding that the land in dispute had been acquired by the Ibadan Native Authority.

It was submitted on behalf of the plaintiff that, since acquisition by the Native Authority could only be validly effected for public purposes, therefore, when this land in dispute had been reclaimed, the purpose was exhausted and the land would revert to the original owner, the acquisition if any being then of no effect. This point was never raised at the trial or before the Federal Supreme Court and their Lordships were not prepared to give it consideration particularly as, if the point were one of substance, evidence as to the use to which the land was put at the material times would be

appropriate to be given before a conclusion could be reached.

It is unnecessary to consider in detail a contention raised by the appellant that one Seidu Williams was in possession of the land in dispute from 1902 onwards which, if true, would be inconsistent with the plaintiff's claim. This contention stems from a plan exhibited to a conveyance dated the 30th September, 1902, by which land in this district was conveyed to Seidu Williams whose son Issa Williams gave evidence and claimed the land in dispute as his. The plan however which was annexed to the conveyance shows a piece of land which, if the plan is accurate, cannot be identified with any land which includes the land in dispute if only because of the way the course of the Ogunpa Stream is marked. It is shown as a single stream running northwards for about 500 feet from the eastern side of the land conveyed whereas on the plans A and C (to which reference has been made) the stream divides into two parts at a point which appears to be less than 50 feet from the northern edge of the land in dispute. This matter was not dealt with by the trial judge but their Lordships do not dissent from the view taken by the Federal Supreme Court that the land conveyed to Seidu Williams has not been identified as including the land in dispute.

The appellant himself did not rely upon his own documents of title for reasons into which it is unnecessary to enter but relied on his possessory title and in refusing a declaration the learned judge rightly said that the onus was on the plaintiff to satisfy the Court that the evidence he had led is sufficient to establish his claim and if not satisfied that the onus had been discharged the Court must refuse the plaintiff the declaration even though there is weakness in the case for the defendant.

The Federal Supreme Court at the end of its judgment gave some weight to the language of section 45 of the Evidence Ordinance (Cap 62) which reads thus:

“ Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only if the particular piece or quantity of land with reference to which such acts are done but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.”

It does not appear that the plaintiff can gain assistance from this section since, as is shown by the plan marked C already referred to, the land in dispute marches with the lands of other families besides that of Ibikunle. It is there shown as Alapinti land but in any event it marches with the land of that family as well as with the land of the Wondo family shown on that same plan. Samuel Olorode, a member of the Wondo family, gave evidence that the whole land in the area including the land in dispute originally belonged to his family and denied that the Ibikunle family had any land in Gbagi.

As was observed by Webber J. in *Ekpo v. Ita*, XI N.L.R. 68:—“ In a claim for a decree of declaration of title the onus is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact.”

This statement of principle was cited with approval by the Board in the unreported case of *Idoko Nwabisi and another on behalf of themselves and the Umeleri people v. R. A. Idigo and another on behalf of themselves and the Aguleri people*, Privy Council Appeal No. 4 of 1958.

Their Lordships therefore agree with the conclusion of the learned trial judge that the plaintiff had not by the traditional evidence adduced on his behalf coupled with the evidence purporting to show acts of ownership by the Ibikunle family proved his right to a declaration of title to the land and that on a review of the whole of the evidence including that called on behalf of the defendants the same conclusion ought to be reached.

They will humbly advise Her Majesty that the appeal be allowed the Order of the Federal Supreme Court set aside with costs and the judgment of the High Court restored. The first respondent must pay the costs of this appeal.

ANACHUNA NWAKOBI, THE OSHA OF
OBOSI, AND OTHERS APPELLANTS

AND

EUGENE NZEKWU AND ANOTHER RESPONDENTS

(AND CONNECTED APPEAL)

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 1019

1964 June 15

Viscount Radcliffe, Lords Hodson
and Pearce

Laches—Equitable defence—Principles applicable—Land—Occupation by claimants previously vigilant in resisting usufructuary occupation—No usufructuary rights—Owners' claim to possession—Equity in occupants outweighing owners' rights.

Nigeria—Land—Laches—Equitable defence—Whether claimants of usufructuary rights entitled as against owner.

From the year 1900 the ownership of the radical title to the suit land was in the Crown until 1948 when, acting under statutory authority, the Crown disclaimed the land which then reverted to its previous owners who were, as finally determined by the Board in *Kodilinye v. Anotogu* [1955] 1 W.L.R. 231, P.C., the Onitshas, the present respondents. That decision, however, expressly left open the determination of any question as to the existence of usufructuary rights which might have been acquired by the Obosis, the present appellants, during the period of Crown ownership or otherwise entitled to recognition. In 1934 both the Onitshas and the Obosis had been forbidden by the Crown to "have any dealings with the land," but the Obosis, in defiance of that warning, had developed their settlement on the disputed land and in 1944 suits had been brought by the Crown, unsuccessfully, against individual Obosis claiming that they had no title to possession. The present consolidated suits were instituted in 1958—a suit for possession by the Onitshas and cross-proceedings by the Obosis—to determine whether the Obosis possessed usufructuary rights, it being contended by them, *inter alia*, that the Crown, if a suitor, could have been met with the defences of laches and acquiescence and that the Onitsha as successors to the Crown's title could be in no better position and could not maintain a suit for the purpose of disturbing their possession:

Held, (1) that the defence of laches involved essentially a personal disqualification on the part of the particular plaintiff; it could not be treated as a stigma on the title to land which, once impressed, necessarily descended with the title and affected all succeeding owners. It did not bite at an identifiable moment of time and could be relied on only when account had been taken of all

the circumstances that affected both the immediate plaintiff and the immediate defendant. Lapse of time was always one of those circumstances, and the inaction might itself lend support to the defendant's equity.

Description of the defence of laches in *Lindsay Petroleum Co. v. Hurd* [1874] L.R. 5 P.C. 221, 239, P.C., approved.

(2) The Obosi were at no time under any misapprehension which led them to suppose that their title to the disputed land was accepted by either the Crown or the Onitsha; they had failed to prove any legal rights in the land, either by way of radical title or usufructuary possession under customary law and, despite the Crown's injunction that the land was not to be interfered with, had for years been putting people and buildings on the land. The Crown, as shown by the suits it brought, had not acquiesced in the Obosi claim of title, and the Onitsha had always been vigilant to assert their rights in the land and to evict those who could not claim an interest as their own tenants. Laches was an equitable defence, and the Obosis had no equity which on balance outweighed the Onitsha's right.

Judgment of the Federal Supreme Court of Nigeria (1961) 1 All N.L.R. 445 affirmed.

The following cases, in addition to those referred to in the judgment, were cited in argument:

Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95; [1957] 3 W.L.R. 830; [1957] 3 All E.R. 599. P.C.;

Amodu Tijani v. Secretary Southern Nigeria [1921] 2 A.C. 399 P.C.;

Akpan Awo v. Cookey Gam [1913] 2 N.L.R. 97;

Sakariyawo Oshodi v. Brimah Balogun [1936] 4 W.A.C.A. 1 P.C.;

Erlanger v. New Sombrero Phosphate Co. [1878] 3 App.Cas 1218 H.L.(E).

Fullwood v. Fullwood [1878] 9 Ch.D. 176;

Attorney-General for Trinidad and Tobago v. Bourne [1895] A.C. 83, P.C.;

Robertson v. Minister of Pensions [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2

All E.R. 767;

Smith v. Clay [1767] 3 Brown Ch.Cas. 638 n.;

Brooks v. Muckleston [1909] 2 Ch. 519;

Rocheffoucauld v. Boustead [1897] 1 Ch. 196 C.A.;

Oshodi v. Imoru [1936] 3 W.A.C.A. 93;

Ramsden v. Dyson [1866] L.R. 1 H.L. 129, H.L.

APPEAL (No. 29 of 1962) from a judgment of the Federal Supreme Court of Nigeria (July 3, 1961) in two consolidated suits, dismissing an appeal from a judgment of the High Court, Onitsha Judicial Division (May 12, 1960), whereby the claim of the Ogbo Family of Umuasele, Onitsha, represented by the present respondents, for damages for trespass to their land known as Ugbo-Orimile, recovery of possession and an injunction, was upheld, and the claim of the people of Obosi, represented by the present appellants, for a declaration that they were entitled to certain usufructuary rights in the same land, and an injunction, was rejected.

The Principal question in this appeal was whether the courts below were right, in law and on the facts, in rejecting the defence of laches and acquiescence put forward by the appellants in answer to the respondent's claim for damages and other relief for trespass.

The facts appear from the judgment of the Judicial Committee.

1964. May 11, 12, and 13. *E. F. N. Gratiaen Q.C., R. K. Handoo and T. C. Ikeazor* for the appellants.

Ralph Milner and C. E. Agbu for the respondents.

June 15. The judgment of their Lordships was delivered by VISCOUNT RADCLIFFE. This appeal arises out of two suits, now consolidated, in which the respondents the Ogbo Family of Umuasele, Onitsha, a branch of the Onitsha community, and the appellants represent the Obosi Community. The dispute between them is a land dispute, the area in question being a part

of Ugbo-Orimile land known as Otu Obosi. It is hereinafter referred to simply as "the disputed land." The consolidated suits were tried in the High Court of the Eastern Region of the Federation of Nigeria by Betuel J. and on May 12, 1960, he gave judgment in favour of the respondents, awarding them £500 damages for trespass, recovery of possession of the disputed land and a supporting injunction. On appeal to the Federal Supreme Court his judgment was affirmed, the unanimous opinion of that court (Ademola F.C.J., Unsworth and Bairamian F.J.J.) being delivered on July 3, 1961, by Bairamian F.J.

Their Lordships are satisfied that the decision of the courts in Nigeria was correct and that the appeal ought to be dismissed.

The quarrel over the disputed land has a long and somewhat complicated history. Since, however, the material facts relating to it are the subject of concurrent findings in the Nigerian courts and the radical title to the land has already been decided to belong to the respondents (see the opinion of this Board reported *sub nom. Kodilinye v. Anotogu* [1955] 1 W.L.R. 231, P.C.) the story can be set out without the need to refer to the evidence in any detail.

It begins in 1884, with a sale of land which included the disputed land by one Akagbue, a member of the Ogbo family, to the National African Company Ltd., to whose rights the Royal Niger Company succeeded. At that time the land was mainly bush, but there were four rent or tribute paying tenants farming on it, who were members of the Obosi community. Akagbue's grant was intended to contain a reservation of the rights of these individual tenants, but the Obosi community itself had no rights whatsoever in the land.

As from the year 1900 the Crown took over the Royal Niger Company's interest in the disputed land, and from then on until the year 1948 the radical title remained in the Crown, to the exclusion both of the respondents, who will hereinafter be referred to as "the Onitshas," and the appellants, hereinafter to be called "the Obosis." In December, 1948, acting under statutory authority, the Crown disclaimed the land, which thereupon reverted in its previous owners, the Onitshas. That it was the Onitshas and not the Obosis who were the previous owners was established in the *Kodilinye* suit [1955] 1 W.L.R. 231, P.C. which has just been referred to. The opinion of the Board, which concluded that issue, was delivered in 1955, and, while it settled the question of the ownership of the radical title, it expressly left open the determination of any question as to the existence of usufructary or other rights which might have been acquired in the disputed land during the period of Crown ownership or might otherwise be entitled to recognition.

The present consolidated suits were instituted in 1958 for the purpose of obtaining the court's decision as to the existence of such rights, which, according to the Obosis, they possessed in the land. The trial judge, after hearing the evidence, decided that there were no Obosi community rights; and his decision on this point was not challenged in the appeal before their Lordships. The argument presented to them, apart from an issue as to *res judicata* which will be referred to shortly, was confined to the proposition that, having regard to all that had happened while the disputed land was vested in the Crown, the Onitshas were debarred by the laches or acquiescence of their predecessors, the Crown, from maintaining a suit for the purpose of disturbing the possession of the Obosi community. Neither the trial judge nor the Federal Court on appeal was prepared to uphold this equitable defence on the part of the Obosis; and their Lordships must now

turn to notice the facts upon which, it is claimed, the defence is entitled to rest.

First, however, it is desirable to mention that the trial judge held that as between Onitshas and Obosis the existence of usufructuary or possessory rights in the Obosi community had already been negatived in another suit, started in 1956, in which the Onitshas had sued one Isaac Maduegbunam Ichu (Suit No. 0/31/56, Nigeria, Eastern Region High Court). Ichu, though undoubtedly an Obosi, had been sued personally for possession of his particular holding; but in his defence he had set up and relied upon the alleged possessory rights of the Obosi community over the disputed land. Moreover, "organised bodies within the Obosi Community" had, the judge found, financed and conducted Ichu's defence, had been fully cognisant of the proceedings and had participated in them. The defence had failed, and an order for possession had been made against Ichu. On these facts the judge held that the non-existence of Obosi community rights in the disputed land was *res judicata* as between Onitshas and Obosis, applying for this purpose the familiar doctrine of "standing by," as explained, for instance, by Lord Penzance in *Wytherely v. Andrews* [1871] L.R. 2 P. & D. 327.

The Federal Court disposed of the appeal without resort to this principle since, whether or not there was a case of *res judicata* or "standing by" for the Onitshas to rely upon, the court held that the Obosis had not in any event succeeded in the present suit in establishing the rights they claimed and the defence of laches was not open to them. Their Lordships will take the same course, since they are in full agreement with the Federal Court on what is really the main issue; and, also it must be pointed out, while a defence of *res judicata*, if made good, would be a complete answer to the Obosis' suit, which forms one of the present consolidated suits, it is not so clear what its bearing would be upon the Obosis' defence of laches in the other suit. Where laches is in question, the issue is not so much the question what rights a plaintiff has as whether in any event his conduct has been such as to leave him in a position to invite the court to enforce them.

Having regard, however, to the arguments that were submitted to them on the question of *res judicata*, their Lordships think that it may be useful to observe that in their view the principle of "standing by" while certainly a valuable one for application when circumstances demand it, does need to be confined to cases in which participation in "the battle" is proved up to the hilt. Otherwise, the distinction between suits in which plaintiffs have chosen to sue a defendant individually, though a community title may be brought in question, and those suits in which they set out to and do challenge a community title as such will be in danger of being obscured; and even a measure of assistance to a defendant from other community members may give plaintiffs an advantage in all future litigation which, in fairness, there is no reason for them to enjoy.

To turn now to the facts upon which the Obosis seek to found their defence of laches. Up to the year 1928 nothing seems to have occurred to suggest that such Obosis as were found in occupation of any holding on the disputed land were anything but either rent-paying tenants of the Onitshas or trespassers: and, if the latter, steps were taken to turn them off. Sometimes about 1928, under the influence of Chief Kodilinye previously referred to, claims of right on behalf of the Obosi community began to be put forward by Obosi occupiers, coupled with refusal to pay rent to the Onitshas. Those claims were not conceded by the latter, and legal proceedings were launched for the recovery of rent. In 1934, however, a

step was taken by the Crown which was no doubt responsible for much of the difficulties that have since arisen. The title to the land had been vested in the Crown since 1900, and, therefore, for these years, despite the legal proceedings that evidently took place, neither the Onitshas nor the Obosis had any radical title to assert. But no action seems to have been taken by the Crown to establish its own position until 1934, when both parties were forbidden by the Resident, the local representative of Government to "have any dealings with the land." The Onitshas, says the trial judge, heeded the warning but the Obosis did not.

In fact what the Obosis did from that time on was to develop their settlement on the disputed land in defiance of the Crown's warning. This was very naturally objected to by the Onitshas, who saw the prospect of their own position being prejudiced without their having the power to intervene, and the record shows how vigorously they protested to the Resident asking him to take some action, if they could not. But the attitude of the Crown during this period is stated by the trial judge to have been that, once having asserted its own ownership by issuing a warning to both parties in 1934, it did not wish to take sides in a dispute, of the rights and wrongs of which it was probably ignorant; and, having in view the abandonment of the land which ultimately took place in 1948, it was content to hold its hand. Nevertheless, the Resident did give the Obosis more than one warning that their conduct was improper, and in 1944 he went so far as to institute suits against a number of individual Obosi occupiers, claiming that they had no title to possession. The suits were unsuccessful in the first court, being defeated on technical grounds of procedure, not on their merits, and after adverse judgment in one of them the Crown for some reason discontinued them: but their institution at least showed that the Crown was far from acquiescing in the Obosi claim of title.

Nothing else calls for mention with regard to the attitude of the Crown. In 1948 came the disclaimer, and, as from that date the Onitshas have been at liberty to take their own proceedings against the Obosis. Plainly, they have not been idle since then, either in suits against individuals or in suits against the community: nor is it part of the appellants' case that the Onitshasi themselves are affected with laches or acquiescence. The whole case that they seek to make is that the Crown, if a suitor, could have been met with these defences and that the Onitshas, succeeding to the Crown's title, can be in no better position.

In their Lordships' opinion the defence of laches cannot be presented just in these terms. Laches involves essentially a personal disqualification on the part of a particular plaintiff: it cannot be treated as a stigma on the title to land which, once impressed, necessarily descends with the title and affects all succeeding owners. In this it is to be distinguished from a defence such as estoppel *in pais* which, given the words or acts upon which a defendant has relied and altered his position, bars the remedy from that time on, both in the hands of the original actor and in the hands of those who claim title through him.

Laches is not like this. It does not bite at an identifiable moment of time and it can be relied on only when account has been taken of all the circumstances that affect both the immediate plaintiff and the immediate defendant. Lapse of time is always one of these circumstances, and the inaction of a predecessor is not a matter to be ignored, for such inaction may itself lend some support to the defendant's equity. It may well be important from other points of view. It may itself contribute part of the positive evidence of a defendant's title, where that is uncertain: or it may

constitute that type of acquiescence which, when analysed operates as an estoppel, because it has led a defendant to alter his position on the faith of the established inaction. But these considerations are separate from laches, and it only leads to confusion to speak of one in terms of the other.

Even if attention is concentrated on the period of Crown ownership which ended in 1948, the facts found are incapable of supporting the required defence. For what has to be proved to make that good? In their Lordships' opinion there is no better description of the defence of laches than that given by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221 at p. 239, P.C.:

" Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just is founded upon mere delay . . . , the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect wither party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Now in their Lordships' opinion the conclusive factor in this present case is that the Obosis were at no time under any misapprehension which led them to suppose that their title to the disputed land was accepted by the other parties, Crown or Onitshas. They were not the victims of any mistake induced by the others. The findings of the trial judge are explicit on this point. " Far from being permitted to build on the land," he says of them, " they were, as they well knew forbidden to do so." And again,

" if the Obosi community, as they did, flooded the land in dispute with persons and buildings, in accordance with an unreasonable belief, not caring whether the land was in their possession or not, with a view to presenting everyone with a '*fait accompli*', enabling them to plead the hardship of being dispossessed; they cannot now complain if as a community they are now dispossessed."

The Federal Court has recorded a similar view of their conduct: " There is, I fear," said Bairamian F.J. ([1961] 1 All N.L.R. 445 at p. 451)

" no merit in their conduct. There is evidence for the plaintiffs of the Resident's oral warning to their Chief . . . The learned judge says that ' Far from being permitted to build on the land they were, as they well knew forbidden to do so: they built all the same; and, after the Crown gave up the land at the end of 1948, they went on trespassing. The idea of depriving the owners of their property without any return did not worry them; it was not until this appeal that they even suggested that, if they lost, they would like to be allowed to stay on and pay rent. They built up a case of hardship by wrongdoing, and wished to have their misconduct condoned by putting the blame on the Crown.'"

The relative positions of the two parties to the present suits appear from

the facts to be as follows. On the one hand are the Onitshas who, after protracted litigation, have established themselves to be the owners of the radical title to the disputed land. In course of time, through no fault of theirs, it has been subjected to large scale occupation and building operation in the name of the Obosi community. The Onitshas have always been vigilant to assert their rights in the land and to evict those who could not claim an interest as their own tenants. During the period when they were powerless actively to assert their rights, because the Crown would not let them, they did what they could to preserve their position by protests to the Crown. So much for the Onitshas. On the other hand are the Obosis who have failed to prove any legal rights in the land, either by way of radical title or by way of usufructuary possession under customary law. All that their community can say is that, with its eyes wide open to the existence and nature of the dispute, it has for years been putting people and buildings on the land, and this despite the Crown's injunction that the land was not to be interfered with.

Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right. The Obosis have no such equity in this case.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.

Solicitors: *T. L. Wilson & Co.; Rexworthy, Bonser & Simms.*

DR. ESIN ANWANA ESIN (FOR HIMSELF AND AS
REPRESENTING THE ESIN FAMILY OF EYO ABASI) APPELLANT

AND

ATANGEDEM ABASI AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1963] 1 All N.L.R. 407

1964 July 3

Lords Evershed, Guest
and Upjohn

Legislation—Pre-1955—Public Lands Acquisition Ordinance, s. 10 and s. 29; Supreme Court Ordinance, s. 11; Native Courts Ordinance, s. 28 (1) (Cap. 185, cap. 211, cap. 142, in the 1948 Laws)—The Supreme Court (Civil Procedure) Rules, 0.II, in the 1948 Laws.

Jurisdiction—The pre-1955 Supreme Court Original jurisdiction under section 11 of cap. 211; summary jurisdiction under section 10 of cap. 185; trial under order for re-trial made under section 28 (1) (b) of cap. 142.

Practice and Procedure—Action begun by writ of summons under the above Rules—Summary procedure by summons taken out under section 10 and section 29 of cap. 185, not exclusive.

Statutes—Interpretation—Procedural provisions—Whether procedure provided by statute exclusive.

Appeal by plaintiffs; (P.C. No. 32 of 1963; F.S.C. 443/1961; High Court (E.N.) Suit No. C/2/55).

The Law is stated briefly as it stood before 1955. The former Supreme Court had the jurisdiction of the High Court of Justice in England, but it did not exercise its jurisdiction to try disputes on land title between Nigerians if there was a competent Native Court in the area to try the dispute, except under an

order made by a district officer under section 28 (1) (b) or (c) of the Native Courts Ordinance, setting aside the judgment and ordering a re-trial before the Supreme Court, or transferring the suit before judgment to the Supreme Court. The district officer had a duty to give reasons for his order.

Section 10 of the Public Lands Acquisition Ordinance provides that the former Supreme Court shall settle (1) what is the proper amount of compensation to be paid for land acquired by Government (2) who are entitled to the compensation, and (3) in what proportion, upon a summons in the form prescribed by s. 29, taken out by the Chief Commissioner (later styled the Lieut.-Governor) in the case of land outside Lagos, or by a claimant.

The ordinary mode of beginning a suit in the former Supreme Court, under the Supreme Court (Civil Procedure) Rules, was by writ of summons—*i.e.* an action, which usually involved pleadings. Pleadings were not required under the originating summons procedure provided in the Public Lands Acquisition Ordinance.

Government acquired an area for a customs site in the Eastern Region; the Lieut.-Governor took out a summons, and the former Supreme Court decided that the annual rent was to be £50 payable to the persons entitled as landlords; but the rival claims of the Esin Family and of the Abasi Family were not settled in that court. The Esins sued the Abasis in the Native Court as if what became Crown land were still private property. The area involved in the suit was not altogether clear. The Native Court decided against the Esins, and at their request to review the case the district officer in January, 1955, set aside the judgment and ordered a re-trial before the Supreme Court, one of his reasons being that the land was Crown land and the other that the parties wished to have counsel (whom they could not have in the Native Court) and put in survey plans.

In the course of 1955 the former Supreme Court was replaced in the Eastern Region by the High Court of the Region, and the High Court tried the dispute. The plan of the land in dispute showed that it was made up of plots A, B, C, and D, making up a little over 19 acres; the Crown land was just over 10½ acres, of which 8 were within the plots A to D. The Esins were given judgment for plots B, C, and D, and the Abasis appealed to the Federal Supreme Court (set up in 1955), and the appeal came up before Brett, Taylor, and Bairamian, F.J.J.: judgment on 24th May, 1963.

Brett and Bairamian F.J.J. were of the opinion that the Native Court suit related to the land acquired by Government and was a nullity: *Jackson v. Cooke* [1937] A.C. 205; also that the High Court had jurisdiction to hear the dispute between the claimants upon a summons taken out under the Public Lands Acquisition Ordinance, but had no jurisdiction to hear it in a suit brought in the Native Court contrary to law and invalidly ordered to be re-tried in the former Supreme Court, and by majority the Federal Supreme Court declared the proceedings in that Court and the subsequent hearing in the High Court a nullity. Taylor, F.J. thought that the Native Court suit related to a much larger area than the parcel acquired by Government, and that the proper course was to excise the parcel acquired by Government, over which the Native Court had no jurisdiction, and hold that the Native Court had jurisdiction over the part outside the parcel. The Esins appealed to the Privy Council.

In the Privy Council it was common ground that insofar as the action related to Crown Land the proceedings in the Native Court were misconceived and a nullity. It was conceded that the area of dispute in that Court extended beyond the Crown land, and also that the Lieut.-Governor was not in every case an essential party as a respondent.

The points for decision upon the arguments were—

(1) Whether the district officer's order setting aside the Native Court suit and ordering the case to be re-tried was, despite the fact that one of his reasons was that the suit related to Crown Land, a valid order for the other reason he gave, namely that the parties wanted to have counsel and put in plans;

(2) Whether the High Court had jurisdiction to hear the suit pursuant to the order for re-trial, or could only have jurisdiction upon a summons issued under the Public Lands Acquisition Ordinance.

Held: (1) The district officer's order was valid for the other reason he gave and was not rendered invalid because of the reason for ordering a re-trial was that the proceedings were a nullity as to the Crown Land.

(2) When an order for re-trial by, or transfer to, the High Court is made under section 28 (1) of the Native Courts Ordinance, the High Court has all the

powers conferred on it by the High Court Law as though the proceedings had originated in the High Court itself, even though the Native Court had no jurisdiction.

Ababio v. Ackumpong, 6 W.A.C.A. 173 followed.

(3) The summary procedure by summons provided in the Public Lands Acquisition Ordinance does not preclude the determination of a dispute on ownership in an action begun by writ of summons: that Ordinance did not intend that summary procedure to be exclusive and to oust the normal procedure.

Decision of the Federal Supreme Court set aside; judgment of High Court restored: the Federal Supreme Court to hear the appeal on the merits.

(*Editor's Note: Ababio v. Ackumpong was not cited in the Federal Supreme Court.*)

APPEAL from the Federal Supreme Court of Nigeria.

LORD UPJOHN (delivering the judgment of the Board). This is an appeal by leave from an order made on the 24th May, 1963, of the Federal Supreme Court of Nigeria whereby certain proceedings in the High Court of Nigeria Eastern Region culminating in a judgment of Kaine J. on 30th October, 1959, were set aside as a nullity.

The problem before their Lordships is purely one of procedure and does not touch on the merits of the case.

To understand the difficulties that have arisen it is necessary to set out some historical facts.

On the 17th July, 1952, the Crown served a notice in the prescribed terms under the Public Lands Acquisition Ordinance 1917 (as subsequently amended) (which will be referred to as the Lands Ordinance) to acquire just 10½ acres of land at Oron for the purpose of building a Customs House thereon. The Crown duly entered on to this land and has ever since been in occupation thereof. This land will be referred to as the Crown land.

At once each of two families, the Esin family and the Abasi family disputed the ownership of the greater part of the Crown Land and therefore the right to the compensation payable for its acquisition; it is regrettable that 12 years later this dispute has not yet been resolved. However in these circumstances on 2nd February, 1954, the Lieutenant-Governor Eastern Region issued a summons under section 10 of the Lands Ordinance making representatives of these families respondents and asking for the determination of the amount of rent payable annually in respect of the Crown land. He offered to pay an annual rent of £50.

On 26th April, 1954, Mr. Justice Brown made an order in these terms: "Order amount of rent payable annually to be £50 as offered by the Lieutenant-Governor and is now payable to the persons entitled as landlords."

In order to determine who were entitled as landlords, on the 7th July, 1954, the Esin family began proceedings in the Native Court at Oron (bearing the case number 563/54) against the Abasi family. The parties appeared without professional advisers and the plaintiffs' action was dismissed by the Judge.

It is common ground that in so far as this action related to the Crown land the proceedings in the Native Court were misconceived and a nullity.

On the 29th January, 1955, an Assistant District Officer purporting to act under section 28 (1) (b) of the Native Courts Ordinance set aside the judgment of the Native Court and ordered a retrial in the Supreme Court of Nigeria as it was then called. Under recent Constitutional revisions that is now the High Court and it will be convenient so to describe it to avoid any confusion. The formal order embodying his decision was dated 31st

January, 1955, and it stated that one of the reasons for ordering a retrial was that the land in dispute was Crown land.

One of the substantial issues in this case is whether that order for re-trial was validly made.

During 1955 the action so ordered to be retried received a new serial number C/2/1955 in the High Court and pleadings were delivered. Later by leave of the Court amendments were made by addition of parties. Then the action became dormant for about four years but ultimately was heard by Kaine J. in September and October, 1959, and he delivered judgment on 30th October, 1959.

There have since been changes of parties by death but nothing turns thereon. The plaintiffs in the action are the appellants and the defendants are the respondents before their Lordships.

It is not now in question that in the proceedings before Kaine, J. the land in dispute related to an area of rather over 19 acres divided, for the purpose of establishing title, into four plots, A, B, C, D. The Crown land was just over 10½ acres of which 8 acres were within the four plots A-D and a little over 2½ acres were outside this area and were not claimed by the plaintiffs in the action.

Kaine J. held that the plaintiffs established title to plots B, C, and D, but failed to establish title to plot A. The action was fought on the footing that the freehold of the Crown land remained in the landlords and having regard to the form of order made on 26th April, 1954, this was probably right and no objection to declaration of title thereto could properly be made, but their Lordships have some difficulty in seeing how it could have been proper to grant injunctions relating to the Crown land which is and ever since 1952 has been in the exclusive possession of the Crown; however that is not an issue before their Lordships.

The defendants appealed to the Federal Supreme Court both on the actual merits which had been the subject of the decision of Kaine, J. and also on the ground that the proceedings before him were a nullity.

The Federal Supreme Court dealt with the latter point as a preliminary issue and by a majority upheld the submission and, as already mentioned, set aside the proceedings C/2/1955 as a nullity. In these circumstances they did not hear the appeal on the merits.

Before reviewing the grounds on which the Federal Supreme Court came to this conclusion it will be convenient to set out the relevant part of section 10 of the Lands Ordinance on which so much hinges.

“ If separate and conflicting claims are made in respect of the same lands, the amount of compensation due, if any, and every such case of disputed interest or title shall be settled by the Supreme Court, which Court shall have jurisdiction to hear and determine in all cases mentioned in this section upon a summons taken out by the Chief Commissioner or, if the lands are situated in the Colony, the Chief Secretary, or any person holding or claiming any estate or interest in any lands named in any notice aforesaid, or enabled or claiming to be enabled by this Ordinance to sell and convey the same.”

The majority of the Federal Supreme Court decided that the action C/2/1955 was a nullity on the ground that the proceedings in the Native Court related to the Crown lands and, as their Lordships read the judgment of Bairamian F.J. who delivered the leading judgment, with which Brett F.J. concurred, related only to such lands; those proceedings were therefore a nullity. Therefore, the order of the District Officer purporting to order a

retrial in the High Court was invalid and the proceedings before them were a nullity.

It was put succinctly by Bairamian J. thus:

“ A summons was taken out by the Lieutenant-Governor (the successor of the Chief Commissioner); there was already a dispute between Dr. Esin and Atang Edem Abasi, and both were respondents to the summons. The Supreme Court had jurisdiction to hear and determine their dispute *upon a summons taken out under that Ordinance*; it had no jurisdiction to hear it in a suit between Dr. Esin and Abasi brought in the Native Court contrary to law and invalidly ordered to be retried in the Supreme Court.”

It is clear from the dissenting judgment of Taylor F.J. that he agreed with the principles thus enunciated but he dissented on the ground that in his view the proceedings in the Native Court related not merely to the Crown land but to the whole of the disputed area of 19 acres. In his judgment he carefully analysed the claim made in rather elementary terms in the Native Court and shewed that in his opinion that claim in fact related to the whole area of 19 acres. Before their Lordships it was conceded that the area of dispute in the Native Court extended beyond the Crown land.

Taylor F.J. then rightly pointed out that it could not be and had not been contended that the Native Court had no jurisdiction over the larger area of land. Therefore he proposed to excise from the area of dispute in action C/2/1955 the Crown land and to let it continue as to the remainder *i.e.*, as to rather over 11 acres.

If it be right that the order of retrial was a nullity as to such of plots A-D as was Crown land their Lordships can see no answer to this proposal, inconvenient though it might be in practice.

Before their Lordships an additional point not expressly taken in the Court below, though clearly based on the passage in the judgment of Bairamian F.J. already quoted, was to the effect that to determine a dispute as to title, when the Crown invokes the powers of the Lands Ordinance to take land, the jurisdiction of the Court could only be invoked by a summons issued under section 10. Then having regard to the mandatory terms of section 29 of the Lands Ordinance it was argued that such summons must be in the form prescribed in Schedule F, that is a summons entitled “ In the Matter of the Public Lands Acquisition Ordinance ” and so on and the present proceedings not being so initiated were incompetent. However it was conceded that having regard to the very wide terms of section 10 not only could the summons be taken out by a party other than the Lieutenant-Governor but that he was not in every case an essential party even as respondent.

On the main point that the order of re-trial was a nullity their Lordships regret that they are unable to agree with the view which formed the basis of the decision of all the Judges of the Federal Supreme Court.

The decision of the Native Court was a nullity in so far as it related to the Crown land. That was one good reason for setting it aside in order that judicial records should be cleansed of invalid orders; but, there were other good reasons stated in the Order of 31st January, 1955, for setting aside the order of the Native Court not only in relation to the Crown land but as to the remainder and their Lordships do not see how that Order can possibly be challenged so far. Then the powers conferred upon the District Officer by section 28 (1) of the Native Courts Ordinance are perfectly general; their Lordships do not think it necessary to quote the section for nothing turns

upon its exact wording, but the District Officer is clearly empowered when setting aside an Order, to order a re-trial in the High Court under sub-paragraph (b) or a transfer to the High Court under sub-paragraph (c) of section 28 (1); no doubt sub-paragraph (b) was directed to the case where there had been a judgment in the Native Court (as in this case) and sub-paragraph (c) to the case where the action was still pending.

Such an order for re-trial would (apart from the argument that proceedings must be initiated in the High Court by summons in the form of Schedule F) have been perfectly valid if it had been made for one of the other reasons given and their Lordships do not see why the order is invalid because one of the grounds for ordering a re-trial was that the proceedings were a nullity as to the Crown land.

In their Lordships' opinion when an order of retrial by, or transfer to, the High Court is made the jurisdiction of that Court is in no way fettered by any absence of jurisdiction in the Native Court whose order has been set aside. The High Court entertaining these proceedings has all the powers and authorities conferred upon it by section 11 of the Supreme Court Ordinance just as though the proceedings had originated in the High Court itself.

Apart altogether from authority their Lordships cannot see how such a proposition could be doubted unless there are some restrictive provisions in the Statute which authorises the retrial or transfer (and there are none) but in fact authority is not wanting. In *Ababio v. Ackumpong*, 6 W.A.C.A. 173 the West African Court of Appeal on appeal from the Gold Coast decided that on a transfer from the Native Court, the Divisional Court (in that case) could exercise all the powers conferred upon it by section 14 of the Courts Ordinance relating to the Gold Coast which is in similar terms to section 11 already mentioned. The correctness of that decision has not been challenged before their Lordships.

It is interesting to observe that in certain interlocutory proceedings in this case in 1955 and in 1956 both Brown J. and Palmer J., relying on this authority, held that the action was properly directed to be retried in the High Court.

It is true that both judges treated the matter as one of transfer under paragraph (c) rather than retrial under paragraph (b) but their Lordships can draw no distinction between these paragraphs for any relevant purpose.

Their Lordships regret that *Ababio's* case does not appear to have been cited to the Federal Supreme Court. Apart from the point to which their Lordships will now turn they cannot see anything in the Lands Ordinance which precludes the High Court from entertaining an action ordered to be retried by it if that action could have been validly entertained by proceedings originating by way of a writ of summons in the High Court.

The point then is whether upon the true construction of the Lands Ordinance proceedings relating to land being acquired by the Crown under that Ordinance can only be instituted in the High Court in the form of a summons as prescribed in Schedule F.

Their Lordships do not accept the submission. The Ordinance provides for a summary procedure by way of originating summons to determine the amount of compensation and questions of title. But there is nothing in sections 10 or 29 of the Lands Ordinance on which so much reliance was placed, to exclude the general jurisdiction under section 11 of the Supreme Court Ordinance to determine questions of title in actions begun by writ of summons under Order II of the Rules of the High Court of Nigeria. It is familiar law that where by Statute or Rules of Court the Court is empowered to determine questions by a special summary procedure that

does not preclude their determination in actions begun by writ (though questions of costs may be involved) unless it is clear that the procedure so laid down is intended to be exclusive and to oust the normal procedure. In their Lordships' opinion the Lands Ordinance intended to lay down only a speedy and convenient procedure for simple cases. It did not intend to oust the jurisdiction of the High Court in complicated cases to hear actions begun by writ where pleadings would be desirable in order to define the real issues between the parties. This case seems to their Lordships just such a case.

Therefore their Lordships can see no reason to deny to the Esin and Abasi families the right to litigate their disputes as to title even in relation to the Crown land by writ of summons or upon an order for re-trial from the Native Court. Their Lordships are glad to be able to reach this conclusion as, having regard to the stage which this action has reached this seems the most convenient and inexpensive course to the parties; it would be lamentable if, as the defendants contended, the whole matter had to proceed *de novo* by summons under section 10.

It is conceded by both sides that when the rights of the parties have been finally determined in action C/2/1955 some further application must be made to the Courts under section 10 of the Lands Ordinance to which the Lieutenant-Governor will be a necessary party in order to apportion the rent of £50 per annum among the various owners of the Crown land, and this seems unavoidable unless all persons interested in the whole of the Crown land can agree. While the Lieutenant-Governor will not technically be bound by the ultimate decision in this action there is no reason to suppose he will not be prepared to abide by it in so far as it does decide matters in dispute between the Esin and Abasi families in relation to the Crown land or some part thereof.

Their Lordships will therefore humbly advise Her Majesty to allow the appeal; to set aside the Order of the Federal Supreme Court dated 24th May, 1963, with costs and to restore the judgment dated 30th October, 1959, of Kaine J. The pending appeal from that judgment to the Federal Supreme Court will then proceed for hearing on the merits.

The respondents must pay the costs of this appeal.

S. M. OGUNDIPE-ALATISHE TRADING UNDER THE NAME
AND STYLE OF FRENCH MEDICINE STORES . . . APPELLANT

AND

THE LAGOS EXECUTIVE DEVELOPMENT BOARD
AND ANOTHER RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 13

Lords Reid, Hodson
and Sir Benjamin Ormerod

Interpretation—"Owner" under section 2 of the Lagos Town Planning Ordinance, Cap. 95, Laws of the Federation—Need not be one with title—Not affected by section 38.

Section 2 of the Lagos Town Planning Ordinance, Cap. 95 defines "owner" as follows: "'owner' means the person for the time being receiving the rent of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person or as receiver (not being appointed by or on behalf of a mortgagee) or who would receive the same if such land or premises were let to a tenant, and shall include a mortgagee in possession."

Held: (1) It is not necessary that such owner should be also a person with title to receive the rent.

(ii) There is nothing in the definition section to indicate that "owner" has any different meaning from that in the definition in any part of the Ordinance. There is no reason why section 38 (c) should not be workable just as well if "owner" is given the definition in section 2 as it would be if "owner" was given a different meaning, namely, a person having a title to receive the rents.

LORD REID. This is an appeal by the former owner of No. 18 Breadfruit Street, Lagos. That property was acquired by the first respondents under the Lagos Central Planning Scheme which was approved by Order in Council No. 3 of 1952. The second respondent was the owner of No. 20 Breadfruit Street and that property was also acquired by the first respondents under the same scheme. The scheme was made under the Lagos Town Planning Ordinance, Chapter 95, of the Laws of the Federation of Nigeria.

The result of the acquisition was that parts of the land acquired were used for road widening and the rest was amalgamated, under the terms of Section 38 of the Lagos Town Planning Ordinance, so as to form one lot.

The duties of the first respondents are those set out in Clause 4 (f) of the Schedule to the Planning Scheme. The purpose of that clause is: "The offer of land within the replanned area to the original owners thereof, as far as it is possible to do so." Then there is provision for the price to be paid.

The first respondents decided that it was not possible to divide up the new lot which, accordingly, had to be offered either to the appellant or to the second respondent. The first respondent decided to offer it to the second respondent and the *bona fides* of that decision is not now attacked.

The appellant's case is that the first respondents were not entitled to offer the land to the second respondent because the second respondent had not been the owner of No. 20 Breadfruit Street within the meaning of the relevant legislation. Accordingly, it is necessary to go to the legislation to see what was meant by "owner." "Owner" is defined in section 2 of Chapter 95 of the Lagos Town Planning Ordinance as follows: "'Owner' means the person for the time being receiving the rent of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person or as receiver (not being appointed by or on behalf of a mortgagee) or who would receive the same if such land or premises were let to a tenant, and shall include a mortgagee in possession."

The learned trial Judge appears to have decided the case on the footing that the plaintiff, the present appellant, had admitted in his pleadings that the second respondent was the owner of No. 20 Breadfruit Street; but their Lordships think that it would be better to look at the facts and see whether on the evidence the second respondent can be regarded as owner of that ground within the meaning of the definition.

Evidence was given by the Estate Officer of the first respondent and by the second respondent himself. The second respondent said in evidence that he had been receiving rents from No. 20 Breadfruit Street since 1938 and then he explained in cross-examination how that had come about. It

appears that the last registered owner of that land was a certain Mr. Cole, that the property had been mortgaged to a mortgagee, that the second respondent had bought Mr. Cole's interest and had then paid off the mortgage debt, but he had never taken any conveyance of the ground. His evidence is to a certain extent corroborated by the Estate Officer who said that he knew that the owner of No. 20 Breadfruit Street was the second respondent and that he could not lay hands on the paper from which he took the second defendant's interest as dated from 1938. He further said that he knew that the second respondent had a freehold interest.

Accordingly, if the definition of "owner" is to be taken at its face value, there can, in their Lordships' view, be no doubt that the second respondent was the owner of No. 20 Breadfruit Street when it was acquired by the first respondents.

The argument which was submitted on behalf of the appellant turned on the provisions of section 38 of the Lagos Town Planning Ordinance. Before coming to section 38, their Lordships must also cite the definition of "holding," or at least the relevant part of it. In section 2 of that Ordinance "holding" is defined as meaning: "any piece of land, and 'original holding' and 'final holding' mean respectively, with reference to a scheme which provides for the redistribution of holdings, a holding prior to its amalgamation with other holdings for the purpose of redistribution and a holding allotted in pursuance of redistribution."

Their Lordships need not quote the whole of section 38 but, in view of the importance attached to it by Counsel for the appellant, they will quote a part of it. The section provides: "A redistribution of holdings comprised in any scheme shall be effected in the following manner," and then there is provision in sub-paragraph (a) for amalgamation of holdings belonging to private owners, public bodies, Crown land, together with all roads, streets etc. within the scheme area. The second paragraph provides for the allotment of an area in respect of roads, streets, back-lanes and open spaces. Then there is the paragraph specially relied on: "(c) by the assignment, so far as is practicable, to as many original owners as is possible, having regard to the provisions of the scheme, of one or more final holdings, equivalent or proportionate in extent and value, or both combined, to their respective original holdings."

The argument is that that collocation in section 38 (c) of owner and holding indicates that the owner, in order to qualify for an allocation, must be not merely a person receiving the rent of the land but also a person with a title to receive the rent.

Their Lordships are unable to attach this meaning to that section. There is nothing in the definition section to indicate that owner has any different meaning from that in the definition in any part of this Ordinance. Their Lordships are unable to see any reason why section 38 (c) should not be workable just as well if owner is given the definition in section 2 as it would be if owner was given a different meaning, namely, a person having a title to receive the rents.

If that is right, it was not argued that there is any other ground on which the present appellant is entitled to succeed.

Accordingly, their Lordships must humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

EGONEKWU DIM AND OTHERS APPELLANTS

AND

ANUSIONWU DURU AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 14

Lords Reid, Hodson and
Sir Benjamin Ormerod

Res-judicata—Estoppel—Failure to produce evidence.

SIR BENJAMIN ORMEROD. This appeal is from a judgment in the Federal Supreme Court of Nigeria on appeal from a judgment of Mr. Justice Betuel of the High Court of the Eastern Region which granted the plaintiffs a title in respect of certain land. The ground of appeal has been reduced to very short terms and the issue between the parties is whether the plaintiffs in this action were estopped by their conduct from setting up any wrongful act by the defendants in respect of the land.

The plaintiffs in this action were people called Amanantos and the defendants were another family by the name of Amanano. The land in question was a piece of land known as Ugwu. The claim by the plaintiffs was that the defendants had trespassed on the land and thereby caused damage.

The defendants' answer was that the land belonged to them and that they had not entered on the land other than as defined by a particular boundary marked on the land.

The issue in the appeal today—which as has been said already is founded on the question of estoppel—relates to earlier proceedings which took place on the question of a claim with regard to the same land between the same parties in respect of a claim with regard to the same land or boundaries of the land. In consequence, there was an order by Mr. Justice Waddington, who tried that action in 1942, in which he said that there would be a non-suit because of the finding of the Referee, to whom the matter was referred, that he was unable to discover the boundary between the land claimed by the plaintiffs and the land claimed by the defendants.

It was not possible therefore, to say that the plaintiffs had been guilty of any trespass and in those circumstances he was not called upon to consider the further question of the amount of damage which had been referred to him.

It has been said in these proceedings that because the learned judge who tried this matter in the first case paid attention to evidence given by the parties, which either amplified or contradicted evidence given before the learned Referee in the earlier proceedings, there should be an estoppel and the learned judge should not have given consideration to evidence of that kind.

It was first argued that the learned judge was bound by the principle of *res judicata*, but it became clear in the course of the argument—and indeed it is said on page 59 of the Record—that when the earlier case came back to the High Court for judgment or argument on the Referee's report a non-suit was entered and it was agreed by Mr. Khambatta that in those circumstances he could not argue that the principle of *res judicata* could

apply. He fell back therefore on the submission that in the particular circumstances of this case the plaintiffs could not now argue or deduce evidence to satisfy the court as to the position of the boundary in question because they were estopped, presumably by their conduct in not producing to the court evidence which was now available and therefore failing to do something which they might well have done, and by their conduct they had caused the defendants to act in such a way that they had been induced to change their position. There was no evidence before the court, so far as their Lordships have been told, that the plaintiffs had available and called at the second hearing evidence which may have been available and was not called at the first hearing. It was clear to their Lordships in the course of the argument that the submission put forward by Mr. Khambatta in those circumstances was without substance.

It is the view of their Lordships that here there was certainly no question of *res judicata* and equally it is extremely difficult to see how there could be established any estoppel which would prevent the plaintiffs from pursuing their action as they did.

In the circumstances their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondents.

NWANKWO UDEGBE AND OTHERS APPELLANTS

AND

ANACHUNA NWOKAFOR AND OTHERS RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1963) 1 All N.L.R. 417

1964 July 14

Lords Reid, Hodson and
Sir Benjamin Ormerod

Practice and Procedure—*Claim for declaration of title—Onus on plaintiff, who must succeed on strength of his own case—Dismissal of claim not a decision in defendant's favour.*

Real Property: See Practice and Procedure, on onus of proof.

The crux in this case was whether the plaintiffs were right in alleging that the land north of the Nkissi stream was theirs as far as a certain line of trees. The defendants alleged that in 1908 a District Officer named Douglas, in proceedings between them and a sister family of the plaintiffs' family, awarded the land to them as far as that line; the award (insufficiently proved) was in the Judge's view, in any case not binding on the plaintiffs either as *res judicata* or on the ground of estoppel by conduct. The defendants alleged that since 1908 they had been using the land in dispute. The Judge said the evidence for both sides was unreliable, that for the defendants more so, but on user he regarded as "a little more probable" the plaintiffs' case that the defendant's first crossed the stream six years before the trial, and "in the absence of better evidence" it seemed to him that there were "some grounds" for accepting the plaintiffs' case.

Held: The award was not binding on the plaintiffs rather because it was not shown that the District Officer was acting in a judicial capacity or as a judicial arbitrator: but the Judge, having regard to his view of the plaintiffs' case, should not have granted them a declaration of title, but dismissed their claim.

Per curiam: As the defendants' title had not been directly in issue, the dismissal of the plaintiffs' claim did not mean that the land belonged to the defendants, or that the defendants had established that their land extended to the line of trees at any part of that line.

Appeal allowed; action dismissed. Dismissal affirmed on appeal to the Privy Council.

Kodilinye v. Odu (1935) 2 W.A.C.A. 336, approved.
Federal Supreme Court judgment affirmed.

APPEAL from Federal Supreme Court of Nigeria.

LORD HODSON (delivering the judgment of the Board). This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 19th February, 1963, which allowed the respondents' appeal from a judgment of Mr. Justice Betuel dated the 6th June, 1961, and given in the High Court of Justice, Eastern Region, Onitsha Judicial Division.

The action was instituted by the appellants, as representing the members of the Umuanugwo Quarters of Ifite-Ukpo, in which they claimed against the respondents, as representing the members of the Uruowelle Quarters of Umudioka, certain relief consisting of a Declaration of Title to some land called " Mpiti " and damages for trespass on the land.

The appellants succeeded at the trial, but, on appeal, the judgment of the trial court was set aside, and the only question for determination on this appeal is whether the Appeal Court were right in so doing, the trial being upon a question of fact.

Their Lordships think it is unnecessary to examine in detail the facts relating to this piece of land. It was a piece of land about 1,000 by 1,200 ft.—roughly a square—of which the boundaries were agreed. There was a river called the Nkissi stream on the south, the Ekpuana stream on the west, on the eastern side a line of trees, and on the northern side there was no particular delineation of the boundary.

Counsel for the appellants has not asked their Lordships to arrive at their own decision as to the facts of this case. If their Lordships had been asked so to do they would have been of the same opinion as the trial judge showed himself to be, in that it appears that the evidence is conflicting and confused, and the difficulty which the trial judge found in arriving at a conclusion is one which is not surprising.

The point in the appeal depends entirely on the question whether, indeed, the learned trial judge did find the necessary facts in favour of the plaintiffs; in other words, whether he was really satisfied.

In these cases the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. Their Lordships refer to the well-known *Kodilinye* case, the judgment of Chief Justice Webber delivered in 1935, which has often been cited by the Board.

" The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. So if the whole evidence in the case be conflicting and somewhat confused, and there is little to choose between the rival traditional stories, the plaintiff fails in the decree he seeks, and judgment must be entered for the defendant."

At the conclusion of the trial the learned judge, having given careful attention to the evidence and having inspected the land, gave a judgment

which, in their Lordships' opinion, is in its language inconclusive. He stated his conclusion, which was in favour of the plaintiffs, in this way. First of all he referred to the defendants' claim. This is a case in which there was a direct conflict on the evidence by both sides. The plaintiffs were claiming the land as theirs and they offered traditional evidence of user and occupation on their side while the defendants similarly offered evidence on their part to the same effect. The learned judge said, with regard to the defendants, " But I am not sure that they have satisfied me as to such user and possession either from time immemorial "—and he then goes on to refer to a case decided in 1908. That language implies that he had not come to a decision adverse to the defendants.

He then referred to the plaintiffs' case, which was that " about six years ago the defendants first crossed the Nkissi stream "—the stream which their Lordships have referred to as being on the south of the disputed land—" and trespassed on the land in dispute." He says, with regard to that, that that case seems a little more probable, and he continues, " but it leaves unexplained the line of trees north of the land in dispute and the alleged existence of the defendants' jujus there."

To explain the reference to the line of trees, the line of trees mentioned is a line of trees not immediately north of the land in dispute, but farther north; north of the whole of the Mpiti land which is referred to in the Douglas Award of 1908. That was regarded by the trial judge and by the Court of Appeal as not binding on the parties and, therefore, it is unnecessary to refer to it further.

The jujus are referred to because the defendants placed reliance on them as showing that the land was theirs. The learned judge found little assistance from their existence and, indeed, he in one passage shows himself uncertain as to whether these were jujus at all. In any event, neither of them were actually on the disputed land, although one was on Mpiti land just short of the undelineated boundary.

The learned judge then referred to parts of the evidence and formed the impression that the plaintiffs' witnesses were unreliable. Their Lordships say that because he continued by saying: " The defendants called some unrepresentative and even more unreliable witnesses than the plaintiffs to give evidence as to user and possession." The use of the phrase " more unreliable " indicates he had found the plaintiffs' witnesses also unreliable.

He continues a little later in the judgment by saying: " The line of trees north of the land in dispute may be a boundary with the Akwa people, but it is not shown that it forms a boundary with the plaintiffs." Then he uses these words, which their Lordships think are very important: " There seems in the absence of any better evidence some grounds for saying that the northern boundary of the defendants with the plaintiffs is the Nkissi Stream."

It seems quite clear, from the terms of that judgment, that the Court of Appeal were right in coming to the conclusion that the learned judge had misdirected himself in saying in effect that, his mind being in that state, being uncertain, in other words, as to whether the plaintiffs or the defendants were right, he could come down on the side of the plaintiffs. Their Lordships agree with the way in which the matter was put by Acting Chief Justice Brett when he said that the " trial judge gave convincing reasons for regarding the witnesses for the plaintiffs as unreliable," and when he went on to say he was " not disposed to allow any greater credit to the case for the plaintiffs than he did." Then he went on to consider the *Kodilinye* case and said that that " is authority for saying that the proper

judgment when a plaintiff claiming a declaration of title fails to prove his case is one dismissing the claim."

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be dismissed.

ABUDU GBADAMOSI IJALE APPELLANT

AND

A. G. LEVENTIS AND COMPANY LIMITED
(AND CROSS-APPEAL CONSOLIDATED) RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 16

Viscount Radcliffe, Lords Hodson
and Donovan

Account stated—Money had and received—Evidence—Purchase of cocoa—Value of ungraded cocoa—Reference directed.

LORD DONOVAN. This is a dispute between Messrs. Leventis and Co. Ltd. (hereinafter called "the company") and Abudu Gbadamosi Ijale (hereinafter called "Mr. Ijale") whom the company employed to buy cocoa and palm kernels on its behalf in Nigeria.

The exact relationship between the two is not clear. The company seem to have regarded Mr. Ijale as its servant. He, on the other hand, calls himself "a produce buyer." It is immaterial for present purposes, however, to know his exact status. It is clear that he bought cocoa and palm kernels on the company's behalf, and with the company's money advanced to him for the purpose. Against these advances of money there was credited to him the value of the produce which he bought. It might have been expected that he would be credited with the amount he had expended in the purchase of this produce on the company's behalf, rather than its value, but it was not so.

The company, in its turn, bought the produce on behalf of the Nigerian Cocoa Marketing Board by whom, it seems, it was eventually exported.

After Mr. Ijale had bought cocoa for the company it would be graded into qualities by officers acting on behalf, apparently, of the aforesaid marketing Board. Before such grading the cocoa was stored in a store known as "No. 1 Store" at Alakoro Marina, placed at Mr. Ijale's disposal by the company. After grading, the cocoa would be removed to another store. Mr. Ijale would then be credited with the value of such graded cocoa against the amount of the advances made to him.

Periodically a "Return of Transactions" was drawn up showing the state of the account between the company and Mr. Ijale. This would show the amount of money advanced to him, and the credits to which he was entitled. The credits would include not only the value of the produce Mr. Ijale had bought for the company, but any monies owing to him for his remuneration. It would also show any stocks of graded or ungraded produce which should still be in the store.

In order to buy cocoa the company had to be licensed, presumably by the aforesaid Cocoa Marketing Board, and in March 1953, the licence held by

opposite. In the company's alternative claim for money had and received the onus of proving that he was entitled to the credit he claimed was upon Mr. Ijale. There is no express finding in the judgment to the effect that he had discharged it; but their Lordships agree that impliedly the learned Judge must be taken as finding that there was some such ungraded produce in the store on 10th June, 1953. Otherwise his reference to the necessity to value it would be meaningless. But at no stage did he determine what the quantity of such ungraded produce was.

Eventually this question came before Abbott J. in the Supreme Court of Nigeria on 29th June, 1955. The company called as a witness a Mr. Welch, acting Principal Produce Officer, Port Harcourt. His evidence was to the following effect. In March 1953 he had found a lot of ungraded cocoa in No. 1 Store, and ordered that it be graded. All the gradable cocoa in the store was in consequence graded and the grading finished on 1st June, 1953. There were 100 bags of Grade 1, 200 of Grade 2, and 400 of bad quality cocoa. The total weight was about 43 tons. Grading ceased on 1st June, 1953, because there was then no cocoa remaining in the store which reached the lowest of the three standards. 73½ tons of such cocoa would be worthless.

Mr. Ijale then again gave evidence maintaining that the value of the ungraded cocoa in the store was £174 9s. 0d. per ton, being the figure of value of Grade 1 main crop, which, he asserted, this cocoa was.

Abbott J. believed the evidence of Mr. Welch that there was no ungraded cocoa in the store at the material time which was of any value. He concluded " I find therefore that the value of the ungraded cocoa in the store on the material date was nil. This case must now go back to the Chief Justice " (as de Comarmond J. had become) " in order that final judgment may be given."

It should be stated that before Abbott J. the company conceded Mr. Ijale's claim to a credit of £276 2s. 6d. for ungraded palm kernels as being in store on 10th June, 1953. The learned Judge remarked that Counsel for the company had to do this, as there was no evidence from his witness regarding palm kernels. Their Lordships think it would be unsafe to found any conclusions of fact one way or the other upon this concession.

The case came before de Comarmond C.J. again on 29th November, 1955. He referred to the fact that his previous judgment was not a final one, saying " because there remained to ascertain the value of some ungraded produce." Thus again he referred to no specific quantities. Adopting the finding of Abbott J. that the value of any ungraded cocoa was nil, he gave judgment for the company for the sum of £25,917 17s. 2d. made up as follows.

	£	s.	d.	£	s.	d.
Original claim	25,025	19	8			
Less conceded in respect of palm kernels	276	2	6	24,749	17	2
Add in respect of the company's claim for interest				1,168	0	0
				Total		
					£25,917	17 2

As regards the claim for interest the learned Chief Justice said that the company's averments in its statement of claim that interest was payable were not challenged in the statement of defence. This however was a

mistake. They were in fact challenged by a general denial in paragraph 1 of the statement of defence.

Mr. Ijale appealed to the Federal Supreme Court of Nigeria against the final judgment of de Comarmond C.J. The appeal was argued on 17th March, 1959, *i.e.* some 3½ years afterwards, and judgment being then reserved, was delivered on 12th May, 1959.

For some reason the aforesaid award of interest by de Comarmond J. was not challenged either in the notice of appeal or in argument. The same applies to a claim by Mr. Ijale that he was entitled to a credit for the proceeds of sale of 3 lorries which he had entrusted to the company for repair and sale. Both these matters are, however, now referred to in the appellant's case among his reasons why the present appeal should be allowed. In the circumstances it is impossible for the Board to deal with them; though it may be mentioned that the company through its Counsel informed the Court of Trial at the first hearing that the lorries would be sold and the proceeds credited to Mr. Ijale.

The Federal Supreme Court of Nigeria allowed Mr. Ijale's appeal to the extent of awarding him a credit for the sum of £10,657 10s. 0d. in respect of ungraded cocoa instead of the amount he claimed, namely £12,764. The Court took the view that de Comarmond J. had found that there were 73½ tons of ungraded cocoa in store on 10th June, 1953, and that Abbott J. was wrong in receiving, and acting upon evidence that there was no such ungraded cocoa of any value. The lowest grade of cocoa was worth £145 per ton and since there was no evidence that the cocoa was of any higher value, Mr. Ijale would be given credit for 73½ tons at £145 per ton.

Both sides have now appealed to the Board, Mr. Ijale contending that he is entitled to the larger credit of £12,764 and the company, as its main contention, asking that he should be credited with nothing in respect of the ungraded cocoa.

Their Lordships, with regret, find themselves unable to support the reasoning of the Federal Supreme Court upon which the decision was reached that Mr. Ijale was entitled to a credit of £10,657 10s. 0d. That conclusion was based on the view that de Comarmond J. had found that there was in fact 73½ tons of ungraded cocoa in store on 10th June, 1953, and that accordingly Abbott J. was not entitled to go behind this finding. In fact de Comarmond J. made no such finding either expressly or impliedly. He seems, indeed, almost studiously to have avoided doing so: for when the case came back to him after Abbott J.'s finding, he stated in his judgment, as their Lordships have already noticed, that his previous judgment was not a final one as there remained to ascertain the value of "some" ungraded produce. In neither judgment does he mention any quantity at all, and their Lordships cannot think this was mere inadvertence. The judgment of de Lestang J. F.S.C. in the Federal Supreme Court, shows how the misunderstanding arose. In that judgment it is pointed out that 73½ tons of ungraded cocoa were shown to be in store on Exhibit "A," and that de Comarmond J. had reached the conclusion that the company had failed to establish that there was no ungraded cocoa in store "as shown on Exhibit 'A'." De Lestang J. F.S.C. stressed the words "as shown on Exhibit 'A'" and continued "It follows therefore inferentially that the learned Judge's finding, though it does not say so in so many words, can only mean that there were 73½ tons of ungraded cocoa."

But de Comarmond J.'s reference to Exhibit "A" related to the company's first claim as upon an account stated, where it was for the company to prove that Exhibit A was incorrect in so far as it related to

ungraded cocoa. This the company failed to do; but, as their Lordships have pointed out already, this did not involve that Mr. Ijale in respect of the company's alternative claim for money had and received, had proved the existence of 73·5 tons of ungraded cocoa in store at the time. Nor did de Comarmond J. find that he had done so by any evidence of his own.

In these circumstances their Lordships are unable to share the view that Abbott J. went beyond the proper scope of the task he was set. To ascertain the value of the ungraded cocoa he has to know the amount of it, and the grades of which it consisted, neither of which matters had up to that point been determined. He was right therefore to receive the evidence of Mr. Welch. Having seen and heard that witness, and having seen and heard Mr. Ijale, Abbott J. preferred the evidence of Mr. Welch, and found accordingly that the value of the ungraded cocoa was nil.

That finding justified the final judgment of de Comarmond J. in so far as it related to the value of the ungraded cocoa; and, if there were no more in the case, would mean that in their Lordships' view the company's cross-appeal should succeed in full. But the evidence of Mr. Welch proved other things besides the value of the ungraded cocoa. In March 1953 (when the company's licence to buy cocoa was suspended and not restored till the following September) he found a lot of ungraded cocoa in Store No. 1, and proceeded to have it graded. The grading was completed on 1st June, 1953. Altogether there was some 43 tons of cocoa divided between the 3 grades. Mr. Eboiyade, clerk to Mr. Ijale, had already spoken to this grading in his evidence for Mr. Ijale at the trial before de Comarmond J. and had added that the last delivery of *graded* cocoa by Mr. Ijale to the company took place on 5th June, 1953. Mr. Ijale ceased to work for the company on 10th June, 1953, and the question naturally arises whether he had been credited by the company with the value of the cocoa graded under the orders of Mr. Welch. The company, of course, should know: but nevertheless advances as an alternative contention that Mr. Ijale should be credited at the most with the sum of £6,500 the value of this graded cocoa.

It should have been easily capable of proof whether this sum had already been credited to Mr. Ijale, but the matter has hitherto not been canvassed at all. Had it been credited it seems likely that the credit would have been reflected in Exhibit "A" which is not confined to matters arising simply between 5th June and 10th June, 1953. There is a credit for salary going back to July 1951. The case is moreover not one where the full facts have been elicited with precision or where the possibility can be excluded that confusion has arisen between the cocoa graded under the orders of Mr. Welch and the ungraded cocoa alleged by Mr. Ijale to have been in the store when he left. The company, moreover, would hardly advance a contention that Mr. Ijale should, as an alternative to his claim, be credited with £6,500 if its books showed that he had had this credit already.

Doing their best with the materials before them, their Lordships feel that the best solution of this melancholy case is to allow Mr. Ijale the credit of £6,500 as being the value of the cocoa graded under the orders of Mr. Welch. This figure, as a figure, is not contested. This means that the figure of £6,500 should be substituted for the figure of £10,657 10s. 0d. allowed as a credit in the Federal Supreme Court: and that the company should recover judgment for £19,418 2s. 2d. arrived at as follows:

	£	s.	d.	£	s.	d.
Amount of Judgment in Federal Supreme Court of Nigeria				15,260	12	2
Add difference between	10,657	10	0	A		
and	6,500	0	0	4,157	10	0
				<u>£19,418</u>	<u>2</u>	<u>2</u>

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed; and that the cross-appeal should be allowed to the extent indicated. The appellant must pay to the respondents three-quarters of the aggregate of the costs before the Board of the appeal and the cross-appeal.

JONES ADEYEYE APPELLANT

AND

E. T. ADEWOYIN AND OTHERS REPRESENTING THE
ADEMATIM ADEMILUYI FAMILY OF IFE RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1963) 1 All N.L.R. 421

1964 July 16

Lords Morton of Henryton, Cohen
and Donovan

Native Law and Custom—Family land. Sharing of Ishakole—Oni of Ife's power to grant land—Extent of power—Family land allotted to branch; division as act of ownership as between members of family.
Practice and Procedure—Action—Plaintiffs—Branch suing re family land allotted to it.

It was conceded on the defendant's behalf that as the only grant he could rely on was that made to him by the Oni in 1952, and as it was a grant of cultivated land, which was beyond the Oni's powers and a nullity, that was destructive of his claim: but it was argued that the destruction of his claim did not *ipso facto* prove the plaintiffs' case, that there was no evidence that before the allotment of 1933 the Otutu family owned the land, and that the presumption that an individual holds land on behalf of the family did not apply to virgin forest.

Held: What was done by the Otutu family in 1933 amounted to acts of ownership, and as everyone, including the defendant, believed in the tradition that the land belonged to the family, the plaintiffs' claim that it did so belong could not be gainsaid by the defendant.

Appeal dismissed: Federal Supreme Court judgment affirmed.

Cases cited:

Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399.

Sumonu v. Disu Raphael [1927] A.C. 881.

APPEAL from the Federal Supreme Court of Nigeria.

LORD DONOVAN (delivering the judgment of the Board). This appeal concerns certain land in Nigeria at a place known as Omifunfun Onigbodogi. The appellant claims that it is his and that he is, therefore, entitled to retain for himself the rents (called Ishakole) which he collects

from tenants he has put upon part of the property. The respondents (who appear in a representative capacity for themselves and other members of their family, called the Ademakin/Ademiluyi family) claim that all the land is family land and that these rents must, therefore be shared among the family, of whom the appellant is himself one.

The facts do not appear to be comprehensively or precisely ascertained. For example, the area of the land in dispute is not exactly known. From the judgment of the Federal Supreme Court of Nigeria there would appear to be about 3,000 acres, which is part of a much larger area measuring about 14 by 14 miles. Again, in the evidence, the word "farmland" is used at times to denote cultivated land and at times virgin forest before it became cultivated.

The essential facts, however, appear to be these. In 1933 the members of the Otutu family, believing that the entire property, inclusive of Omifunfun, belonged to that family, called a family meeting to straighten out certain difficulties which apparently had arisen with regard to the land, and allotted the land between members of the family. The land at Omifunfun was allotted to "the entire children of Ademiluyi." These were treated as inclusive of the children of his younger brothers, namely, Adebowale and Adeyeye, who are now deceased. The appellant is one of the children. The respondents were also entitled under the same allotment to the same land, they say, "as members of the Ademakin Ademiluyi family;" and their Lordships presume that this embraces "the entire children of Ademiluyi," the specified allottees. There is no dispute that the parties to this litigation are members of the family to whom the land at Omifunfun was thus allotted in 1933. The appellant's version of this meeting is that it referred to different land altogether, and that in 1933 he did not know where the Omifunfun land was.

Nothing material seems to have happened after this allotment in 1933 until the year 1938. Then, according to the appellant, he was taken to the land by a hunter, who told him that the land belonged to the Otutu family. So he came home and told the Oni about it, who said that he, the appellant, could put his tenants on the land; and he did so.

Thereafter, there were boundary disputes between the appellant and others on neighbouring land, which the appellant settled at his own expense by invoking the offices of the Oni, who sent officials to mark out the boundaries in dispute. The appellant built himself a home on the land.

The respondents to the present appeal say that, "some years after" the meeting in 1933 (which in fact appears to be the year 1938) the family whom they represent allowed the appellant and one Adeyemo Eletiko to put tenants on the land, apparently to farm it, on the understanding that, when the tenants started to pay rent, the rent would be shared between members of the family. Then Eletiko died, and the appellant continued the arrangement as representative of the family.

However, when rent was paid, the defendant did not share it, but kept it for himself; and, after making various promises, which he did not keep, finally asserted that the land was his and that no member of the family was entitled to share in the land.

That precipitated the present litigation. The respondents, as plaintiffs, sued the appellant, as defendant, in the High Court of Western Nigeria. They claimed, first, a declaration that the land was family land; second, mesne profits; and, third, an injunction restraining the present appellant from entering or doing any act upon the land. In the High Court they were unsuccessful. In the Federal Supreme Court, they succeeded, though the

claim to mesne profits was abandoned, and the injunction secured was limited to preventing the present appellant from collecting the rents. They could not prevent him going on to the land, because he was a member of the family.

The appellant now appeals to the Board.

Their Lordships must here go back a little in point of time to the year 1949. In that year there was a dispute concerning the land, or some part of it, between the appellant and one Sanni Odera, each claiming title to the land. The dispute came first before the Ife Native Land Court in February 1949. There the present appellant was successful. Odera appealed to the District Officer, who dismissed his appeal in April 1949. He appealed further to the Resident's Court at Ife in May 1950. That court ordered a remit to the Ife Native Court, inquiring whether its judgment was meant to declare absolute ownership of the land in the present appellant, or only to declare that he had hunting rights over it. That court did not answer the question, but tried the case afresh on additional evidence and concluded that its previous decision was wrong. It now held, in effect, that the Otutu family had hunting rights only over the land. The present appellant appealed against this finding to the District Officer's Court at Ife in 1951, but unsuccessfully.

In the present case, the Federal Supreme Court took the view that the foregoing proceedings, on the face of them, were nullities. This was apparently because the constitution of the Native Court changes from time to time, so that one court could hardly say what another court, differently constituted, meant by its decision. But, however, this may be after discussion, counsel on both sides treated all the proceedings to the Native Court and before the Resident as a nullity; and the appeal to the Federal Supreme Court proceeded on that basis.

The importance of the matter, for present purposes, lies in the admission of the present appellant when before the Native Court, namely that he claimed "for himself and on behalf of the family"; that in his evidence he testified that "this farmland belongs to me and my family"; and that he said nothing at all about a grant to him by the Oni in 1938 of permission to put tenants on the land.

What happened next was this. The appellant, who has hitherto thought that the land was owned by the Otutu family and now found it declared that the family had only hunting rights, went off to the Oni and secured what he regarded as a grant to the land himself; and this was in 1952.

In the present case, the Oni gave evidence on behalf of the appellant in the High Court to the effect that at some time prior to the litigation with Odera he had given permission to the appellant to go and farm in the Omifunfun forest. No particular part of the forest was specified. It is not in issue that the Oni has the right to grant farming rights in virgin forest. After the Odera case, the Oni said that the present appellant asked him to confirm his farming rights at Omifunfun, and he did so in 1952.

When the dispute came before the High Court, in which proceedings the Oni gave the evidence their Lordships have just outlined, Acting Judge Oyemade decided in favour of the present appellant on grounds which he expressed as follows:

"From the evidence before me, I find that, according to traditional history, the Otutu family, of which the plaintiffs are descendants, had only hunting rights over the land in dispute and as such that family could not have validly allotted the land to anyone. I believe that the

gainsaid by the defendant, who until the Odera judgment, shared the family belief in the tradition that the land belonged to the family, and it was in that belief that he cultivated it and put tenants on the land (see Defence, paragraph 18)."

The consequent Order of the Court declared that the land in dispute was family land, and an injunction was granted restraining the defendant from collecting and appropriating the rents, which should instead be shared by the family.

Their Lordships, after careful consideration of all that has been urged before them on behalf of the appellant, having reached the clear conclusion that the judgment of the Federal Supreme Court is one which they cannot disturb. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

BANQUE GENEVOISE DE COMMERCE ET DE
CREDIT APPELLANTS

AND

COMPANIA MARITIMA DE ISOLA SPETSAI
LIMITADA RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 20

Lords Reid, Hodson and
Sir Benjamin Ormerod

Admiralty action—Action in rem—Mortgage—Novation—Date of payment postponed but action lies for breach—Action to recover sum of money maintainable only when money due or ascertainable.

The appellants sued for £380,627 being the whole sum secured by a mortgage raised on the vessel *Spetsai Patriot* in 1958 together with interest and bank charges. In their defence the respondents founded on an agreement of October 26, 1961, which they contended was a novation of the 1958 mortgage or had rescinded or revoked it. In exercise of the Admiralty jurisdiction originally conferred by the Colonial Courts of Admiralty Act, 1890, the Federal Supreme Court dismissed the action *in rem*. There had been a number of disputes and litigations in various countries in which the appellants and respondents and others were involved. It was admitted that the 1961 agreement superseded the agreement in the mortgage of 1958. The appellants contended that under the agreement of 1961 the old mortgage deed remained in operation with the substitution of £50,000 and certain dates in Article 6 of the agreement for the sums and dates of repayment set out in the mortgage deed.

Held: (1) A mortgage is granted to secure payment of a specified sum; where the date of payment is merely postponed, and there is a breach of a condition in the mortgage for which the mortgagee is entitled to immediate payment he can sue for payment of that sum.

(2) The action being one to recover a sum of money and no sum had become due or ascertainable when it was raised, it must fail.

LORD REID. This is an appeal from the Federal Supreme Court of Nigeria exercising Admiralty jurisdiction originally conferred by the Colonial Courts of Admiralty Act, 1890. That Court on 7th November, 1962, dismissed an action *in rem* brought by the appellants against the

respondents' s.s. *Spetsai Patriot* a vessel flying the Liberian flag. The appellants are a Swiss Bank to which this vessel was mortgaged in 1958 by a deed of mortgage registered in Liberia and admittedly valid. The mortgage was to secure the repayment of £292,790 with interest and bank charges. That sum ought to have been repaid by instalments in 1958 and 1959 but no part of it was ever repaid. On 30th June, 1962, while the vessel was in the Port of Lagos the appellants raised the present action and arrested the vessel.

The appellants sued for £380,627 being the whole sum secured by that mortgage together with interest and bank charges. In their defence the respondents founded on an agreement of 26th October, 1961, which they alleged was a *novation* of the 1958 mortgage or had rescinded or revoked it. There had been a number of disputes and litigations in various countries in which the appellants and respondents and others were involved, and the parties to this agreement were the appellants and their subsidiary referred to as SISCO, the respondents and Mr. Petroutsis their Managing Director, and also the American Trading Company of Panama. As the decision of the present case turns on the proper construction of that agreement it is necessary to set out the relevant provisions in some detail. The agreement was in French but there is an agreed English translation from which these excerpts are taken. In them "the Bank" means the present appellant and "CMIS" means the respondent.

"At all events the contracting parties with a view to a definitive settlement of all the accounts and litigation between them agree by these presents as follows:

Settlement:

Article 1. The parties waive the drawing up of detailed accounts. CMIS acknowledges that it is indebted to the Bank in the sum of three hundred thousand pounds sterling (£300,000) as the balance of all accounts and of all claims between the Bank and SISCO of the one part and CMIS and Petroutsis of the other part. It is a comprehensive figure, acknowledged to be a capital sum but which bears no interest.

Article 2. The recovery by the Bank of the above mentioned sum is assured by the realization of the following assets of CMIS:

(a) A claim against the hull insurers of the s.s. *Spetsai Glory* estimated at £ sterling 125,000 already assigned to the Bank.

(b) A claim against the insurers or charterers of the s.s. *Spetsai Glory* etc. for expenses disbursed by the Bank for the account of the ship (included in the sum of £ sterling 300,000), for general average and 'special charges' estimated at £ sterling 70,000 and for the guarantee in connection with the collision with the s.s. *Leonidas*.

(c) The s.s. *Spetsai Island* registered in the name of SISCO which is to be sold to Japan at an estimated £ sterling 80,000.

(d) Two maritime mortgages also as security are to be given by CMIS in favour of the American Trading Company of Panama for £ sterling 50,000 each on the s.s. *Spetsai Patriot* and the s.s. *Spetsai Navigator* which is to be transferred by SISCO to CMIS.

Article 5. Promising good and faithful carrying out of the present settlement the parties reciprocally discharge each other for the balance of all accounts and of all claims and waive all civil or criminal procedure. CMIS and Petroutsis undertake to eliminate at their own

expense and their liability any hinderance which may arise from sequestrations and arrests effected by third parties on the s.s. *Spetsai Island* and the s.s. *Spetsai Navigator* in Greece. The Bank also shall release as soon as this settlement is signed the sequestrations or other measures taken by it on the s.s. *Spetsai Patriot* and the s.s. *Spetsai Fortune* in order to facilitate the placing of the said vessels at the free disposition of CMIS and of Petroutsis. The mortgage on the s.s. *Spetsai Patriot* shall be limited to £ sterling 50,000 and transferred in favour of the mortgagee and the mortgage on the *Spetsai Fortune* shall be cancelled immediately upon the signing of these presents.

In order to facilitate the formalities for the releasing of the seizures, arrests, etc. the Bank this day shall have to Petroutsis an express authorization to the Italian lawyers (Office Berlinghieri) to proceed immediately to this end so that these two vessels may immediately be at the free disposal of CMIS and Petroutsis and shall telegraph in the same terms to such lawyers.

The seizures and arrests of s.s. *Spetsai Patriot* and s.s. *Spetsai Fortune* imposed by Andreas Valsamakis and Cap. D. Tsekouras shall be lifted and discharged solely at the expense and at the liability of C. Petroutsis and CMIS, the Bank having no responsibility whatsoever in this connection. In addition SISCO shall immediately restore ownership of the s.s. *Spetsai Navigator* to CMIS and undertakes to carry out all the necessary formalities to fulfil this undertaking which in the case of the *Spetsai Navigator* shall include putting into possession.

The Bank and the Mortgagee also undertake to supply a certificate regarding the s.s. *Spetsai Patriot* intended for the Liberian Authorities under the terms of which this vessel shall change its name in accordance with the instructions of C. Petroutsis.

Article 6. In as much as the realization of the claims for C.T.L., G/A etc. on the *Spetsai Glory* and the sale price etc. of the *Spetsai Island* are not envisaged before a year, the mortgages in favour of the mortgagees (in accordance with art. 2 (d) of these presents) shall become due as to one half (£ sterling 25,000 for each mortgaged vessel) on the 1st November, 1962, and as to the other half on the 1st May, 1963, but only up to the amount of the balance not realized by the Bank by such date as provided in art. 2 (a), (b) and (c), the intention of this contract being that the Bank shall not receive more than £ sterling 300,000.

Any payment made to the Bank arising from the sources set out in article 2 (a), (b) and (c) over and above £ sterling 200,000 shall be considered as payment on account of the mortgages (a half on each) and an act to this effect signed by the mortgagee shall be delivered at the same time as the receipt by the Bank and the necessary registrations shall be made. Also all payments made to the mortgagee by virtue of the above-mentioned mortgages shall be considered as a payment made to the Bank on account of its claim for £ sterling 300,000."

There was much argument before the Federal Supreme Court about the effect of this agreement, but as a result of the clear and cogent judgment of that Court delivered by Sir Lionel Brett F.J., Counsel for the appellants felt bound to admit the validity of practically the whole of that judgment excepting the concluding part, and their Lordships are satisfied that this admission was wisely and properly made.

It is now admitted that the 1961 agreement superseded the agreement in the mortgage of 1958, and the contention of the appellants now is that under the agreement of 1961 the old mortgage deed remained in operation with the substitution of £50,000 and of the dates in Article 6 of the agreement for the sums and dates of repayment set out in the old mortgage. The mortgage deed of 1958 contains elaborate provisions requiring the shipowner to comply with and satisfy all the provisions of the Liberian Maritime Code (Section 4); not to do or permit anything to be done which might injuriously affect the registration of the vessel (Section 5) and to maintain the vessel in good running order and repair (Section II). The appellants say that the respondents were in breach of these obligations on 30th June, 1962, and that they were therefore then entitled to the remedies provided in Section 21 of the Mortgage Deed including the right to "(3) bring suit at law in equity or in Admiralty as it may be advised to recover judgment for any and all amounts due or otherwise hereunder and collect the same out of any and all property of the shipowner whether covered by this mortgage or otherwise."

So the first question which their Lordships must consider is to what extent, if at all, the 1958 Mortgage Deed remained operative in 1962. It is now admitted that that must depend on the intention of the parties to the 1961 agreement as determined by a proper construction of its terms. On the one hand the respondents found on Article 2 (d) which provides for the granting of new mortgages in favour of the American Trading Company of Panama, and undoubtedly if such new mortgages had been granted they would have superseded the 1958 mortgage. On the other hand the appellants found on a sentence in the middle of Article 5 "The mortgage on the s.s. *Spetsai Patriot* shall be limited to £ sterling 50,000 and transferred in favour of the mortgagee." They maintain that this was an alternative to Article 2 (d) or at least that it was effective to keep the 1958 mortgage alive until new mortgages were granted under Article 2 (d). The true construction and effect of these provisions is not at all clear but their Lordships are prepared to assume, without deciding the matter, that on this question the appellants are right.

There is no provision entitling the appellants to the benefit of any mortgage after the making of the 1961 agreement. Under Article 2 (d) new mortgages were to be granted in favour of the Panama Company and not of the appellants and Article 5 provided for transfer of the old mortgage to the "Mortgagee" which meant the Panama Company. But it is plain from various provisions of the 1961 agreement that there must have been some close connection between the appellants and the Panama Company, and their Lordships will assume that in 1962 the appellants were entitled to enforce all rights which the Panama Company could have enforced if the 1958 mortgage had been transferred to them; but in any event the appellants cannot have any greater right than the Panama Company could then have had.

It therefore becomes necessary to consider what would have been the rights of the Panama Company on 30th June, 1962, if the 1958 mortgage had been transferred to them before that date. The leading provision in favour of the Panama Company is Article 2 (d) and it must be read in conjunction with Articles 1 and 6 and the rest of Article 2. Whatever be the meaning and effect of the sentence in Article 5 authorising transfer of the old mortgage to the Panama Company it cannot, in their Lordships' judgment, be held to confer on the Panama Company any greater rights than they would have had if new mortgages had been granted under Article

2 (d). " Limited to £50,000 " must have been intended to mean limited to the obligation in respect of which the new mortgage was to be granted.

The general scheme of the 1961 agreement is clear. The round sum of £300,000 is substituted for all claims which the appellants might then have had, and that sum was to be recovered primarily out of the assets specified in Article 2 (a), (b) and (c). The estimated value of those assets stated in Article 2 was £275,000 and Article 6 makes it clear that the mortgages were only to secure payment of the amount of any balance remaining after those other assets had been realised. If those assets had realised £25,000 more than their estimated value nothing would have been due or recoverable under the mortgages. If they realised considerably less than their estimated value then the Panama Company could use the mortgages to recover any balance of the £300,000 up to a maximum of £50,000 on each mortgage. Article 6 states that the realisation of those other assets was not envisaged before a year *i.e.* before 26 October, 1962, and in order to allow time for their realisation it provided that the first instalments of the sums secured by the mortgages should become payable on 1st November, 1962.

Normally a mortgage is granted to secure payment of a specified sum. The date of payment is merely postponed and if by reason of a breach of a condition in the mortgage, the mortgagee becomes entitled to immediate payment he can sue for payment of that sum. But in this case there was no ascertainable sum secured by the mortgage and no sum due until the year had elapsed and it was seen by how much the sums realised from the other assets fell short of £300,000. So when the vessel was arrested on 30th June, 1962, and the present action was raised a few days later no sum had become ascertainable or due. Nothing would have been recoverable if the new mortgage had been granted under Article 2 (d) and nothing was recoverable by virtue of the old mortgage. As the present action is an action to recover a sum of money and no sum had become due or ascertainable when it was raised it must fail. That was the ground of decision set out in the last two paragraphs of the judgment under appeal and in their Lordships' judgment it is correct. It therefore becomes unnecessary to decide any of the other issues raised in argument. Their Lordships have already tendered their advice that this appeal should be dismissed. The appellants must pay the costs of the respondents.

- (1) NNAEGBO EKWEZE AND OTHERS APPELLANTS
 AND
 AJANA ENWELUM AND ANOTHER RESPONDENTS
 AND
- (2) UZODIGWE MADIKA AND OTHERS APPELLANTS
 AND
 NWANWUBA ASIEGBU AND OTHERS RESPONDENTS
 AND
- (3) AJANA ADUAKA AND OTHERS APPELLANTS
 AND
 VINCENT EKWEALOR RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 21

Lords Morton of Henryton, Cohen
 and Donovan

Practice and Procedure—Consolidation—Evidence—Admissibility of unregistered document and map not countersigned by Surveyor-General.

(i) The parties in all three suits were descended from one ancestor who had left all his land among his three sons; the three suits were to decide the boundaries of the three branches of the family.

Held: It was desirable to order consolidation to save time and costs, there being a common question of fact running through all three suits. There was no ground for saying that the discretion of the trial Judge had been exercised wrongly.

(ii) Two other grounds were canvassed: (a) that a document, Exhibit C, put in at the trial was wrongly admitted. The document was a record produced from proper custody dated April 7, 1917, and relating to the boundary of the lands in dispute. The objections were based on the fact that the document being an instrument was not registered; that it was tendered as an arbitration award and that if it was an agreement, one of the contestants was not a party to it.

(b) that a document Exhibit D was not registered under the Land Registration Ordinance; that the sketch map attached to it was not signed as it should have been under the Survey Ordinance and that the sketch map left the boundaries uncertain.

Held: Both Exhibits C and D cannot be regarded as "instrument" within the definition of section 23 of the Land Registration Ordinance. The documents simply record agreements as to boundaries and involved no cession or disposition of land on any one's part, for the boundaries may have corresponded with existing rights.

LORD DONOVAN. Though the record in this case indicates that there are three appeals, there are in fact only two, and those two are consolidated. The third apparent appeal, between Ajana Aduaka & ors. and Vincent Ekwealor, is not effective. The plaintiff in that cause was successful in the High Court in Eastern Nigeria, but unsuccessful in the Federal Supreme Court, and does not appeal to the Board.

The litigation concerns the proper boundaries between land in Eastern Nigeria occupied by the Agbudu and the Abube peoples. It raises,

therefore, a question which is predominantly one of fact, and the decisions of the High Court of the Eastern Region and of the Federal Supreme Court in Nigeria have been adverse to the Abube people. There are thus concurrent findings of fact which the Board cannot, consistently with its practice, disturb, unless they are vitiated by some error of law. For the Abube people, who are the present appellants, it is alleged that such is the case.

The facts must be briefly summarised.

The land in question lies in the Onitsha Province of Eastern Nigeria. The plan Exhibit A was produced in the courts below by the Agbudu family, purporting to show the land owned by each of the Abube and Agbudu peoples. Another plan was put in by the Abube people, showing what land they claimed. That is Exhibit B, and this exhibit comprised practically the whole of the land in dispute. There have been apparently many boundary disputes before in this area, some of which were settled, at least for a time, by the District Officer back in 1917. On part of the land he caused boundary pillars to be put up. Somebody later on removed them.

In or about 1956 the Abube people caused a school to be built on land claimed by the Agbudu, and this precipitated the present litigation. In February 1957, an action was begun between representatives of the Agbudu people, as plaintiffs, and representatives of the Abube people, as defendants. It will be convenient to call this Suit No. 1.

The Agbudu people claimed a declaration of title to the land now in dispute, damages for trespass and an injunction. The Abube people filed a lengthy defence denying the plaintiffs' claim. Not content with this, the Abube people in March 1957, apparently for reasons connected with prestige, began their own action, claiming damages for trespass by the Agbudu on land called by a different name in their statement of claim, but being, as their Lordships were informed, virtually the same land as in Suit No. 1, and this second suit may be called Suit No. 2. Not surprisingly, in these circumstances, Suits Nos. 1 and 2 were later consolidated.

Then, also in March 1957, a third action was begun, this time on behalf of the Umuawa people, as plaintiffs, and the Abube people, as defendants. In this action the Umuawa people claimed title to certain land in the same vicinity as the land in dispute in Suits 1 and 2. They also claimed damages for destruction of boundary pillars and an injunction. In this suit, which their Lordships will call Suit No. 3, the Abube people were eventually successful in the Federal Supreme Court of Nigeria, and the Umuawa people have, as already stated, not appealed. But Suit No. 3 was also consolidated with Suits Nos. 1 and 2, and this is one of the matters now complained of in the present appeal by the Abube people. The reason will presently appear.

In Suit No. 1, the Agbudu people, as plaintiffs, were successful in the High Court of Eastern Nigeria and also in the Federal Supreme Court. In Suit No. 2 they were likewise successful as defendants. Thus the Abube people were unsuccessful in both suits, and they now appeal to the Board.

In Suit No. 1 the learned trial judge, Mr. Justice Reynolds, found that the Agbudu people were owners of all the land they claimed, such land being verged pink on Exhibit A, less a small portion which their Lordships must mention separately hereafter. The learned judge also awarded the Agbudu people damages for trespass and an injunction.

In Suit No. 2 the learned judge found that there was no evidence of trespass by the Agbudu people and dismissed the claim by the Abube people for damages for trespass and an injunction. An appeal to the Federal

Supreme Court by the Abube people in relation to Suits Nos. 1 and 2 was dismissed.

The grounds upon which the Federal Supreme Court's judgment in Suits Nos. 1 and 2 in favour of the Agbudu people is now said to have been erroneous are these: First, that the three suits should not have been consolidated; second, that a document, Exhibit C, put in at the trial was wrongly admitted; and third, that another document, Exhibit D, put in at the trial, was also wrongly admitted.

Two other matters have been canvassed, with which their Lordships will in due course deal; but, taking the foregoing grounds in order and dealing first with consolidation, it is obvious that Suits Nos. 1 and 2 were properly consolidated, and the contrary is not seriously argued. The real complaint is that Suit No. 3 was brought into the consolidation as well. Seeing that the Abube people were eventually successful in this suit, it is not at first sight apparent why they should complain; but it is said that the consolidation of Suit No. 3 was prejudicial to them in Suits Nos. 1 and 2, inasmuch as the order of proceeding enabled witnesses in Suit No. 3 to be asked leading questions in cross-examination to the prejudice of the Abube family in respect of Suits Nos. 1 and 2. But the order of proceedings was agreed to on behalf of the Abube family without any reservation being made about the cross-examination of particular witnesses, and the present complaint is made in very general terms with no condescension as to particulars.

Consolidation is dealt with by Order II, Rule 7, of the Eastern Region High Court Rules of 1955. This provides: "Causes or matters pending in the same court may by order of the Court be consolidated, and the court shall give such directions as may be necessary with respect to the hearing of the causes or matters so consolidated."

In the Federal Supreme Court the appeals were heard by Chief Justice Sir Lionel Brett, Federal Justice Unsworth and Federal Justice Taylor. The last named delivered the leading judgment, with which his colleagues agreed. Dealing with the matter of consolidation, Federal Justice Taylor, after referring to the fact that the parties in all three suits were descended from one Ikenga who had left all his lands between his three sons, observed that all three actions were to decide the boundaries of the three branches of the family; that it was desirable to order consolidation to save time and costs, there being a common question of fact running through all three suits; that there was no ground for saying that the discretion of the trial judge had been exercised wrongly, and that as regards the cross-examination of witnesses he was not prepared to say that any injustice had been occasioned. Nothing has been urged before their Lordships which leads them to a contrary conclusion.

Their Lordships therefore pass to Exhibit C, said to have been wrongly admitted. This is a record produced from proper custody, dated the 7th April, 1917, referring to a land dispute between the Agbudu and the Umuowo peoples, the latter being the Umuawa people differently spelt. After the history of the matter is set out, there is an agreement signed by representatives of the two peoples and a representative of a neighbouring one—the Igbariam—to accept the boundaries between their several lands set out in a sketch accompanying the document. This sketch is now missing. The agreement is countersigned by P. J. Gardner, the then District Officer, and dated 7th April, 1917. There is a note added by another District Officer, Mr. Lawton, dated the 1st November, 1917, referring to certain incursions by a branch of the Abube people into the land and recording that they had been told to abandon all their houses built beyond the boundary.

The note concludes: "As this boundary is artificial and is covered with farms and buildings, cement pillars must be put up at corners." This document, Exhibit C, was admitted by the trial judge. It is now said that this was wrong for the following reasons: First, if it were an agreement, the Abube people were not a party to it; second, the instrument was not registered, and, third, it was tendered as an arbitration award: the judge held it was not, and should not have admitted it as an agreement. Their Lordships think it would be convenient to deal with these objections after dealing with Exhibit D.

This again is a document produced from proper custody dealing with a boundary dispute between a branch of the Abube people and the Agbudu and is also dated the 7th April, 1917. It contains an agreement by both peoples as to the boundary between them. A sketch map is attached to the document showing *inter alia* a triangular piece of land which is shaded. This is stated in the agreement to have been ceded to the Abube village of Enuyi as blood money for the murder of an Enuyi man. A further note says the Abube do not agree, for they claim the shaded portion as of right. Therefore, continues the note, this passes to Agbudu and Igbariam, *i.e.*, families on the flanks of this shaded land. (In parenthesis it may be said the learned judge at the trial found this note to have been made *ex post facto* and held it did not deprive the Abube people of this shaded portion.) There is a later note dated the 17th July, 1918, signed by the Acting District Officer, Mr. Lawton. It refers to constant friction over the boundaries and to "summonses galore" in the native court. The note goes on to refer to the placing of boundary posts in the shape of concrete pillars at points marked I, II and III on "the big map," which are said to make the boundaries now perfectly clear. These points are shown on the sketch map attached to Exhibit D.

The Abube people were a party to the agreement contained in Exhibit D. It is said, however, to have been wrongly admitted on three grounds: (1) it was not registered under the Land Registration Ordinance; (2) the sketch map was not signed as it should have been under the Survey Ordinance, and (3) the sketch map left the boundaries uncertain.

The decision of the Federal Supreme Court in the matter of Exhibits C and D may be summarised thus. Although the Abube family were not parties to the agreement contained in Exhibit C, they were parties to the agreement contained in Exhibit D. These two agreements were made on the same day and ought to be read as one. They were evidence admissible as memoranda of past acts and oral transactions relating to ownership of Ikenga land. Exhibit C refers to admissions made by the Warrant Chief of Abube to the District Officer in open court. The two exhibits C and D were made with a view to their use in the native courts, and to shut them out when they have been acted upon for the last forty years would work more injustice than would be prevented.

With these views their Lordships agree. They may add that a witness before the trial judge, one Enwelum, for the Agbudu people, said that Mr. Gardner, the District Officer, stayed in the vicinity for some two weeks settling the boundary disputes. The Agbudu people sat on one side, the Abube on another and the Umuawa on a third. The meetings were held in broad daylight, and, when Mr. Gardner went to blaze the boundaries, all these groups went with him and witnessed it. The record does not disclose any cross-examination on this specific point.

With regard to the objection based on the Land Registration Ordinance, it is provided by section 23 of that Ordinance as follows: "No instrument

other than a will required by this ordinance or by any enactment repealed by this ordinance to be registered shall be pleaded or given in evidence in any court unless the same shall have been registered." An "instrument" is defined in section 2 of the ordinance as follows: "'instrument' means document conferring, transferring, limiting, charging or extinguishing, or purporting to confer, transfer, limit, charge or extinguish, any right title or interest in land in Nigeria, and includes a will, and a power of attorney under which any instrument may be executed, but does not include a judgment or order of the court on any statutory enactment."

Neither Exhibit C nor D can in their Lordships' view be regarded as "an instrument" within that definition. The documents simply record an agreement as to boundaries, and, for all anyone knows, they involved no cession or disposition of land on anyone's part for the boundaries may have corresponded to existing rights.

As regards the objection to Exhibit D based on the Survey Ordinance, Section 23 (1) (b) thereof provides as follows: "No map, plan or diagram of land, if prepared, in the case of land in the Eastern or the Western Region, after the 20th day of October, 1897, or, in the case of land in the Northern Region after the 16th day of May, 1918, shall, save for good cause shown to the court, be admitted in evidence in any court, unless the map, plan or diagram . . . is prepared and signed by a surveyor and countersigned by the Director of Surveys."

In the first place, it would seem to be very debatable whether the sketch attached to Exhibit D is a map, plan or diagram of land within the scope of the Section; but, if it is, the court still has a discretion to admit it for good cause. The point as to inadmissibility on this ground was not taken in the High Court, but it is now said that the court had no power to admit it unless good cause were first shown. The Federal Supreme Court said that the trial judge could have admitted it for good cause, meaning that good cause existed.

In the circumstances it seems to their Lordships, with respect, to be a somewhat barren technicality now to insist that good cause should have first been shown. If this point were to be taken, it should have been taken before the trial judge, when the matter could if necessary have been regularised, and not taken for the first time in the Federal Supreme Court.

As regards the objection to the admission of Exhibit C on the ground that it was tendered as evidence of an arbitration award but admitted as evidence of an agreement, their Lordships do not understand the substance of this objection and cannot sustain it.

On the sketch map attached to Exhibit D there is a shaded portion already referred to as belonging to the Abube people. It is now urged that, as this shaded portion cannot be defined so as to mark the boundaries, the consequence follows that the adjacent land claimed by the Agbudu family likewise cannot be defined and that their claim should therefore fail. As to this, it is to be recalled that in Exhibit D there is a reference to points I, II and III being marked on the "big map." On the sketch attached to Exhibit D, these marks are reproduced along the path to Achalla, which is the topmost boundary of the shaded portion. At the bottom point of the shaded land there is a reference on the sketch map to a boundary post. It is contended that this boundary post was non-existent, but the learned trial judge said this about this particular argument, "A surveyor would, in my opinion, experience no difficulty in inserting that area on the plan Exhibit A nor in actually marking it out on the land."

The Federal Supreme Court dealt with the matter in greater detail (see the

judgment of Federal Judge Taylor) and arrived at the like conclusion, no doubt on the footing *id certus est quod certum reddi potest*. But, taking the sketch in Exhibit D as the starting point, one knows where the northern boundaries of this shaded portion are, and one knows the area. One can see moreover, that the western boundary comes down at an angle to join the Igbariam boundary at a point below the source of the Ezuku stream. It seems clear to their Lordships that with these data a competent surveyor could delineate the area with sufficient exactitude. The alternative is to say that the whole claim of the Agbudu people to a very much larger area must fail. Apart from the extravagance of the argument, their Lordships think it unsound for the reasons given in both the courts below.

Another exhibit was put in before the learned trial judge, Exhibit E. This referred to an agreement over a boundary and was an agreement between the Agbudu people and the Amagata people. The Federal Supreme Court held it to be inadmissible, as it was irrelevant, and Federal Judge Taylor commented that the trial judge apparently took the same view for he made no mention of it in his judgment and placed no reliance upon it in arriving at his decision. It was urged upon their Lordships that the exhibit may nevertheless have had some latent effect upon the trial judge's decision; but this is pure conjecture.

In their Lordships' view none of the objections urged before them invalidate the decision of the Federal Supreme Court, with which they respectfully concur. They will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

AMUSA YESUFU OBA AND ANOTHER APPELLANTS

AND

HUNMUANI AJOKÉ RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

1964 July 22

Lords Morris of Borth-y-Gest, Guest
and Donovan

Practice and Procedure—Amendment of writ or pleadings—Parties to address court before amendment—Concurrent findings of fact.

Held: (i) Prudence required that it should be an invariable rule of practice for a Judge to invite the parties to address him before he amends a writ or the pleadings of his own motion. (See *Ambrosini v. Tinko* (1929) 9 N.L.R. 8.)

(ii) Where there are concurrent findings of fact in the Courts below adverse to the two appellants and which do not come within the exceptions to the rule, their Lordships will not interfere with such findings.

LORD DONOVAN. This is an appeal from a judgment of the Federal Supreme Court of Nigeria given in favour of the respondent on 5th February, 1962.

In an action between the first appellant and the respondent in January 1957, the first appellant was adjudged to be the owner of a plot of land with a house on it in Adeyemi Street, Mushin. On 14th February, 1957, following his success in this action, the first appellant agreed to sell the

property to the respondent for £300. Of this purchase price £100 was paid on the signing of the agreement, and £200 was to be paid on or before 31st March, 1957. The respondent claimed that she had tendered this £200 before 31st March, but that the first appellant had refused to accept it. She alleged further that in this refusal he was encouraged by the second appellant who tried to induce her to proffer a further £50. In July 1957 the first appellant sold the property to the second appellant for £800, and evicted the respondent from the house.

She thereupon brought her action in August 1957, claiming in her writ specific performance of the contract of 14th February, 1957. The action was originally against the first appellant only, but by leave the second appellant was added as a defendant in November 1957.

In the statement of claim delivered in February 1958 the respondent alleged against both appellants *inter alia* that the first appellant's refusal to receive the balance of £200 and his subsequent sale of the property to the second appellant for a higher sum, was a fraud upon the respondent, in which fraud the second appellant was implicated because he had full knowledge of the facts.

At the trial the respondent and her witnesses deposed, *inter alia*, to having made the tender of the £200 before the 31st March, 1957, in the presence of the second appellant, who urged the respondent to proffer £50 more. Her story was corroborated by a witness who went with her, one Adeleye. The appellants gave evidence completely denying this story. The first appellant denied having seen the respondent as she alleged. It was for this reason that he wrote her a letter dated 5th April, 1957, in which he referred to the non-payment of the £200, and said that in the circumstances he was returning the deposit of £100 and re-taking possession of the property.

It may be remarked that this letter called forth a reply from the respondent's lawyer alleging that the first appellant had evaded taking the balance of £200, warning him against "this trick," and proffering the £200 once more. On behalf of the appellants the point was taken that this reply (which was not written until the 9th May) did not assert that there had been a tender before the end of March but stated that the balance had been offered since the end of March.

The second appellant also gave evidence denying that he was present on any occasion when the £200 was tendered to the first appellant, and denying also the allegation that he had suggested the payment of an additional £50.

In his judgment Taylor J. said that both the present appellants were most unsatisfactory witnesses, in particular the second appellant, who had been very evasive in his evidence. By contrast the present respondent and her supporting witness impressed him as witnesses of truth. He found that the £200 had been tendered in time to the first appellant who would not accept it. He further found that the second appellant was present at the time of the tender and asked the respondent to pay a further £50. Further, the second appellant knew of the existing contract of sale of the property between the first appellant and the respondent. He ordered that the first appellant execute a conveyance of the property to the respondent against payment of the £200, the transaction to take place on 6th September, 1958, before the Registrar of the Court.

Both appellants appealed to the Federal Supreme Court of Nigeria, in which judgment was delivered on 5th February, 1962, dismissing the appeals. Brett F.J. with whom Unsworth and Bairamian F.JJ. concurred, after reciting the facts, upheld Taylor J.'s finding that the £200 had been

tendered to the first appellant before 31st March, 1957, and that the second appellant knew at the time of such tender of the respondent's interest in the property.

The learned Federal Justice then went on to deal with a procedural point raised by the two appellants. In his judgment Taylor J. found that no fraud had been proved on the part of the two appellants: and he referred to an argument for the second appellant to the effect that if no fraud were proved against him, the sale of the property to him could not be set aside, even if he knew of the interest of the respondent. The learned judge rejected that argument: but since the writ did not specifically ask that the sale be set aside as against the second appellant, on the ground that he had notice of the respondent's prior interest, the learned Judge, of his own motion, suitably amended the writ. He did this pursuant to Order 33 of the Nigerian Rules of Court which in terms confer a power on the Judge to do so. In the Federal Supreme Court complaint was made of the learned Judge's action, on the ground that the parties were not given an opportunity of being heard first. But this amendment as Brett F.J. pointed out, raised no new issue of fact on which further evidence might be necessary, and did not prejudice the appellants. The statement of claim fully pleaded the issue against both appellants, and the facts pleaded had been proved against them. It was true that the learned Judge had held that the facts were wrongly described as fraud, but no argument on that particular point had been addressed to the Federal Supreme Court. In the older cases the Court of Chancery had used the word "fraud" to describe conduct such as the appellants' conduct here. But since the appellants did not take exception to the word, and were aware of the sense in which it was used, he would hold that the relief asked for could have been given on the writ as it stood before the learned Judge's amendment. He thought however that prudence required that it should be an invariable rule of practice for a judge to invite the parties to address him, before he amended the writ or the pleadings of his own motion. In this connection Brett F.J. referred to the decision of the Board in *Ambrosini v. Tinko* (1929) 9 N.L.R. 8.

Their Lordships are in agreement with the observations of Brett F.J. on this point and do not desire to add to them. The Federal Supreme Court varied the order of Taylor J. by ordering the second appellant to join in the conveyance of the property to the respondent. No point is raised concerning this variation.

The case therefore emerges simply as one where there are concurrent findings of fact in the Courts below adverse to the two appellants, and which does not come within the exceptions to the rule that their Lordships will not interfere with such findings. It has been urged upon them that the respondent's story, even though corroborated, was so improbable that it should be treated as incredible and rejected. The Courts below did not take that view. They regarded it as a case where an attempt had been made to cheat an illiterate woman out of her property for the sake of getting a higher price. In their Lordships' view the evidence, once accepted, amply justified that conclusion. They will accordingly humbly advise Her Majesty that the appeal be dismissed. There will be no order as to costs, the respondent having taken no part in the appeal.

ADERAWOS TIMBER COMPANY LIMITED

APPELLANT

AND

BALE ADEDIRE AND OTHERS

RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

(1963) All N.L.R. 429

1964 July 28

Lords Morris of Borth-y-Gest, Hodson
and Guest

Legislation—Forestry Ordinance (1948 Laws of Nigeria cap. 75), s. 2, s. 4, s. 22, s. 23 (1), (4), s. 27, s. 33, s. 34, s. 36, s. 44 (1), s. 46 (6) and s. 48; Ife Native Authority Forest Reserve Order, 1941 (as amended in 1953) Native Authority Ordinance (1948 Laws of Nigeria cap. 140), s. 62 (1); Native Authority (Amendment) Ordinance, 1948 s. 36 (c); Local Government Law 1957 (W.N.), s. 242, (printed as s. 246 in cap. 68 of the 1959 Laws of the Western Region); *The forestry (Southern Provinces Native Authorities) Rules, Rule 40.*
Practice and Procedure—Plaintiffs' *locus standi*—Certain family rights saved in Native Authority Forest Reserve—Concession by Native Authority to company in Reserve—Plaintiff family head—Whether entitled to challenge concession.

Appeal by second defendant: (P.C. No. 33 of 1963). (See *Adedire etc.*, (1963) 1 All N.L.R. 39.)

The Forestry Ordinance: section 2 defines "communal lands" as "lands in the Colony or Southern Provinces at the disposal of a native community or of any native chief on behalf of the community"; "forest produce" includes *inter alia* "timber" and "trees"; "native community" means "any group of persons occupying any lands in accordance with and subject to native law"; "protected tree" means any species of tree declared by the prescribed person to be protected under the Ordinance. Section 4 enables the Governor to constitute Government Forest Reserves, and declare certain lands as Government protected forests. Section 34 enables a native authority in certain circumstances to declare lands as a communal forestry area; and s. 36 places such an area under the control of the native community acting on certain advice. Section 44 provides for the destination of fees. Section 46 (6) provides for the Governor making rules on permits etc. Section 48 provides for the N.A. making rules on the management of reserves within its jurisdiction and distinguishes between forest reserves, native lands and communal lands; and Rule 40, under which the Agreement purported to be made, provides that "the owners of protected trees, with the approval of the Governor, may grant licences" etc. But no point was ever taken by the plaintiffs as to the power of the N.A. to conclude the Agreement.

As to the Native Authority (Amendment) Ordinance 1948, s. 36 (c): the funds of the N.A. (which would include fees from the concession) would be applied to public purposes and the welfare of the inhabitants.

The judgment of the Privy Council is confined to the *locus standi* of the plaintiffs to sue the action. In their statement of claim they alleged that they were members of the Ife community and sued as such members and taxpayers; that the forest area, the subject matter of the concession, was the communal property of the Ife community which was held in trust by the Ife District N.A.; that the Oni was the trustee of Ife communal lands and a principal shareholder of the company; that the Oni and his council signed the concession on behalf of the Ife D.N.A. and as "the traditional authority on behalf of the communal owners of the land": so in the testimonium; that he acted in a dual capacity and the deed ought to be set aside on the ground that the Oni's interest as shareholder conflicted with his duty as trustee of communal lands.

The company in its defence denied the allegations and claimed that the concession was duly made under the powers vested in the N.A. by law.

The trial judge had refused the first plaintiff an amendment to show that he was suing in a representative capacity. The first plaintiff testified that "the

action is by the whole community of Ife and I am the leader of the people who owned farms in the Forest Reserve." The trial judge observed in his judgment that there was no evidence as to what constitute the Ife community, that the identity of the communal owners was not clear, and that there was no evidence on the identity of the other plaintiffs; and he decided (in this regard) that the plaintiffs had failed to prove their right to bring the action.

In the Privy Council reference was made to *Tijani v. The Secretary Southern Nigeria* [1921] 2 A.C. 399 at p. 404, and to *Sunmonu v. Disu Raphael* [1927] A.C. 881 at p. 883; the plaintiffs argued that the lands of the N.A. Forest Reserve were communal lands and the Chief allocated land on behalf of the community, hence the Oni's signing the concession deed "as the traditional authority on behalf of the communal owners of the land" in the testimonium. They also submitted that if the point on *locus standi* was the only point decided against them there should be a non-suit.

Held: (a) The Forestry Ordinance contemplates Communal Forestry Areas as being distinct from Native Authority Forest Reserves, and as in the latter Reserve rights in or over the land are extinguished (except to the limited extent of the rights reserved), the right of ownership of the land within the area of the Forestry Reserve is conferred on the native authority and such land ceases to be communal land.

(b) The Oni of Ife was not a party to the deed *qua* traditional authority and the description in the testimonium must be treated as surplusage.

(c) The plaintiffs did not establish their *locus standi* to bring this action to set aside the concession deed: there was no satisfactory proof that the first plaintiff as a native of Ife community had a *locus standi* to sue the action; also his membership of the Ogunleye family would not entitle him to challenge the deed on the ground that the Oni's interest as shareholder of the company conflicted with his duty as trustee of communal lands (as alleged in the statement of claim); and in any event the reserved rights of the Ogunleyes under the Order establishing the Reserve must be exercised consistently with the constitution of the Forest Reserve.

(d) The matter of non-suit was not raised before the trial judge and it would be inappropriate for the Board to exercise its discretion upon a matter peculiarly within the province of the trial judge.

Appeal allowed; Federal Supreme Court judgment set aside; High Court judgment restored.

Other case cited:

Prescott v. Birmingham Corporation [1955] Ch. 210.

LORD GUEST (delivering the judgment of the Board). This is an appeal from a judgment of the Federal Supreme Court of Nigeria allowing the appeal of the plaintiffs-respondents against the order of Kester J. sitting in the High Court of Justice, Western Region of Nigeria at Ibadan, dismissing the plaintiffs-respondents' claim.

The respondents claimed against the Caretaker Committee of the Ife Divisional Council, first defendants and the appellants, second defendants (a) an order to set aside a Deed of Concession dated 6th January, 1954, between the Ife District Native Authority and the appellants; (b) against the appellants an account of all profits derived by the appellants from the concession and an order to pay the sum found due into the Ife Divisional Council Treasury, and (c) an injunction to restrain the appellants from further exploiting the concession.

In his judgment the trial judge amended the title and statement of claim by substituting the words "Ife Divisional Council" for the first defendants. No point arises on this amendment.

In their statement of claim the respondents alleged that they were members of the Ife Community and sued as such members and taxpayers. They further alleged that the forest area, the subject matter of the concession attacked was the communal property of the Ife Community which was held in trust for the community by the Ife District Native

Authority, whose successor was the first defendant; that Sir Adesoji Aderemi, the Oni of Ife, was at the material time the trustee of Ife Communal lands and a principal shareholder of the appellant company; that Sir Adesoji Aderemi acted in a dual capacity as Oni of Ife and as major shareholder in the appellant company, and that the Concession Deed ought to be set aside on the ground that Sir Adesoji Aderemi's interest as shareholder conflicted with his duty as trustee of Communal lands. The first defendants in their defence claimed that the respondents' claim was barred by section 62 of the Native Authority Ordinance (Cap. 140) and/or by section 242 of the Local Government Law 1957. The appellants denied the allegations of the respondents and claimed that the Concession was duly made under the powers vested in the Native Authority by law.

Kester J. dismissed the respondents' claim. He held (1) that the respondents were not estopped from denying the ownership of the land by the Ife Community (2) that they had failed to prove their right to bring the action (3) that the Oni of Ife was not a trustee in respect of the Forest Reserve and therefore no question of his acting in a dual capacity arose (4) that the Concession was a valid deed and (5) that the respondents' claim was statute-barred.

The Federal Supreme Court reversed the decision of Kester J. Taylor F.J., who delivered the judgment of the Court, held (1) that the respondents had a *locus standi* entitling them to bring the action (2) that the Oni of Ife acted in a dual capacity in relation to the Concession in that he was in a fiduciary position as Oni of Ife and a major shareholder in the appellant company and that the Concession Deed should on this ground be set aside and (3) that the action was not statute-barred. There followed an order by the Federal Supreme Court setting aside the Deed of Concession and otherwise in terms of the respondents' claim.

Only the second defendants are appellants; the first defendants, having acquiesced in the judgment of the Federal Supreme Court, were not represented.

Their Lordships address themselves first to the question of the *locus standi* of the respondents to sue this action. In order to set out the rival contentions of parties it will be necessary to examine closely the legislation under which the concession came to be granted and the terms of the Deed of Concession.

The Forestry Ordinance (1948 Vol. III, Cap. 75) provides in Part III for the constitution of Native Authority Reserves. By section 22 the native authority may by order made with the approval of the Governor constitute as a native authority reserve any land lying within the area of its jurisdiction. Before this is done there must be notice of the authority's intention and an inquiry into the existence of any rights claimed over the lands (section 23 (1)) and by section 23 (4) if the inquiry discloses the existence of any rights over the land the Resident may amend the boundaries of the reserve so as to exclude these areas. By section 27

“Every right in or over land within an area constituted a native authority forest reserve under section 22, other than the rights set forth in the order constituting such reserve, shall be extinguished upon the coming into operation of the order, save as provided in section 23.”

Any sale, mortgage or transfer of any right in or over the land within the forest reserve without the consent of the native authority is null and void (section 28). The management of a native authority forest reserve is to be undertaken under section 33 by the native authority constituting it. Part II

of the Ordinance provides for the Constitution of Government Forest Reserves and Government Protected Forests. Part VII deals with Communal Forest Areas which may be declared by a native authority at the request of a native community. All fees received under the Ordinance must be paid into the native treasury of the native authority administering the reserve (section 44 (1)). Under section 46 the Governor may make regulations (6)

“ regulating the grant and prescribing the form that any licence or permits may take in any particular case—

- (a) to take forest produce in forest reserves or on lands at the disposal of Government, or on native lands or communal lands, and
- (b) to sell, purchase and export forest produce.”

The Native Authority may with the approval of the Governor make rules for any of the purposes prescribed in section 46 for the general protection and management of forests and forest produce in their areas (section 48). Under section 2 of the Ordinance “ Communal lands ” are defined as “ lands in the Colony or Southern Provinces at the disposal of a native community or of any native chief on behalf of the community.” “ Forest Produce ” includes *inter alia* “ timber ” and “ trees.” “ Native Community ” means “ any group of persons occupying any lands in accordance with and subject to native law.” “ Protected tree ” means any species of tree declared by the prescribed person to be protected under the Ordinance.

Acting under the powers conferred by the Forest Ordinance the Ife District Native Authority with the approval of the Governor enacted the Ife Native Authority Forest Reserve Order 1941, under which the land described in the First Schedule subject to the rights set forth in the Second Schedule was constituted a Native Authority Forest Reserve. In 1953 the Ife District Native Authority Forest Reserve (Amendment) Order was made under which the First and Second Schedules were amended. These amendments are immaterial to the present appeal as the area affected by the Concession is included in the Ife District Native Authority Reserve as amended in 1953.

In virtue of their powers under section 48 of the Forestry Ordinance the Ife Native Authority with effect from 15th November, 1943, made Rules entitled the Forestry (Southern Provinces Native Authorities) Rules. Rule 40 provides.

“ The owners of protected trees, with the approval of the Governor, may grant licences conferring on the holders the exclusive right to be granted permits in Form 1 of the First Schedule for trees of particular species within an area defined in such licences. Licences so granted shall be in such form and on such terms as may be decided according to the circumstances of each case.”

The term “ owner ” is defined in Rule 2 to include in relation to timber or forest produce “ any member of a native community who is entitled by native law or custom to take timber and forest produce.”

In this complicated background of legislation their Lordships now turn to the Deed of Concession (Exhibit “ A ”) between the Ife District Native Authority and the appellants, dated 6th January, 1954. This agreement was made by the Native Authority in exercise of the powers conferred by Rule 40 of the Forestry Rules above referred to. Clause 1 provides:

" 1. In consideration of the due fulfilment by the Company of all the terms and conditions of this Agreement the Native Authority in exercise of the powers conferred by Rule 40 of the Forestry (Southern Provinces Native Authorities) Rules 1943 made under the Forestry Ordinance Cap. 75 as amended by Native Authority Public Notice No. 58 of 1948 published in the supplement to Gazette No. 35 of 1948 hereby grants to the Company subject to the limitations and restriction hereinafter contained and to the provisions of the Forestry Ordinance and the Forestry (Southern Provinces Native Authorities) Rules 1943 as made by the Ife-Native Authority exclusive permission

(a) to enter for the purposes hereinafter stated upon fifty-three square miles of forest area described in the Schedule hereto and surrounded by a red line on the map attached as Annexure C and hereinafter referred to as the Concession Area and subject to the provisions of this Agreement to fell any tree of a girth not less than that shown for each species in Annexure B to this Agreement to convert into logs lumber or firewood any tree so felled or any naturally fallen tree and to extract such logs lumber or firewood from the forest within the Concession Area.

(b) to make such roads railways and bridges and to erect such buildings as are necessary within the Concession Area for the felling conversion and extraction of all such logs lumber and firewood:

PROVIDED: (a) that nothing in this Agreement shall interfere with the right of any native under the jurisdiction of the Native Authority to take by permit from the Native Authority any tree he may require for his own use or for sale or barter so long as it is converted into lumber or otherwise fashioned or hollowed out for any purpose by hand power only and is not exported from the lands under the jurisdiction of the Native Authority except by the Company

(b) that nothing in this Agreement shall interfere with the right of any native under the jurisdiction of the Native Authority to any free grant of forest produce to which he may have been entitled previous to the signature of this Agreement and subject to the provisions of the Forest Ordinance and the Forestry (Southern Provinces Native Authorities) Rules

(c) that the Native Authority on behalf of the Government of the Western Region reserves the right to take such logs lumber or firewood as are required for the essential works of the Native Authority or the Government of the Western Region if the Company cannot supply these requirements on commercial terms but the Native Authority shall only exercise this right in emergency and with the specific approval of the Lieutenant Governor.

Clause 9 provides:

9. The Company shall pay on demand to the Native Authority fees and royalties assessed at rates in accordance with the Tariff at the time in force under the Forestry Ordinance and Forestry (Southern Provinces Native Authorities) Rules made thereunder by the Ife Native Authority on all logs lumber and firewood felled or cut which is defined as merchantable under Annexure A or which the Company extracts from the forest or sells or uses in the forest.

PROVIDED that at the end of each year fees and royalties shall be paid upon the merchantable contents as assessed by the forest officer of any tree of these species defined as merchantable in Annexure A to

this Agreement and whose girth exceeds the minimum girth as laid down in Annexure B to this Agreement which is left standing or felled but not extracted from the area when felled is discontinued in an annual coupe under Clause 6.

The Schedule defines the Concession area as the lands lying within the boundaries of the Ife Native Authority Forest Reserve.

No point has been taken by the respondents at any stage of the proceedings as to the power of the Native Authority to conclude the Agreement. The contention for the appellants was that the respondents had not established a title to pursue this action to set aside the deed. Only the first plaintiff gave evidence. He stated that he was a native and taxpayer of Ife. "The action" he said "is by the whole community of Ife and I am the leader of the people who owned farms in the Forestry Reserve." Upon this evidence the trial judge held that the respondents had no *locus standi* to pursue the action. Before the Board the respondents contended that the respondents were the communal owners of the land and as such entitled to set aside the concession which affected the trees in the area of the communal lands. Reference was made to the well-known case of *Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399 and to the observations of Lord Haldane at p. 404

"In the instance of Lagos the character of the tenure of the land among the native communities is described by Rayner C.J. in the Report on Land Tenure in West Africa, which that learned judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority: 'The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family has charge of the land and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land'."

and to this later observations in *Sunmonu v. Disu Raphael* [1927] A.C. 881 at p. 883:

“ It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important; because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399, 404, a decision of this Board; in the judgment the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends *prima facie* to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification ”

referring with approval to the statement of Rayner C.J. referred to in the previous case. It was argued that the lands over which the Native Forestry Reserve had been constituted were communal lands and that so far as the management of the land is concerned the power to allocate the land is exercised by the Chief on behalf of the whole community interested in the land. If allocation is made to a group, then the land belongs to that family in perpetuity. If allocation is made to a stranger, the proceeds will go to the family fund. Their Lordships are not concerned in this case to dispute the validity of the above propositions so far as communal lands in Nigeria are concerned. This was said to be the reason why the Oni of Ife signed the testimonium of the Concession Deed “ as the traditional authority on behalf of the communal owners of the land.” But these contentions take no account of the effect on the lands of the Constitution of a Native Authority Forest Reserve in terms of the 1941 and 1953 Orders. The result of the constitution of the Forest Reserve upon the land is that under section 27 of the Forestry Ordinance every right in or over land within the forest reserve other than the reserved rights is extinguished. The rights reserved in the order under consideration are rights to reside, rights to farm, rights of way and rights to hunt and fish granted to certain communities. But there is no trace of the reservation of a right to cut down trees except for their limited personal needs. Such a right would indeed be inconsistent with the constitution of a forest reserve. *Prima facie* it would appear that section 27 confers the right of ownership of the land within the areas of the forest reserve on the native authority “ if all rights in or over land ” are extinguished. But the right to fell timber must at any rate be extinguished. If this be so, then the rights of the communal owners over the trees in the forest reserve no longer exist. This construction of section 27, their Lordships consider, is reinforced by reference to certain other provisions in the Forestry Ordinance. The Forestry Ordinance contemplates Communal Forestry Areas as being distinct from Native Authority Forest Reserves (section 34). A communal Forestry Area is managed and controlled by the native community acting with the advice of the native authority (section 36). By the interpretation in section 2 “ communal lands ” is defined as “ lands . . . at the disposal of a native community or of any native chief on behalf of the community.” It appears to their Lordships inconsistent that lands should remain communal lands after the constitution of a native authority

forest reserve under which all rights in or over the lands are extinguished. Moreover in the rule making power conferred on the Governor in section 46 (b) of the Forestry Ordinance applied to native authorities by section 48 a distinction is made between forest reserves, native lands and communal lands on the presumed basis that they are different areas. The pattern becomes clearer when it is found that the fees received under the Ordinance are to be paid into native treasury (section 44 (1)). The revenue and funds of the native authority which would include the fees payable under the concession must under section 36 (c) of the Native Authority (Amendment) Ordinance (No. 4) of 1948 be applied to the administration, development and welfare of the area of the authority and to the welfare of the inhabitants. It may be observed in passing that this is the destination of the royalties which the respondents themselves seek in their claim (iii).

Their Lordships find it quite impossible to suppose that these elaborate provisions are consistent with the view advanced for the respondents that the title to dispose of the trees is in the native authority, but that the title to the beneficial ownership of the trees is in the communal owners. They have reached the conclusion that the lands over which a Native Authority Forest Reserve has been constituted ceased to be communal lands and have passed under the administration of the Native Authority.

Their Lordships recognise that this conclusion leaves unexplained the description in the testimonium of the Concession Deed of the Oni of Ife "as the traditional authority on behalf of the communal owners of the land." The Oni of Ife was not a party to the deed *qua* traditional authority and the description must therefore be treated as surplusage.

Apart from these general considerations their Lordships consider that there is great force in the observations of Kester J. to this effect:

"Who are the 'communal owners?' Although the plaintiffs claimed as members of the 'Ife Community' there is no evidence before the Court as to what constitutes this community. The identity of the 'communal owners' is not clear or certain. Apart from the 1st plaintiff, there is no evidence about who the other plaintiffs are. No evidence whatever about their identities Paragraph 1 of the statement of claim was denied by the defendants. In the circumstances, therefore, I am unable to hold that the words 'communal owners' in Exhibit 'A' refer to the unidentified class of persons described as 'Ife Community' which the plaintiffs claim they belong and by which right they have brought this action."

They attach considerable weight to these views of the trial Judge who is more versed in native law than their Lordships. When to this is added the fact that the first plaintiff at an early stage in his evidence was refused an amendment to show that he was suing in a representative capacity their Lordships are satisfied that there was no satisfactory proof that the first plaintiff as a native of Ife community had a *locus standi* to sue his action.

The case of *Prescott v. Birmingham Corporation* [1955] Ch. 210 was relied on by Counsel for the respondents as showing that a ratepayer may have a title to challenge unauthorised expenditure of a local authority but this case is far removed from the present case where the respondents' interest is too remote to give them a title to sue.

The *locus standi* of the respondents was supported in the Federal Supreme Court by a reference to the evidence of the first plaintiff who said that his family name was Ogunleye and that he was the head of that family who still hunted in the Forest Reserve. It was argued that his membership of

the Ogunleye family qualified his interest in portions of the conceded area. This was not the basis of his title to sue in the pleadings or before the High Court. But their Lordships are prepared to consider this argument as it was apparently taken without objection in the Federal Supreme Court. The only basis for the respondents' title as a member of the Ogunleye family must be contained in the Second Schedule to the Ife Native Authority Forest Reserve Order 1941 as amended by the Ife District Native Authority Reserve (Amendment) Order 1953, whereby the Ogunleye family's rights to reside, farm, hunt and fish are reserved. There are in their Lordships' opinion two answers to this contention. Firstly, the claim of the respondents to set aside the concession is based on a fiduciary duty said to be owned to the Ife community. The first plaintiff's membership of the Ogunleye family would not entitle him to challenge the deed on the ground alleged in the statement of claim. Secondly, and in any event the reserved rights of the Ogunleye under the order must be exercised consistently with the constitution of the Forest Reserve.

Their Lordships have therefore reached the conclusion that the respondents have not established their *locus standi* to bring this action to set aside the concession deed. It follows that it is unnecessary for their Lordships to consider the remaining points, namely whether there was a fiduciary duty owned by the Oni of Ife to the Ife community or whether the claim was statute barred, matters upon which they express no opinion.

The logical result of their Lordships' conclusions would be to allow the appeal and restore the judgment of Kester J. dismissing the action. Mr. Lawson, Counsel for the respondents, however, submitted that if the point on *locus standi* was the only point decided adversely to his clients there should be a non-suit. Their Lordships are not prepared to sustain this submission. This matter was not raised before the trial Judge and it would be inappropriate for their Lordships to exercise their discretion upon a matter peculiarly within the province of the trial Judge.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the judgment of the Federal Supreme Court set aside with costs and the judgment of Kester J. restored. The respondents must pay the appellants' costs before the Board.

EMMANUEL AYODEJI AJAYI

APPELLANT

AND

R. T. BRISCOE (NIGERIA) LIMITED

RESPONDENTS

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 1326; [1964] 3 All E.R. 556

1964 July 28

Lords Morris of Borth-y-Gest, Hodson
and Guest

*Hire Purchase—Hire purchase agreement—Motor lorries—Unserviceable—
Written permission to withhold instalments pending repairs—Claim for unpaid
instalments—Promissory estoppel—Equity in favour of promisee—
Qualifications—Nigeria.*

PO 33*

On a claim by the plaintiffs against the defendant for unpaid instalments under two hire-purchase agreements relating to a number of motor lorries, the defendants, who had had trouble with the lorries, relied on a letter from the plaintiffs which stated, *inter alia*, "... we are agreeable to you withholding instalments due on the Seddon Tipppers as long as they are withdrawn from active service." After that letter the defendant had laid up the lorries, most of them with the plaintiffs, and he contended that they could not enforce payment pending the return of the lorries to service, and he relied on the equitable defence as defined by Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888) 40 Ch.D. 268, C.A. that "if persons who have contractual rights against others induced by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before." The defendant alleged that no notice had been given to him that the lorries were available for active service and that as a result of the plaintiffs' promise he had altered his position in a number of specified respects:

Held, that the principle of promissory estoppel as defined by Bowen L.J. in the *Birmingham and District Land Co's* case (*supra*) and confirmed in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, H.L.(E.) was that when one party to a contract in the absence of fresh consideration agreed not to enforce his rights an equity would be raised in favour of the other party. That equity was, however, subject to the qualifications (1) that the other party had altered his position; (2) that the promisor could resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; and (3) the promise only became final and irrevocable if the promisee could not resume his position. The defendant had not made good the equitable defence, for the evidence did not support his allegation that he had altered his position, and it could not be said to have been proved that the lorries were not made available to him after they had been repaired. He had therefore failed to establish any defence to the plaintiffs' claim.

Order of the Federal Supreme Court of Nigeria affirmed.

The following cases, in addition to those referred to in the judgment were cited in argument:

Salisbury (Marquess) v. Gilmore [1942] 2 K.B. 38; 58 T.L.R. 226; [1942] 1 All E.R. 457, C.A.;

Foakes v. Beer [1884] 9 App.Cas. 605 H.L.(E.);

Fenner v. Blake [1900] 1 Q.B. 426, D.C.;

In re Wickham [1917] 34 T.L.R. 158;

In re William Porter & Co. Ltd. [1937] 2 All E.R. 361;

Buttery v. Pickard [1946] W.N. 25; 62 T.L.R. 241;

Charles Rickards Ltd. v. Oppenheim [1950] 1 K.B. 616; 66 T.L.R. (Pt. 1) 435; [1950] 1 All E.R. 420, C.A.;

Foster v. Robinson [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342, C.A.;

Perrott (J.F.) & Co. Ltd. v. Cohen [1951] 1 K.B. 705; [1950] 2 All E.R. 939, C.A.;

Beesly v. Hallwood Estates Ltd. [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

APPEAL (No. 28 of 1963) from a judgment and order of the Federal Supreme Court of Nigeria (Brett, Taylor and Bairamian F.J.J.) (December 21, 1962) dismissing the present appellant's appeal from a judgment of the High Court of Lagos (Onyeama J.) (January 23, 1961) whereby the respondents (the plaintiffs) were awarded £11,304 16s. as sums due under two hire-purchase agreements entered into between the plaintiffs and the appellant (defendant).

The following facts are taken from the judgment of the Judicial

Committee. The plaintiffs issued their summons on November 2, 1959, and by their statement of claim they relied on two agreements dated June 1, 1956, and July 31, 1956, relating altogether to 11 Seddon lorries valued at £24,511 6s. 8d. which had been delivered to the defendant on hire. The defendant had paid deposits of £1,071 2s. 6d. and £3,000 under the respective agreements and had agreed to pay the balance of £20,440 4s. 2d. by stated instalments on stated dates between July 1, 1956, and January 30, 1957. The defendant failed to pay the instalments in accordance with the agreement and, at the date when proceedings were instituted, there was still unpaid £11,304 16s. 0d. That sum the plaintiffs claimed.

The substantial issue raised by the defence was that the defendant had been induced to enter into the agreements by fraudulent representations about facilities to be provided by the plaintiffs for repairing the lorries and providing spare parts for them. The defendant counterclaimed repayment of the money he had already paid under the agreements on the ground that the consideration had wholly failed and rescission of the agreements.

The trial judge found against the defendant on the issue of fraud and gave judgment for the plaintiffs for the full amount claimed as rents due on the lorries in accordance with the agreements.

On appeal to the Federal Supreme Court the point was taken, as the sole ground of appeal, that the defendant was not obliged to pay the arrears due on the hire-purchase agreements so long as the lorries were off the road.

The defendant founded on a letter to him written by the plaintiffs' manager and dated July 22, 1957, which was in the following terms:

" Dear Sirs,

SEDDON/TIPPERS

We are in receipt of your letters of 5th and 12th July and are indeed very sorry to hear about the troubles you have had with your fleet of Seddon Tipplers.

We hope very soon to be able to put at your disposal the service of our engineer and on completion of our workshop in Apapa we should be able to give you a proper service for your Seddon vehicles in the time to come.

Please rest assured that we do regret the inconvenience and loss you have been put to and we confirm herewith that we are agreeable to your withholding instalments due on the Seddon Tipplers as long as they are withdrawn from active service.

Yours faithfully
(Sgd.) B. A. Heidemann
Acting manager."

The Federal Supreme Court dismissed the defendant's appeal. 1964. July 6, 7 and 8. *J. G. Le Quesne Q.C.* and *Mervyn Heald* for the appellant.

Dingle Foot Q.C. and *Dick Taverne* for the respondents.

July 28. The judgment of their Lordships was delivered by LORD HODSON, who stated the facts set out above and continued: Reliance was placed on the equitable principle stated by Lord Cairns L.C. in *Hughes v. Metropolitan Railway Co.* (1877) 2 App.Cas. 439, H.L.(E.) which was 10 years later held to have general application in the case of *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888) 40 Ch.D. 268. C.A. where the principle was interpreted by Bowen L.J. as follows (*ibid.* p. 286):

“ If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.”

It was argued that the principle applied to this case for the suspension of the obligation to pay instalments still operated, no notice having been given to the defendant that the lorries were available for active service nor any other step taken to cause the suspension to cease. The judgment of the Federal Supreme Court was given by Taylor F.J., who held that he could not see in what way the defendant had altered his position or could be held to have acted on the promises contained in the letter under consideration.

Before their Lordships the defendant has taken the same point as he took in the Federal Supreme Court, arguing that the plaintiffs could not enforce payment in the circumstances of this case pending the happening of a certain event which had never occurred. This event is the return to service and availability for service of the lorries. He claims that he has altered his position and relies on the following circumstances. First he says that the relevant terms of the agreements (clause 14 in each case) provided for the determination of the hiring if the hirer did not make punctual payments of the instalments of rent. He maintains that the conduct of the parties is inconsistent with determination in accordance with the clause because after instalments had fallen into arrear and after the payments ought to have been completed the lorries remained in the possession of the defendant with the consent of the plaintiffs, that three were never returned and eight were later returned to the plaintiffs with their approval and remained thereafter in their possession subject to the terms of the agreement in that it was open to the defendant to complete the transaction by paying the balance due and become the owner of the lorries. By the letter of July 22 it is said that the plaintiffs made plain they were not going to enforce their rights and would not insist on payment before the lorries were all back in service. By this letter they gave the defendant all he asked for since he had written on July 12 pointing out that he had been compelled to lay up the lorries and had no desire to forfeit the large sums of money involved. In that letter the defendant proposed to make the necessary contribution for all essential repairs which were to be debited to his account and payment made when the vehicles were again in service. It is said the defendant acted on the letter of July 22 by not putting forward proposals alternative to those he had already made in his letter of the 12th. Further, it is said that after the letter of July 22 he did lay up the lorries by delivering eight to the plaintiffs after that date with the result that they were out of service and earned no revenue. Lastly it is said that he organised his business on the basis that the lorries would be put in repair and he would not have to make the payments due on them until they were back in service and accordingly earning revenue.

The defendant's final contention was that having altered his position in the manner indicated the plaintiffs never gave notice that the period of suspension was at an end before issuing their summons and that accordingly the lorries never having been returned or made available for service he was entitled to rely on the equitable defence as defined by Bowen L.J. in the *Birmingham and District Land Co.* case, 40 Ch.D. 268 at p. 286.

Alternatively, he went further and contended on the authority of the

cases of *Central London Property Trust v. High Trees House Ltd.* [1947] K.B. 130; 62 T.L.R. 557; [1956] 1 All E.R. 256 and *Combe v. Combe* [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767 C.A. that the promise given by the letter of July 22 was irrevocable unless the lorries were made available for service and that since this never happened the plaintiffs cannot enforce their claim.

Their Lordships are of opinion that the principle of law as defined by Bowen L.J. has been confirmed by the House of Lords in the case of *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, H.L. (E.) where the authorities were reviewed and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promised for which he had given no consideration. The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.

The difficulty of this case stems in great part from the fact that the equitable defence was never expressly pleaded and no part of the agreement at the trial appears to have been directed thereto. Certainly the trial judge made no reference to it. True it is that the defence contains in paragraph 29 a reference to the letter of July 22, 1957, by which "the defendant was asked to withhold the instalments due on the Seddon Tippers so long as they are withdrawn from the road." Again paragraph 30 reads: "The defendant avers that the fleet of Tippers were not on the road on the receipt of this letter and ever since they have not been on the road (eight are with the plaintiffs and three lying in the defendant's garage)." These paragraphs are contained in a narrative statement of facts pleaded in order to establish the allegation of fraud, and although the letter of July 22, 1957, was put in evidence it was used not in support of the doctrine of promissory estoppel but to show that the defendant "was told not to pay at all any more." It is not surprising that the trial judge did not address his mind to the implications of the letter which are now relied upon and, indeed, made no express finding on the question whether or not the lorries were ever made available to the defendant for return to service. The plaintiffs' witness, Gramhanssen, chief accountant to the plaintiffs gave evidence that the defendant had been asked to remove the lorries after repairs but had failed to do so. This was denied by the defendant.

The correspondence is incomplete and there is a gap between letters written in July, 1957, and a letter written on behalf of the defendant in April 1958. It can be inferred from the last mentioned letter, but not with certainty, that during this period the plaintiffs were making demands for payment of the instalments due under the agreements.

Their Lordships have referred to those matters of fact not to exclude the raising of the equitable defence but to show that the facts relied upon, although covered by the pleaded defence, were not investigated at the trial through no fault of the plaintiffs. Battle was joined by the defendant on the issue of fraud and on that issue the plaintiffs succeeded. The defence was first put forward effectively in the Federal Supreme Court and further

elaborated before their Lordships on inadequate material. It would not be just to the plaintiffs to remit the matter either for a new trial or for a decision to be given at this late stage on the fact which have not been expressly found. Their Lordships agree with the Federal Supreme Court in thinking that an application to that end should be rejected, especially as the defence sought to be raised is of a suspensory or delaying nature and not of itself decisive to defeat the plaintiffs' claim for all time.

The question remains whether the defendant has made good the defence. In their Lordships' opinion he has not succeeded in so doing.

The defendant did not alter his position by not putting forward counter-proposals after receipt of the letter of July 22, 1957. There is no evidence to support the contention that he did so by organising his business in a different way having regard to the fact that the lorries were out of service, and it cannot be inferred from the evidence given that such reorganisation was necessary. It can be said that the lorries were laid up and there is evidence to support the view that they were laid up after the receipt of the letter of July 22, 1957. Nevertheless, in view of the evidence given by the plaintiffs' witness, not rejected by the trial judge (although contradiction by the defendant) it cannot be said to have been proved that the lorries were not made available for the defendant after they had been repaired.

The defendant has accordingly failed to establish any defence to the plaintiffs' claim. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *T. L. Wilson & Co.; Wilkinson, Kimbers & Staddon.*

NATIONAL BANK OF NIGERIA LTD. APPELLANTS

AND

OBA. M. S. AWOLESI RESPONDENT

[ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA]

[1964] 1 W.L.R. 1311

1964 July 15
Oct. 5

Lords Reid, Hodson and
Sir Benjamin Ormerod

Guarantee—Banking account—Overdraft—Guarantee in consideration of bank “continuing the existing account”—Due payment guaranteed of “all advances, overdrafts, liabilities, . . . whether made, incurred or discounted before or after the date hereof” to named person—Second account opened with same bank and operated without guarantor’s knowledge—Substantial payments into second account—Manner of operation of accounts increasing burden on guarantee—Overdrafts on original account remaining unreduced—Whether guarantee of an existing account—Whether opening of second account substantial variation of terms of guarantee—Whether guarantor discharged.

Between September 26 and December 24, 1955, T. issued 14 cheques drawn on his account with the plaintiff bank, the National Bank of Nigeria, at the Shagamu branch, each of which was returned marked “Refer to Drawer.” On December 30, 1955, the defendant, T.’s uncle, executed a guarantee of T.’s account up to £10,500. The cheques were honoured by the plaintiffs on

December 29, 30 and 31, 1955, and as a result on the latter date the account became overdrawn to the extent of £10,096. By the guarantee the defendant, in consideration of the bank "continuing the existing account" with T. for so long as they thought fit, "or otherwise giving credit, accommodation or granting time," guaranteed "on demand in writing . . . the due payment of all advances, overdrafts, liabilities, bills and promissory notes, whether made, incurred or discounted before or after the date hereof to or for (T) either alone or jointly with any other person . . . together with interest, commission and other bank charges . . ." On January 12, 1956, a new account (account No. 2) was opened by T. at the Shagamu branch; its opening and subsequent operation took place without the defendant's knowledge. No further cheques were drawn on the first account and the payments into it were only just sufficient to pay the monthly debits of interest, and by July 24, 1957, the account was still overdrawn to the extent of £10,023 14s. 3d. During 1956, however, £29,000 was paid into the No. 2 account, and between January 1 and March 31, 1957, approximately a further £4,000 was paid in, so that at times the No. 2 account was in credit to over £2,500. By May 1957, the credit balance was again reduced to only £2 19s. 4d. T. also had an account at the bank's Lagos branch, to which in December 1955, he transferred £520. On May 21, 1957, the bank wrote to T. and the defendant demanding security and a substantial reduction in the overdraft by June 10. That demand not having been complied with, the bank sued both T. and the defendant, T. submitting to judgment for £10,023 14s. 3d. and judgment being given against the defendant as guarantor for £9,610 14s. 4d. the sum found to be due by combining all three accounts and striking a balance. That judgment was reversed on appeal and the bank's claim dismissed with costs. On appeal by the bank:

Held, (1) that, on its true construction, the guarantee was of the account as it existed at the date when the guarantee was made and the parties did not contemplate the opening of a second account and that, by permitting the opening of the second account the bank had permitted a substantial variation of the terms of the contract without the defendant's knowledge and to his detriment. The defendant, therefore was discharged from his guarantee.

Holme v. Brunskill (1878) 3 Q.B.D. 495, C.A. applied.

Held, further, that even were the guarantee to be construed as covering all three accounts, since they had not been operated as one account, whereby the principal sum guaranteed would have been reduced, but had been operated in such a way as to increase the burden on the defendant, the defendant was discharged from his guarantee.

Decision of the Federal Supreme Court of Nigeria affirmed.

The following cases, in addition to those cases referred to in the judgment, were cited in argument:

Devaynes v. Noble (Clayton's Case) (1816) 1 Mer. 529;

Henniker v. Wigg (1843) 4 Q.B. 792; 1 Dav. & Mer. 160;

Mutton v. Peat [1900] 2 Ch. 79, C.A.;

Deeley v. Lloyds Bank Ltd. [1912] A.C. 756; 29 T.L.R. 1, H.L.

APPEAL (No. 8 of 1963) by the National Bank of Nigeria Ltd. from a judgment of the Federal Supreme Court of Nigeria (Taylor and Bairamian F.J.J., Unsworth F.J. dissenting) (March 30, 1962) allowing, by a majority, an appeal by Oba. M. S. Awolesi from the judgment of the High Court of Justice in the Western Region of Nigeria (Irwin J.).

The following statement of facts is taken from the judgment of the Judicial Committee: The claim by the plaintiffs, the National Bank of Nigeria Ltd. (the present appellant), hereafter called the bank, was made against E. O. Adeyemi Taiwo, sued as first defendant and principal debtor, and the respondent, Oba. M. S. Awolesi, sued as second defendant and guarantor for the sum of £10,023 14s. 3d. That sum represented money lent to Taiwo by the bank at his request together with interest and bank charges.

Taiwo, a nephew of the respondent, was a customer of the bank at their Shagamu branch. Over the period from September 26, 1955, to December

24, 1955, Taiwo issued fourteen cheques drawn on his account at that branch for a total of £9,844. Each cheque was endorsed "refer to Drawer." One cheque dated September 26, 1955, for £1,120 was honoured on December 29 and the remaining thirteen cheques drawn for a total of £8,724 were honoured on December 30 and December 31, 1955. After payment of those cheques the account was, on December 31, 1955, overdrawn to the extent of £10,096.

On December 30, 1955, the respondent executed a guarantee of Taiwo's account in favour of the bank, such guarantee not to exceed the sum of £10,500. The terms of the guarantee were as follows:

" GUARANTEE, AWOLESE TO BANK

Singular—For an Individual

TO THE NATIONAL BANK OF NIGERIA LIMITED

In consideration of the bank (which expression shall include their successors and assigns) continuing the existing account with Emmanuel Olaseni Adeyemi Taiwo of 140 Akarigbo Street, Shagamu (hereinafter called the principal), for so long hereafter as the bank may think fit, or otherwise giving credit or accommodation or granting time to the principal, I, the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo, Shagamu hereby guarantee, on demand in writing being made to me, the due payment of all advances, overdrafts, liabilities, bills and promissory notes, whether made, incurred or discounted before or after the date hereof, to or for the principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.

(2) It is mutually agreed that the total amount recoverable hereon shall not exceed (£10,500) in addition to such further sum for interest thereon and other banking charges in respect thereof, and for costs and expenses as shall accrue due to the bank within six months before or at any time after the date of demand by the bank upon me for payment.

(3) And further, that this guarantee shall be applicable to the ultimate balance that may become due to the bank from the principal.

(4) I agree that this guarantee shall be a continuing security to the bank, and shall not be determined except at the expiration of six calendar months, written notice given to the bank of my intention so to do, and in the event of my death the liability of my legal personal representatives and for my estate shall continue until the expiration of six months' notice in writing given to the bank of the intention of my executors or administrators to determine this guarantee.

(5) A demand in writing shall be deemed to have been duly given to me or my legal personal representatives by sending the same by a messenger or by post addressed to me at the address hereon and shall be effectual notwithstanding my change of residence or death and notwithstanding notice thereof to the bank, and such demand shall be deemed to be received by me or my legal personal representatives after the despatch thereof, and shall be sufficient if signed by any officer of the bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and despatched by a messenger or put into the post office.

(6) I agree that a copy of the account of the principal contained in the bank's books of account, or of the account for the preceding six months if the account shall have extended beyond that period, signed

by the manager or any officer for the time being of the bank, shall be conclusive evidence against me of the amount for the time being due to the bank from the principal in any action or other proceedings brought against me or my legal personal representatives upon this guarantee.

(7) I also agree that any admission or acknowledgment in writing by the principal or any person on his behalf of the amount of the indebtedness of the principal, or otherwise in relation to the subject matter of this guarantee, or any judgment or award obtained by the bank against the principal shall be binding and conclusive on me and my legal personal representatives.

(8) I waive in the bank's favour all or any of my rights against the bank or the principal (so) far as may be necessary to give effect to any of the provisions of this guarantee.

Dated at Shagamu this (December 30, 1955)

(Sgd.) M. S. Awolesi,
Guarantor.

Witness: Emmanuel Amusan,
Ishokun Street,
Shagamu."

On January 12, 1956, a new (No. 2) account was opened by Taiwo at the bank's Shagamu branch. Its opening and subsequent operation took place without the knowledge of the respondent. After the No. 2 account was opened no cheques were drawn on the first account which remained overdrawn. The amounts paid in to the first account after that date did not represent a serious attempt to reduce the overdraft and interest thereon but were enough to pay off the monthly debits on account of interest. The resultant total overdraft on July 24, 1957, after debiting interest due on July 23 was £10,023 14s. 3d.

During the year 1956 approximately £29,000 was paid into the No. 2 account, and from January 1, 1957, to March 31, 1957, approximately £4,000 was paid in. The bank ledger showed that the No. 2 account was at times in credit to the extent of over £2,500 but that in May, 1957, the credit balance was only £2 19s. 4d. Taiwo also had an account with the bank's Lagos branch, and on December 30, 1955, he issued a cheque for £520 payable to the bank and that amount was transferred to the Lagos branch account.

On May 21, 1957, by letter addressed to Taiwo and to the respondent, the bank demanded collateral security for the overdraft and payment of a substantial amount in reduction thereof before the close of business on June 10, 1957. Legal proceedings were threatened in the event of non-compliance with the demand. Compliance not having been made proceedings for recovery of the debt due were begun on August 21, 1957, against Taiwo and the respondent. Taiwo submitted to judgment for £10,023 14s. 3d. and judgment was given against the respondent as guarantor for £9,610 14s. 4d. found to be due to the bank after a reference combining the two accounts at Shagamu with the Lagos account and taking the balance due on July 24, 1957, after treating all three as one unbroken account. The defendant appealed to the Federal Supreme Court who, by a majority (Taylor and Bairamian F.JJ., Unsworth J. dissenting), reversed the decision of Irwin J. and dismissed the plaintiffs' claim with costs. The plaintiffs, appealed to the Judicial Committee of the Privy Council.

1964. July 15. *Neil P. M. Elles* and *John G. H. Gasson* for the bank.

The defendant did not appear and was not represented.

1964. October 5. The reasons for the judgment of their Lordships were given by Lord Hodson, who stated the facts as set out above and continued: it is unnecessary to consider in detail how the total figure of indebtedness was ascertained but the basis of the calculation, in accordance with the judge's direction, was that the three accounts had been operated as one account from December 30, 1955, to July 24, 1957.

It is clear according to the terms of the guarantee that it was a continuing security to the bank and it is assumed by their Lordships that the letter of May 21, 1957, constituted a sufficient demand made upon the respondent for the purposes of the guarantee.

The question for consideration which depends in the main on the construction of the document of guarantee itself is whether the majority of the Federal Supreme Court were right in arriving at the conclusion that in the events which have happened the respondent was discharged from his responsibility as guarantor.

The guarantee refers to "the continuing of the existing account" as consideration for the guarantee which suggests that the parties had agreed that the account of the principal debtor existing on December 30, 1955, should be continued in an unbroken state and that they did not contemplate the opening of a second account. It is true that the way in which consideration for a contractual obligation is expressed is not conclusive but it is relevant in construing the terms of the contract itself. It would appear also that the words "ultimate balance" in clause 3 and "account" in clause 6 can most naturally be read, in the light of clause 1, as relating to the existing account and that the words "or otherwise giving credit or accommodation or granting time" in clause 1 *prima facie* refer to the existing account. Their Lordships agree with Taylor and Bairamian F.J.J. in construing the guarantee in the narrow sense of a guarantee of the account as it existed at the date when the guarantee was given. When the bank allowed Taiwo to open the second account they were permitting the position of the respondent to be prejudiced as to his guarantee, for, as happened thereafter, it was possible for Taiwo to make payments into the bank without releasing the respondent from his liability under the guarantee. The opening of the new current account was an unauthorised departure from the terms of the contract of guarantee.

In *Ward v. National Bank of New Zealand Ltd.* (1883) 8 A.P. 755, P.C. their Lordships said (*ibid.* p. 763) "A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed." The same judgment adopted the language of Cotton L.J. in *Holme v. Brunskill* (1878) 3 Q.B.D. 495 C.A. where he said (*ibid.* 505):

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry into the effect of the alteration. . . ."

In *In re Sherry, London and County Banking Co. v. Terry* (1884) 25 Ch.D. 692, C.A. Lord Selborne L.C. referred to the rule saying (*ibid.* p. 703); "A surety is undoubtedly and not unjustly the "object of some favour both at

law and in equity, and I do not know that the rules of law and equity differ on this subject."

On the construction of the contract so far accepted there was a substantial variation of the contract of guarantee to the prejudice of the respondent without his knowledge for he lost the benefit of all sums paid in by the principal debtor into his No. 2 account, which was, as the ledger shows, at times in credit to the extent of as much as £2,500. The respondent's guarantee therefore must be taken to have been discharged.

If, on the other hand, the contract should be construed, as the bank contends, so as to cover any account which Taiwo opened at their branches the opening of the No. 2 account would not necessarily be a variation of the contract and the guarantee, being a continuing security, would cover all the accounts since ultimately there would be only one debt due from the debtor to the bank. The various accounts were not however operated as one entity and each had its own independent existence. In the ordinary way there is no objection to a bank allowing a customer to open a number of accounts but, where there is a guarantor of the customer's indebtedness, his position may be affected. An examination of a copy of the plaintiff bank's ledger shows that, in the original account, monthly debts were entered in respect of interest charged on the amounts outstanding by way of overdraft. If all the sums that Taiwo paid into the bank had been paid into his account this would have produced a reduction of the principal debt and a consequent reduction of the interest. Since this course was not followed the position of the respondent was prejudiced and the amount for which he became liable on his guarantee was increased.

Taiwo as principal debtor was bound under clause 6 of the guarantee to accept a copy of these accounts of the principal contained in the bank's books of account as conclusive evidence, against him of the amount for the time being due to the bank. He submitted to judgment for the full amount stated in the original account as being due from him to the bank. By clause 7 of the guarantee the judgment obtained against Taiwo was binding and conclusive against the respondent. On this footing the bank would be entitled to judgment for the full amount of £10,610 14s. 3d. as claimed and not for the lesser sum of £9,610 14s. 4d. awarded by the trial judge. The bank is now content to accept the lesser sum as representing an approximation of the amount which would be due if the various accounts had in truth been operated as one. They were not operated as one and the question is whether the respondent has been substantially prejudiced by the way in which the accounts had in fact operated. Their Lordships are of opinion that by acting as it did, outside the terms of the guarantee, the bank increased the burden on the respondent as guarantor and the respondent's guarantee was discharged which construction of the document is adopted.

They have accordingly humbly advised Her Majesty that the appeal be dismissed.

Solicitors: *A. L. Bryden & Williams.*

SOLO DABO

APPELLANT

AND

ABDALLA MOUSA

RESPONDENT

[ON APPEAL FROM THE GAMBIA COURT OF APPEAL]

1965 Mar. 30

Lords Hodson, Pearce and
Upjohn

Claim for money delivered to the defendant for a purpose; defendant not delivering money as directed—question of fact.

LORD HODSON. This is an appeal from an order of the Gambia Court of Appeal, delivered on the 2nd December, 1963, affirming a judgment of the Supreme Court of The Gambia dated 25th June, 1963.

The action was commenced by the respondent, Abdalla Mousa, as plaintiff by writ dated 23rd March, 1963, in which he claimed the sum of £19,200 due from the appellant. The endorsement on the writ is as follows: "The plaintiff claims £19,200 being money received from the plaintiff by the defendant in accordance with the statement of claim annexed hereto."

The sole question was a question of fact, whether or not the plaintiff was right in saying that the defendant had received money from him which he had not returned or accounted for, and Mr. Finer for the appellant has, in their Lordships' opinion, very rightly applied himself solely to that question and has not allowed himself to be diverted by various other matters which have been raised in defence in the Court of first instance, and also in the Court of Appeal in The Gambia. For example, the question of jurisdiction was raised, but that objection has no substance in it. The action was brought in The Gambia, where the defendant was and where the debt, if it existed, was also, and no question of conflict of law arises. The action was competent in The Gambia. A further adumbrated defence was to the effect that the money, if it was ever paid, which is denied, was paid in respect of an illegal transaction in connection with diamonds. There was no evidence of illegality and that matter was rejected in the court below and has not been referred to by learned counsel who appear for the appellant. The fact is that the plaintiff and the defendant are admittedly men who have been in business in buying or digging diamonds. There is nothing necessarily illegal about that.

The transaction in question was not expressly related to diamond buying. The evidence about it is sketchy. The plaintiff said in his evidence:

"On 2nd July, 1962, the defendant"—that is Solo Dabo—"in Freetown came to me and said he had business at Bo. I had £19,200 with me. I was not ready to go up to Bo. So I gave defendant the £19,200 to carry it to my brother Mohamed Khalil at Bo. I asked defendant when he reached Mohamed Khalil—he should give him the £19,200 and to show him the business. The business was to buy diamonds. Defendant has a digger's licence—and Khalil has a dealer's licence. I also have a dealer's licence. (This is it Ex. 'A' admitted.) Defendant took the £19,200 from me and gave me a small note—which said he had received the £19,200 from me to give to my brother Khalil.

The note has been lost—I do not know where it is. Defendant did not give the money to my brother. After 2 or 3 days I went up to Bo myself and asked my brother about this money," and then that he did not get any information from his brother.

"Defendant was not to be found at Bo by me. After a week or so I went to Lebanon and met defendant in the Lebanon and asked him for that money. He told me he had the money in Freetown in the diamond business. Defendant said he was ready to return to Freetown that same day and pay the money to my brother Mohamed Khalil. Defendant left the Lebanon. I heard from my brother that he had not received any money."

He proceeded: "On 27th February I came to Bathurst"—Bathurst being in The Gambia—"and met Solo Dabo in the street. I went with defendant to Ahmed Jacob at 7 Cameron Street on 28th February in the afternoon. I asked Solo Dabo about the money. Ahmed Jacob was not present. Defendant told me that he was not running away with the money."

There was no note in existence relating to what took place on the 2nd July, 1962. The note was said to have been lost, but it has been referred to, since a copy came into existence on the 8th March, 1963. The point that turns on this is that the learned Chief Justice who tried the case misled himself by thinking wrongly that this document of the 8th March, 1963, was a promissory note and subject to the law relating to bills of exchange, whereas in fact it was nothing of the kind; it is, as its contents show, merely an acknowledgment of the indebtedness in the sum of £19,200, purporting to be a repetition of what had been said at the original date when the lost note of the 2nd July, 1962, came into existence. It is called a promissory note because the man who wrote it out, Mr. Jacob, who is a business man, was asked to give it that name. It reads as follows. Their Lordships refer to the second paragraph first, because this paragraph came into existence first. "I Solo Dabo hereby declare and admit having received from Mr. Mohamed Abdallah Mousa the sum of £19,200—say nineteen thousand two hundred pounds sterling—for safe keeping and promise to deliver this sum to his nephew Mr. Mohamed Khalil at Bo, Sierra Leone, on demand." That is signed by the defendant and it was witnessed by Mr. Jacob himself and his clerk, Mr. Cole, both of whom gave evidence in support of the document.

The first paragraph, which was added afterwards, contains the germ of the error about promissory notes, because it reads as follows: "Copy in lieu of lost promissory note made on the 2nd July, 1962, at Freetown (Sierra Leone) which reads as follows." It was stamped a few days later as a promissory note.

The learned judge, however, in their Lordships' opinion, was not misled by the title wrongly given to this document, because on a consideration of his judgment it appears that he gave close attention to the evidence regarding the document, as strong evidence in support of the plaintiff as to the transaction which he spoke to as having occurred on the 2nd July, 1962, and it matters not to his conclusion that it was falsely described. Indeed, the defendant denied his signature to the document and said it was a forgery, but the document itself was obviously of great importance, if it was what it purports to be, an acknowledgement of the debt, and the learned judge dealt with it in that way. He, having heard the parties and the corroborative witnesses, Mr. Jacob and Mr. Cole, has given a judgment which in their

Lordships' opinion is unassailable, and was so held to be in the Court of Appeal in The Gambia.

The Court of Appeal did, however, take one point which is in favour of the appellant. There was in the course of the cross-examination of the appellant a challenge to him as to the transactions which he said had taken place between himself and the respondent. There had been dealings, no doubt about matters which had to do with diamonds and about matters which had not to do with diamonds, and, when he was cross-examined, the appellant was asked if he had any record which showed what he said was due, if anything, to the respondent. He said in effect that all he owed the respondent was £5,000 and not £19,200 at all, and he produced a document which he had to go home and fetch, a book, which fitted in with his own story. The criticism which is made of the learned Chief Justice in his judgment is that he ought not to have rejected out-of-hand this book, having regard to the way in which it was produced, and ought not to have regarded it as a concocted document.

Their Lordships think there is substance in that criticism in that the learned judge may have placed a wrong emphasis on the way in which this book was produced; but the Court of Appeal have dealt with that matter. In effect they have shown that, although the book which was produced is consistent with the appellant's account of the transaction between himself and the defendant, the entries in the book are not shown sufficiently to relate to the transaction in question in this suit. There is nothing to connect that transaction with the £5,000 to which the entries in the book refer.

Their Lordships will accordingly humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

SALIM RAKAR APPELLANT

AND

THE QUEEN RESPONDENT

[ON APPEAL FROM THE SIERRA LEONE COURT OF APPEAL]

[1966] 3 W.L.R. 986; [1967] 1 A.C. 241

1966 June 30

Lords Morris of Borth-y-Gest, Pearce
and Wilberforce

Criminal Procedure—Summing-up—Circumstances calculated to arouse suspicion—Limited evidence against one of three defendants—Necessity for warning to jury—Reference to be made to the defendant's denials.

The jury were warned by the trial judge in his summing-up that it would be dangerous to convict the appellant on B's evidence alone since there were circumstances which raised a reasonable inference that B might have been an accomplice, and that they should not accept the alleged statement of the first defendant unless they were satisfied that it had been made, and that in any event it could only be evidence against the first defendant. But he referred to the "proposition" put forward by the prosecution that the stolen money was kept at M and that as soon as the police were on the scene all three defendants went to M in the car to collect it and said that "two of them at least got there and collected the money," on several occasions referring to "the suit-case and money." In those passages he did not repeat the warning to the jury of the

limited nature of the evidence affecting the appellant. The jury found the appellant "guilty" by an eight to four majority verdict:

Held: the summing-up was defective in that it did not sufficiently differentiate between the position of the appellant and that of the other defendants. The reference to the "proposition" put forward by the prosecution might have led the jury to infer that the appellant was knowingly a party to the collection of the stolen money and that he knew stolen money had been taken to M; and the warning that the evidence on that point was derived from the first defendant and not evidence against the appellant should have been reiterated.

LORD MORRIS OF BORTH-Y-GEST. The appellant was one of five persons who were charged with Robbery with Aggravation contrary to section 23 (1) (a) of the Larceny Act 1916. A *nolle prosequi* was entered by the prosecution against one of them and a separate trial ordered in the case of another. With the two others the appellant was tried at Freetown before Cole P.J. and a jury of twelve. The information was dated the 29th October, 1963. Evidence was heard on the 1st, 2nd, 3rd and 6th April, 1964. After a summing-up on the 7th April, 1964, the jury returned their verdicts. In regard to the 1st accused the jury were unanimous in finding him guilty. In regard to the 2nd accused 9 jurors found him guilty and 3 found him not guilty. The appellant was the 3rd accused. 8 jurors found him guilty and 4 found him not guilty. It is provided by section 27 of the Jurors and Assessors Ordinance (Cap. 38 of 1960) as follows:

" 27. (1) On the trial of any person or persons for any offence punishable by death the verdict shall be unanimous.

(2) On the trial of any person or persons for any offence not punishable by death, if, after deliberation, there be a majority of two-thirds of the jury, the verdict of the majority of two-thirds shall be held, taken to be, and received by every Court in the said Colony as the verdict of the whole jury in the cause:

Provided that where the number of the members of the jury has been reduced to eleven or ten under the provisions of section 37, the majority of eight and seven members of the jury respectively shall be deemed to be the verdict of the majority of two-thirds of the jury required by this section:

Provided further that, if the Court is not satisfied that the verdict of the said majority is in accordance with the weight of the evidence, the Court may refuse to accept it, and in each and every such case the verdict shall be unanimous."

Following upon the return of their verdicts by the jury the learned judge said that he accepted the majority verdicts as regards the 2nd and the 3rd accused. The 1st accused was sentenced to 10 years' imprisonment and the 2nd and 3rd each to 7 years. All three appealed to the Court of Appeal. Their appeals were dismissed on the 24th October, 1964.

The appellant petitioned for special leave to appeal to Her Majesty in Council and such leave was granted in January 1965.

The charge of robbery with aggravation related to the 30th August, 1963. The allegation was that at a place between mile 40 and mile 41 in the Freetown-Bo Road in the Port Loko District of Sierra Leone the accused robbed one Olivio Paolo of one black tin trunk, £6,000 in money and a car key all of which were the property of a company that employed Olivio Paolo as an accountant. In the course of his duty Olivio Paolo had gone to Freetown and had drawn £6,000 from Barclays Bank. Some of the money

was in £5 currency notes. That money (in a black tin box) was later being taken by Olivio Paolo from Freetown to Rokel. He was in an Opel car which was driven by a driver Abu Bangura. There were two other passengers in the car. At about mile 40 in a stretch of dual carriage way they had to stop because a Volkswagen car in front of them pulled up in a position which prevented their passing. What then happened was that four men rushed from the Volkswagen car. One had a pistol and the others were variously armed. These men obtained at pistol point the key of the Opel car, required the boot of the car to be opened, took from it the black tin box containing the £6,000 and placed it in the Volkswagen car. Two other men came out of the bush on one side of the road and joined the four attackers. The six men then went off in the Volkswagen car.

So far as the appellant was concerned the effective question at the trial was whether it was proved that he was one of the attackers. He gave evidence at the trial. He denied that he was involved in the robbery. His evidence was that he was ill in bed at Freetown on the 30th August. He said that he knew nothing of the robbery until the 5th September when he was asked some questions by the police.

On the 5th September the police held an identification parade. The first and second accused and the appellant together with others were paraded. Olivio Paolo picked out the first accused as having been one of the attackers but he did not pick out anyone else. The driver of the Opel car—Abu Bangura—was not invited to the parade because he had told the police (on the 31st August) that he could not identify his attackers.

Olivio Paolo gave evidence at the trial. He identified the first accused as having been one of the attackers and as having carried and pointed first one pistol and then two pistols. He did not identify the appellant. He had told the police that the attackers were masked but that the mask of the first accused had fallen away. Abu Bangura gave evidence and in his evidence he did identify the three accused as having been among the attackers.

Two other parts of the evidence call for special mention. A taxi driver Sallu Conteh gave evidence that on the 2nd September he drove from Freetown to Mano. So far as now relevant his evidence was that he drove the first accused and the third accused to a house in Mano. Both the accused went into the house. The appellant came out. When subsequently the first accused came out he was carrying a brown suitcase. The appellant in his evidence agreed that he had gone to Mano. He had gone with the first accused who had told him that he was going to visit his grandmother. On arrival at Mano the first accused told him that his grandmother had gone elsewhere. The appellant said that he did see the first accused come out of the house with a suitcase but as he had understood that the visit was to a grandmother there seemed nothing surprising in the incident. He had no knowledge of the contents of the suitcase.

There was evidence also that on the 5th September the police went to a house in Mano which could probably reasonably be inferred to be the same house that was visited on the 2nd September as above described. It proved to be the house of an aunt of the first accused. In circumstances which need not be referred to in detail the police found a sum of £400 in £5 notes. Having regard to the denomination of the notes and to the fact that on the strap on bundles of the notes there was the bank stamp of Barclays Bank dated the 20th August it was a reasonably clear inference that the £400 was a part of the money which the attackers (whoever they were) had taken on the 30th August.

After the first accused was arrested he made a statement to the police on

the 7th September. He did not sign it and at the trial objection was taken to its admission in evidence on the ground that he did not make it. The jury were given a clear direction that they should only accept it if they were satisfied that he made it and that if they were so satisfied they should then consider what weight to give to it while remembering that it could only be evidence against the first accused and not against anybody else. The statement as recorded was virtually a confession but it implicated, among others, the appellant. In the statement the first accused described how on the 30th August the box was taken to a certain place and prised open and the money taken out, how he with others drove to another place, how he left to fetch a container for the money, how on his return with a suitcase he found that the money was then only £3,700, how on the 31st August he took the money in the suitcase to his aunt's house in Mano (not telling her that the case contained money) and how on the 2nd September with the appellant and another he went by taxi to Mano and collected the suitcase containing the money.

The first accused did not give evidence at the trial. He made a statement from the dock.

In regard to the witness Abu Bangura there were various circumstances, which need not here be recited, which could raise a reasonable suspicion that he may have been an accomplice of the attackers on the 30th August. The jury were directed that they should consider whether Abu Bangura was an accomplice. They were warned that if they thought that he was an accomplice then it would be dangerous for them to convict on his evidence alone and that they should look for corroboration. They were told that if they considered Abu Bangura to be an accomplice then they should consider whether there was evidence (apart from his) which they could accept and which implicated the accused in the commission of the crime.

From a recital of the facts it is manifest that the summing-up to the jury required a differentiation between the cases of the three separate persons who were accused and who were being tried together at one trial and demanded mention of the particular considerations affecting each accused. A very difficult and complex task was, as their Lordships think, performed with obvious care and in most respects with great accuracy and clarity but their Lordships have been driven to the conclusion that unfortunately there were at least two passages in the summing-up which contained error which might so seriously mislead a jury and adversely affect the appellant that he would be deprived of the protection of the law. The inclusion in the summing-up of the passages in question may well have turned the scale against the appellant. Even with their inclusion one-third of the jury were in favour of an acquittal.

The scheme of the summing-up was orderly and helpful. The ingredients of the offence were described. The standard of proof was explained. The facts were outlined. The general case of the prosecution was reviewed. Finally the case of each accused was separately considered with an analysis of what was put forward both by prosecution and by defence.

Having referred to the facts and to the case for the prosecution the learned judge addressed himself to the question: "How do they set about to prove it?" He explained the difference between direct evidence and circumstantial evidence. He then said:

"You will recall that Olivio said that he was certain the first accused was the man who carried the pistol in the first instance and pointed it at him and then at George. He said also that the first accused was the one

who ran back to the Volkswagen car and returned with another pistol. George also identified this accused as did Abu Bangura. As regards the second accused, it was Bangura alone who pointed him out. As to the third accused, it was again Bangura alone who pointed him out. The prosecution then put forward the proposition that the money was stolen and taken to Mano and kept there but that as soon as the police were on the scent, as far as the first accused was concerned, all three accused were seen in a car chartered by him *en route* to Mano. Two of them at least got there and collected the money. All three were later found in a car in which a suitcase in which was put the money which the first accused had got from Mano. The car with all three accused was driven on to as far as Wellington by the 'Two Sisters Cotton Tree' with the suitcase and money."

If the prosecution had put forward "the proposition" that on the 2nd September the appellant was knowingly a party to the collection of the stolen money then a most careful warning from the learned judge was called for when referring to such proposition. It was mere surmise so far as the appellant was concerned. There was grave danger that at this point and particularly having regard to the language used that the jury might think that there was some evidence that the appellant knew that stolen money had been taken to Mano. The fact that it was so taken was stated by the first accused in his statement but his statement was not evidence against the appellant. It is true that elsewhere in the summing-up there was a warning to that effect but in this passage in the summing-up a jury might have been seriously misled unless the state of the evidence was at that stage carefully explained and unless the warning that the first accused's statement was not evidence against the appellant was given at that stage. Otherwise there was danger that the jury might think that proof was to be found possibly in the "proposition" of the prosecution or possibly in the unsworn statement made by the first accused in the absence of the appellant.

The reference to the journey to Mano with the words "two of them at least got there and collected the money" was particularly damaging. There was no evidence given, which was admissible against the appellant, that he "collected the money." His whole case was that he knew nothing about the money. His case was that his journey to Mano was an entirely innocent one and that the fact that the first accused brought out a suitcase was not a circumstance in any way calculated to arouse suspicion. No evidence, admissible against him, was given which proved that he knew what were the contents of the suitcase. The following sentence was also damaging—"All three were later found in a car in which a suitcase in which was put the money which the first accused had got from Mano." The only evidence that the suitcase contained money was in the statement of the first accused. When in the next sentence there was again a reference to "the suitcase and money" the jury, by this further reiteration, may have been further misled into thinking that some evidence had been given which was admissible against the appellant which proved (a) that the suitcase contained money which was the stolen money and (b) that the appellant knew this.

Their Lordships recognise that there were circumstances that were well calculated to arouse suspicion. It is, however, in precisely such a situation that the rules of evidence are a safeguard for an accused person. The evidence which was given which was admissible against the appellant was limited. Abu Bangura identified him. Beyond that there was merely a link between him and Mano (in that he went there) and a link between Mano and

some of the stolen money (in that some of it was found there). With the first accused the appellant was at a house in Mano on the 2nd September. In that house there was found some of the stolen money on the 5th September. It was imperative that no more than the admissible evidence should be stressed. Great prominence was in fact given to the "suitcase and money." What the jury may have understood to be an assertion that there was some direct evidence connecting the appellant with the "suitcase and money" could only have related to the evidence as to what the first accused said in a statement.

The passage in the summing-up following that quoted above was partly a repetition and summary and partly an amplification of what had gone before. Again there was a coupling of the "suitcase and money." The full passage was as follows:

"The prosecution say that the first accused took part in the commission of the crime. The Police interviewed the first accused sometime on the 2nd September. You will recall the evidence of Detective Sub-Inspector Smith who told you that on the 2nd of September he saw the first accused about the robbery. Then about 4 p.m. all of the accused were seen in the first accused's house and later the first and third left for Mano; that later the second accused also was seen going in the direction of Mano; that the first and third accused were seen with a suitcase coming from a house at Mano and all three of them were later found in a car coming to Freetown and the car which stopped at Wellington had had in it the suitcase and money which had been retrieved from Mano."

If such words were to be used they demanded in connection with them any by way of qualification of them an emphatic warning as to the limited nature of the evidence against the appellant.

The summing-up proceeded to deal separately with the individual cases of the three accused. There were various references to the "bits and pieces of evidence" apart from the evidence of Olivio and of Abu Bangura. When the case of the appellant was being examined there was again a pointed reference to the "suitcase containing the money." The summing-up at this stage had certain passages which resembled those above referred to. Again the jury were not warned of the extremely limited nature of the evidence affecting the appellant. The position was thus stated:

"The third accused was again identified by only Bangura after the latter had been in custody for about three days and after he had told the police that he could not identify any of the attackers. You may feel that he had something he was hiding. But that is entirely a matter for you. Apart from being identified as one of those who were seen at the scene, he was seen in the house of the first accused on the 2nd of September. He and first accused left by car for Mano that day, went inside the house at Mano and came out again boarded a car and returned to as far as Wellington with the suitcase according to the prosecution, containing the money. That also is entirely a matter for you. The prosecution say that the surrounding circumstances are such from which you can say the first and third accused or one of them was one of those who committed the offence."

The words "according to the prosecution" doubtless refer to the case as presented by the prosecution. Their case as against the first appellant could however be very differently supported as compared with their case against

the appellant. The case for the prosecution could only be based upon evidence and not upon a "proposition." If it was being suggested by the prosecution that the appellant was implicated by reason of some connection with a suitcase containing money it was imperative to assist the jury by pointing out the limit of the admissible evidence and to refer to the appellant's denial of any knowledge as to what the suitcase contained. The comments which their Lordships have made in regard to the earlier passages are here applicable.

As already stated the three accused appealed to the Court of Appeal. Among the points taken by the appellant in his grounds of appeal was the point that the only evidence touching the appellant other than that of Bangura was the evidence of Sallu Conteh and that it was not possible from the evidence of Sallu Conteh or from the circumstances to attribute knowledge to the appellant of the fact of the robbery or of the fact that the first accused was carrying money or was carrying money which resulted from robbery. In the judgment in the Court of Appeal this point was not specifically mentioned. It was said:

"We do not know, of course, whether or not the jury did indeed regard Abu Bangura as an accomplice. Supposing, however, that they did, and supposing also that they heeded the learned judge's warning as to the danger of convicting without corroboration, in our opinion there was sufficient corroborative evidence to warrant their verdict."

That, however, did not deal with those parts of the summing-up which contain the directions and passages of which complaint is made.

It has been pointed out that after two-thirds of the jury had found the appellant guilty the learned judge accepted the majority verdict. That meant that pursuant to section 27 of the Jurors and Assessors Ordinance he did not "refuse to accept it" which he could have done if he was not satisfied that the verdict of the majority was not "in accordance with the weight of the evidence." The acceptance of the verdict by the learned judge cannot affect the present appeal. Had there not been the passages in the summing-up which are complained of there might not have been a majority of two-thirds of the jury in favour of a conviction. In that event there would not have been a verdict which could have been received "as the verdict of the whole jury in the cause."

Similar or comparable considerations show that this is not a case in which the proviso to section 20 (1) of the Courts (Appeals) Ordinance 1960 could be applied. The proviso enables a court of appeal, though of opinion that a point raised in a criminal appeal might be decided in favour of an appellant, to dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred. With a different summing-up more than four of the jury might have been in favour of an acquittal and no verdict of guilty could have been recorded.

For the reasons which have been earlier set out their Lordships will humbly advise Her Majesty that the appeal should be allowed and the conviction quashed.

AND

THE ATTORNEY GENERAL OF SIERRA LEONE . RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL FOR SIERRA LEONE]

[1969] 3 W.L.R. 970; [1969] 3 All E.R. 384 P.C.; [1970] A.C. 853

1969 June 3

Lords Morris of Borth-Y-Gest, Hodson, Guest, Wilberforce
and Sir Gordon Willmer

Sierra Leone—Constitution—Amendment—Protection from racial discrimination—Amendment of Constitution restricting citizenship to persons “of negro African descent” Statute—Validity—Bill recorded as “passed” by Clerk of House.

1. The added qualification to the Constitution was essentially a racial one. The “Special circumstances” pertaining to the appellant within the meaning of section 23 (4) (f) would have to be additional to the difference of race; the circumstances pertaining to the appellant not being different from what they were in January 17, 1962, from the circumstances on 27th April, 1961. The amendment of the Constitution consequently offended against the letter and flouted the spirit of the Constitution and was therefore invalid.

2. There was no basis for the suggestion that the bill amending the Constitution was not properly passed or for supposing that a procedural requirement was forgotten or ignored.

Majority Judgment delivered by LORD MORRIS OF BORTH-Y-GEST. On 27th April, 1961, Sierra Leone attained fully responsible status within the Commonwealth. On that date by virtue of the Sierra Leone Independence Act 1961 the former Colony and the former Protectorate together became part of Her Majesty's dominions under the name of Sierra Leone. Immediately before that date the Constitution of Sierra Leone, which was set out in the Second Schedule to the Sierra Leone (Constitution) Order in Council, 1961, S.I. 1961, No. 741, came into effect in Sierra Leone.

It is beyond question that on 27th April, 1961, the appellant became a citizen of Sierra Leone. That was the result of section 1 (1) of the Constitution which provides as follows:

“Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961:

Provided that a person shall not become a citizen of Sierra Leone by virtue of this subsection if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone.”

The appellant was born in the former Protectorate on 20th May, 1927. He was on 26th April, 1961, a British protected person. He was born of an indigenous Sierra Leone mother (who belonged to the Temne tribe) and a Lebanese father. His father who was born and bred in Senegal and who had never been to Lebanon had lived in Sierra Leone for a period of 56 years prior to the commencement of the proceedings. At the time of the institution of the proceedings the appellant lived in Freetown and was the

substantive Director of Broadcasting and Director of the National Dance Troupe and Secretary of the Hotels and Tourist Board.

The central issues which are raised in the proceedings concern the validity or otherwise of certain enactments which, if valid, materially affect (and undoubtedly adversely affect) the appellant's status as a citizen. In his action the appellant claimed a declaration "that the Amendments to Section (1) of the Constitution by Act No. 12 of 1962 and Act No. 52 of 1965 are *ultra vires* the Constitution and are void." It was upheld by the learned Chief Justice in the Supreme Court that certain purported amendments of the Constitution (*i.e.*, those resulting from Act No. 12 of 1962 and Act No. 39 of 1962) were *ultra vires* the Constitution and so were null and void. A different view was taken in the Court of Appeal who reversed the decision of the learned Chief Justice. Appeal is now brought from the Judgment and Order of the Court of Appeal.

The first Act to be considered is the Constitution (Amendment) (No. 2) Act 1962 which was Act No. 12 of 1962. For convenience their Lordships will refer to it as "Act No. 12." It was entitled "An Act to Provide for the Amendment of Certain Sections of the Constitution." It was assented to by the Governor-General in Her Majesty's name on 17th March, 1962. By section 1 it is provided that it "shall be deemed to have come into operation on the 27th day of April 1961." At the end of the Act are the statements:

"Passed in the House of Representatives this 17th day of January, in the year of Our Lord one thousand nine hundred and sixty-two.

S. V. WRIGHT

Clerk of the House of Representatives.

THIS PRINTED IMPRESSION has been carefully compared by me with the Bill which has passed the House of Representatives and found by me to be a true and correctly printed copy of the said Bill.

S. V. WRIGHT

Clerk of the House of Representatives."

Section 2 is of prime importance. It is as follows:

"2. Section 1 of the Constitution is hereby amended—

- (a) by the insertion immediately after the words, 'Every person' in the first line of subsection (1) thereof of the words 'of negro African descent'; and
- (b) by the addition at the end thereof of the following new subsections—

'(3) For the purposes of this Constitution the expression "person of negro African descent" means a person whose father and his father's father are or were negroes of African origin.

(4) Any person, either of whose parents is a negro of African descent and would, but for the provisions of subsection (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any District Council or other local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the Civil or regular Armed Services of Sierra Leone for a continuous period of twenty-five years.' "

If the amendments to section 1 of the Constitution by Act No. 12 are valid the results are startling. As a result of the carefully designed provisions of the new Constitution which came into operation immediately before 27th April, 1961, the appellant became a citizen of his country on that date. The provisions of Act No. 12 would now deny him and deprive him of that citizenship. If the Act, apart from section 1, was valid, and if section 1 could also have validity then the amendment of the Constitution would be deemed to have come into operation on 27th April, 1961, so that as a result of such deeming process the appellant would be denied his citizenship as on the very day that he actually acquired it. Yet in truth and in fact he would have been a citizen in the intervening period between 27th April, 1961, and 17th March, 1962. The reason for this purported retroactive deprivation would be that he was not a person "of negro African descent." In turn the reason would be that his father and his father's father could not be described as "negroes of African origin." No occasion now arises to consider the meaning of the vague words "of African origin." It is conceded and it was common ground that the appellant's father was not a "negro." If the amendments to section 1 of the Constitution by Act No. 12 were valid then under the provisions of the new s.1 ss. 4 the appellant would be entitled to register as a citizen of a status aptly described by the learned Chief Justice as "second class." He could be a citizen who would have to wait for 25 years (and also during that period be continuously resident or continuously serving in the civil or regular Armed Services) before he would be qualified to become a member of the House of Representatives or of any District Council or other local authority.

When the appellant was faced with the personal situation arising for him on the passing of Act No. 12 he did in fact decide to register. It is not now suggested that by so doing he in any way debarred himself from making effective challenge to the validity of the legislation.

Their Lordships are not concerned with the wisdom or desirability or fairness of passing such a measure as Act No. 12 but only with its validity. To that aspect their Lordships now turn.

One Chapter of the Constitution (Chapter II) bears the heading "Protection of Fundamental Rights and Freedoms of the Individual." Section II contains declarations of the fundamental rights and freedoms of the individual to which "every person in Sierra Leone" is entitled. Later provisions of the Chapter were designed for the purpose of affording protection to those rights and freedoms. Thus there was to be protection (a) of the right to life (b) from arbitrary arrest or detention (c) of freedom of movement (d) from slavery and forced labour (e) from inhuman treatment (f) from deprivation of property (g) for privacy of home and other property (h) of a nature that would secure the protection of the law (i) of freedom of conscience (j) of freedom of expression (k) of freedom of assembly and association and (l) from discrimination on the grounds of race or of similar grounds.

One of the main grounds of the appellant's attack upon section 2 of Act No. 12 was based upon the last of these. He became a citizen of a country whose Constitution proclaimed that there should be no discrimination on the grounds of race. Yet it is just such forbidden discrimination which, so the appellant contends, constitutes the very basis and essence and substance of Act No. 12. To lack "negro African descent" as in that Act defined will bring about deprivation and disability. It is section 23 of the Constitution which gives protection from discrimination on the grounds of race. Subsections (1) and (2) and (3) of section 23 are as follows:

“ (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression ‘ discriminatory ’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

It is to be observed that subsection 1 is direct and prohibitive: subject to certain exceptions “ no law shall make any provision which is discriminatory.” No provision which offends can therefore be valid.

The first question which arises is whether the content of section 2 of Act No. 12 is “ discriminatory ” within the meaning of subsection 3 of section 23 of the Constitution. As to this it is beyond dispute and indeed it was very properly conceded that the adoption of the word “ negro ” involved a description by race. Their Lordships have no doubt that the effect of Act No. 12 was discriminatory. Different treatment would be afforded to different people. Some persons but not others would have disabilities or restrictions. The differentiations would be attributable wholly or mainly to respective descriptions by race. It is not suggested that the exceptions set out in subsections 5, 6, 7 or 8 of section 23 have applicability in this case. It is said, however, that the exception set out in subsection 4 (f) is applicable and that the result is that the general prohibition against discrimination (see subsection 1) does not apply.

Though only subsection 4 (f) is said to be applicable its context will best be seen if the subsection is set out. It is as follows:

“ (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

- (a) for the appropriation of revenues or other funds of Sierra Leone or for the imposition of taxation (including the levying of fees for the grant of licences); or
- (b) with respect to persons who are not citizens of Sierra Leone; or
- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; or
- (d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
- (e) for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency; or
- (f) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances

pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

The question which falls to be considered therefore is whether the provisions of subsection 4 (f) gave warrant for the making of the discriminatory provisions contained in Act No. 12. It may be accepted that questions as to who are to be citizens of a country are normally questions for the country to decide. When Sierra Leone on 27th April, 1961, attained fully responsible status it attained it with a Constitution, no doubt very carefully planned and negotiated, which set out who were to be its citizens and which contained detailed and specific provisions in regard to making alterations of the Constitution and also specific provisions giving certain protections to "every person" (and *a fortiori* to every citizen) in Sierra Leone: one of such protections was from discrimination on the ground of race. Their Lordships will later refer to the provisions enabling alterations of the Constitution to be made. At the date when Act No. 12 was passed no alteration of section 23 had been made. So the question which arises is whether subsection 4 (f) gave any authority for the passing of Act No. 12. Immediately before it was passed the appellant was, under the terms of the Constitution, a Sierra Leone citizen. He had been one throughout the period since 27th April, 1961. If the Act is valid then because his father and his father's father could not be described as "negroes" of African descent the effect would be that his citizenship was taken away from him and in effect he would be deemed never to have had it though undoubtedly in fact he had had it. Leaving aside the separate question, to which their Lordships will refer, whether in any event Act No. 12 could have retrospective force, it has to be considered whether the "disability or restriction" of deprivation of citizenship is something which "having regard to its nature and to special circumstances pertaining to" the appellant and those similarly placed is "reasonably justifiable in a democratic society." It seems very doubtful whether it could be said that to impose a disability on the ground that someone's father and paternal grandfather were not "negroes of African descent" was something which having regard to its "nature" was reasonably justifiable in a democratic society. But apart from this it is to be observed that to justify (under subsection 4 (f)) making discriminatory legislation not only must the disability be of itself of a nature that makes it reasonably justifiable but there must also be "special circumstances pertaining" to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society. Their Lordships can see no trace of any "special circumstances" pertaining to the appellant or to those similarly placed to him whose fathers and grandfathers were not negroes of African descent. If section 23 provides that no law shall make any provision which treats some people differently from others merely because of differences in race it cannot be that such differences in race would alone constitute "special circumstances" pertaining to those being treated differently. The special circumstances would have to be additional to the differences of race (or of tribe or of place of origin or political opinions or colour or creed as the case may be). It was contended that "special" circumstances pertaining to the appellant and others similarly placed were to be found in the fact that they could be said to belong to an immigrant community whose links with the country were formed more recently than those of others. But the essence of the change that Act No. 12 would effect would be to eliminate those who were not negroes of African descent. Under subsection 1 of section 1 of the Constitution, as it came into effect, a person became a citizen on 27th April,

1961, if (a) he was born in the former Colony or Protectorate and (b) he was on 26th April, 1961, either a citizen of the United Kingdom and Colonies or a British protected person and (c) one of his parents or one of his grandparents was born in the former Colony or Protectorate. Under the designed amended subsection 1 of section 1 a person would become a citizen if (a) his father and his father's father are or were negroes of African origin and (b) he was born in the former Colony or Protectorate and (c) he was on 26th April, 1961, a citizen of the United Kingdom and Colonies or a British Protected Person and (d) one of his parents or grandparents was born in the former Colony or Protectorate. No change would be made in the provisions of subsection 2. It will be seen therefore that the designed change was not one that added anything in regard to having links with Sierra Leone or long family associations with Sierra Leone. The essential change did not involve that a person's father or father's father should have lived in Sierra Leone: what the change involved was that a person's father and father's father had to be " negroes " and also negroes of " African origin." The new added qualification in subsection 1 was essentially a racial one. The only circumstance which was to exclude those who under the provisions of subsection 1 of section 1 had already become citizens was that they would not satisfy a description which was essentially a description by race. In their Lordships' view Act No. 12 offends against the letter and flouts the spirit of the Constitution. Nor have their Lordships heard any reason assigned which could seem to justify the enactment. The circumstances pertaining to the appellant (or to any others similarly placed) were no different on 17th January, 1962, when Act No. 12 was passed, from the circumstances pertaining on 27th April, 1961. Nothing had changed. There was no reason why the appellant should be deprived of his citizenship. There were no special circumstances pertaining to the appellant or to others similarly placed.

It is to be observed that Act No. 12 does not even purport to amend section 23 (4) nor could it have done so. Section 23 is a section referred to in the proviso to section 43 and Act No. 12 admittedly did not result from a Bill passed by the House of Representatives in two successive sessions there having been a dissolution of Parliament between the first and second of those sessions.

Before proceeding to consider an Act which was passed for the second time on 3rd August, 1962, Act No. 39 of 1962 (which will be referred to as Act No. 39) their Lordships must refer to the provisions of the Constitution relating to its amendment and to certain additional submissions which were made in regard to Act No. 12.

Chapter IV of the Constitution deals in Part I with the composition of Parliament, in Part II with Legislation and Procedure in the House of Representatives and in Part III with the summoning, prorogation and dissolution of Parliament. It is to be noted (see s. 31) that included in the qualifications for membership of the House of Representatives is that a person must be a citizen of Sierra Leone.

The provisions of sections 42 and 43 of the Constitution are of the utmost importance. They are as follows:

" 42. Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Sierra Leone.

43. (1) Parliament may alter any of the provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) any of the provisions of the Sierra Leone Independence Act, 1961:

Provided that in so far as it alters—

- (a) this section;
- (b) sections 11 to 25 (inclusive), section 29, section 44, subsection (2) of section 54, section 55, sections 56, 73, 74, 75, 76, 77, 79, 80, 81, 84, 85, 86, 87 to 93 (inclusive), 94, 95, 96, 97, 98, 99, 102 or 103;
- (c) section 107 in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or
- (d) any of the provisions of the Sierra Leone Independence Act, 1961.

a bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless the bill has been passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions.

(2) For the purposes of subsection (1) of this section, a bill passed by the House of Representatives in one session shall be deemed to be the same bill as a bill passed by the House in the preceding session if it is identical with that bill, or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since that bill was passed in the preceding session.

(3) A bill for an Act of Parliament under this section shall not be passed by the House of Representatives in any session unless at the final vote thereon in that session it is supported by the votes of not less than two-thirds of all the members of the House.

(4) The provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) the Sierra Leone Independence Act, 1961, shall not be altered except in accordance with the provisions of this section.

(5) In this section—

- (a) references to any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to any law that amends, modifies, re-enacts with or without amendment or modification or makes different provision in lieu of, that provision; and
- (b) references to the alteration of any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to the amendment or modification, or re-enactment, with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of different provision in lieu of that provision."

It will be seen that section 1 of the Constitution is not one of the sections referred to in the proviso to section 43. A bill to amend section 1 did not therefore have to be passed by the House of Representatives in two successive sessions but it did require at the final vote upon it (see subsection 3) to be supported by the votes of not less than two-thirds of all the members of the House.

In regard to Act No. 12 a point was taken that it had not been "passed" in accordance with the provisions of the Constitution in that it had not been supported by the votes of two-thirds or more of all the members. It was argued that the endorsement of the Clerk of the House of Representative on Act No. 12 was merely that the Bill had been passed and that it did not record that the Bill had been passed in accordance with the provisions of

subsection 3 of section 43. Comparison was made with the endorsement on Act 39. That is an Act which is designed to amend section 23 of the Constitution. As section 23 is one of the sections referred to in the proviso to section 43 (1) it was necessary that a Bill for an Act to amend section 23 should have been passed by the House of Representatives in two successive sessions there having been a dissolution between the first and the second of them. The printed endorsement on Act No. 39 (over the name of the Acting Clerk of the House of Representatives) is in these terms: "Passed in the House of Representatives for the second time and in accordance with the provisions of subsection (1) and (3) of section 43 of the Constitution this 3rd day of August in the year of Our Lord one thousand nine hundred and sixty-two." There appears to be no statutory requirement that an endorsement should be in any particular form (though there are requirements in regard to authentication and assent and date of operation (see Act No. 63 of 1961)) but it will be seen that an endorsement could, according as would be appropriate, record (a) that a Bill had been passed or (b) (if the Constitution was being altered) passed with the necessary voting support or (c) (if the sections or provisions referred to in the proviso to section 43 (1) were being altered) passed for a second time and in accordance with the provisions of subsections (1) and (3). It was argued that, because the endorsement on Act No. 12 merely records that the Bill was "passed," it should be inferred that it was passed in an ordinary manner and not in the special manner (under subsection 3) of having the support of the votes of not less than two-thirds of all the members of the House. Their Lordships do not think it right to draw any such inference. There is no reason to suppose that there was any irregularity. It is recorded by the Clerk of the House of Representatives that the Bill was passed. There is no basis for any suggestion that the Bill was not properly passed or for supposing that a procedural requirement was forgotten or ignored.

A further submission in regard to the invalidity of Act No. 12 was based upon a consideration of section 9 of the Constitution. That section which is not one referred to in the proviso to section 43 provides as follows:

" 9. Parliament may make provision—

- (a) for the acquisition of citizenship of Sierra Leone by persons who do not become citizens of Sierra Leone by virtue of the provisions of this Chapter;
- (b) for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of subsection (1) of section 1 or section 4 of this Constitution; or
- (c) for the renunciation by any person of his citizenship of Sierra Leone."

In reliance upon paragraph (b) it was submitted that Parliament was not entitled to make provision for depriving of his citizenship of Sierra Leone a person who is a citizen by virtue of subsection 1 of section 1 or section 4 of the Constitution. The appellant became a citizen of Sierra Leone on 27th April, 1961, by virtue of subsection 1 of section 1 and was a citizen on 17th January, 1962: it was submitted therefore that on that latter date Parliament was not entitled to pass a Bill which would have the effect of depriving him of his citizenship. As their Lordships are clearly of the opinion for the reasons that have already been set out that the amendments to section 1 of the Constitution by Act No. 12 were invalid it is not necessary to express a final view in regard to this additional submission. Linked with a consideration of it is the question whether, assuming that the

provisions of section 2 of Act No. 12 were otherwise valid, the Act could in any event validly be deemed to have come into operation on 27th April, 1961. If it could and if therefore section 1 of the Constitution was amended on 27th April, 1961, could it be said that there was any moment of time on that date during which the appellant became a citizen? or was the result, albeit by a deeming process, that the appellant never became a citizen? If so then he was not deprived of citizenship and the provisions of section 2 of Act No. 12 would not violate s. 9 of the Constitution. If however, retroactive operation of Act No. 12 could not be effected then was it an effect of the passing of Act No. 12 that section 9 (b) of the Constitution was impliedly repealed? Or was section 9 (b) impliedly amended? If it was what was the amendment?

If, as their Lordships conclude, the amendments to section 1 of the Constitution by Act No. 12, when passed, were in violation of the provisions of section 23 of the Constitution and so were invalid, it is contended by the respondent that that consequence was nevertheless avoided by the passing of Act No. 39 of 1962. Act No. 39 has the title—"An Act to amend the Constitution in order to effect the Avoidance of Doubts." It does not set out what the doubts were but as the purpose of the Act is to amend section 23 of the Constitution in a particular way it is a reasonable assumption that the doubts were doubts in the minds of some persons as to the validity of Act No. 12. As section 23 is one of the sections mentioned in the proviso to section 43 a Bill for the amendment of it required to be passed in accordance with the provisions both of subsection 1 and of subsection 3 of section 43. The Bill was so passed. It was passed for the second time on 3rd August, 1962. It was assented to in Her Majesty's name on 3rd October, 1962. The Act has but two sections. They are as follows:

" 1. This Act may be cited as the Constitution (Amendment) (No. 3) Act, 1962, and shall be deemed to have come into operation on the 27th day of April, 1961.

2. Subsection (4) of section 23 of the Constitution is hereby amended by—

(a) the substitution of a semi-colon and the word ' or ' for the fullstop at the end of paragraph (f); and

(b) the addition immediately thereafter of the following new paragraph—

' (g) for the limitation of citizenship of Sierra Leone to persons of negro African descent, as defined in subsection (3) of section 1 of this Constitution, and for the restrictions placed upon certain other persons by subsection (4) of the said section ' ."

It is to be observed that Act No. 39 does not refer to Act No. 12. It does not attempt any process of re-enactment. It purports to amend subsection 4 of section 23 of the Constitution by adding a new paragraph. The new paragraph refers to subsection 3 and subsection 4 of section 1. In the Constitution unless it had been validly amended there were no such subsections of section 1. Had the provisions of section 2 of Act No. 12 been valid then there would have been the addition to section 1 of the Constitution of such subsections. Act No. 39 needed as a basis an assumption that Act No. 12 was valid and so was an existing Act. That was an incorrect assumption. Their Lordships are quite unable to accept the contention that Act No. 39 should be regarded as impliedly reviving or

re-enacting any invalid provisions of Act No. 12. The provisions of section 2 of Act No. 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision in Act No. 39 which purports or sets out to give them life. Though Act No. 39 was passed in accordance with the provisions of section 43 it becomes meaningless once the provisions of section 2 of Act No. 12 are ignored as they must be.

A view-point (which found favour with the learned Chief Justice) that it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law was not advanced before their Lordships and would not have been acceptable.

Their Lordships' conclusions make it unnecessary to express any final opinion as to whether if Act No. 12 had otherwise been valid its purported retroactive operation could have validity. The terms of the Constitution must have been drafted after consultations and agreement. It probably was not in fact contemplated that an important provision concerning citizenship which came into operation on 27th April, 1961, would be altered other than prospectively. Parliament in Sierra Leone was however (by section 42 of the Constitution) given the plenitude of power to make laws which results from the use of the words " make laws for the peace, order and good government of Sierra Leone " and also the power (see section 43) (subject to the proviso) to " alter " the provisions of the Constitution.

The Constitution laid it down that if it is desired to alter the provisions contained in the sections referred to in the proviso to section 43 there must be a Bill passed in two successive sessions with a dissolution of Parliament between those sessions: and all other requirements of subsections 1 and 2 and 3 must be satisfied. This points to the view that the normal expectation would be that Parliament would decide that alterations to the entrenched clauses of the Constitution would operate prospectively after a new Parliament was in being. But whether this be so or not the power of Parliament is only restricted to the extent which is set out in the Constitution. The general power of Parliament must include a power to enact that legislation (if valid and validly passed) is to have retrospective effect. An intention so to enact would have to be shown by clear and definite words. So also Parliament is entitled to have recourse to deeming provisions. It is not for the Court to decide as to the wisdom or the desirability of exercising such powers. It is to be observed however that whatever Parliament might, by some deeming provisions, have succeeded in doing in the early part of 1962 it could not have altered any of the facts of history. Whatever the position could have been deemed to be, the fact would remain that the appellant had become a citizen. He would continue to be one until some valid enactment brought about a change. In view of the conclusions which their Lordships have expressed they need not refer further to the problems which have been raised. The circumstance that they are posed (as well as those already noted in reference to section 9) is commentary enough of the difficulties which have been created by the scheme of legislation which it was thought appropriate to attempt to adopt.

Their Lordships are therefore in agreement with the result which was reached by the learned Chief Justice. On the basis of that result the wording of the appropriate declarations was left to be settled by Counsel on both sides between them. In the first declaration which Counsel jointly drafted there is a reference to Act No. 52. That was an Act with the short title " The Constitution (Consolidation of Amendments) Act, 1965." As the reference

to Act No. 52 was included by reason of the agreement of Counsel on both sides in drafting the declaration it has not been necessary for their Lordships to examine that Act. Three declarations were made in the Supreme Court. They were as follows:

“(1) That the amendments to Section (1) of the Constitution by Act 12 of 1962 and Act No. 52 of 1965 are *ultra vires* the Constitution and therefore null and void;

(2) That the purported amendment by Act No. 39 of 1962 of Section 23 of the Constitution was *ultra vires* the Constitution and therefore null and void;

(3) That all consequential amendments to other sections of the Constitution—e.g.,—the inclusion of the figure ‘1’ on line 1 of section 31 of the Constitution are *ultra vires* and void.”

In view of what their Lordships have held they do not restore the second declaration.

For the reasons which they have set out their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgment of the learned Chief Justice dated 1st December, 1967, be restored (subject to the omission of the second declaration). The respondent must pay the costs of the appellant before their Lordships' Board and in the Court of Appeal.

Dissenting Judgment by LORD GUEST. With a great deal of the advice tendered to Her Majesty in the majority judgment delivered by Lord Morris of Borth-y-Gest I find myself in complete agreement. It is only on one point, but a critical point, that I wish to dissent from the advice tendered.

I find it unnecessary to repeat the background and facts relating to this appeal which have already been set out in the majority judgment.

Law No. 12 of 1962 was challenged on various grounds by the appellant as being *ultra vires* of the Constitution. I agree with the advice tendered as regards the procedural point, the point as affected by section 9 (a) of the Constitution and also as to the powers of Parliament to pass retrospective legislation that the challenge of *ultra vires* fails. It is with the point as affected by section 23 that, with respect, I disagree.

No. 12 of 1962 provides in effect that as from 27th April, 1961, it is a prerequisite of Sierra Leone citizenship in addition to the requirements of section 1 (1) of the Constitution that a person should be of “ negro-African descent ” as there defined. This is purported to be effected by a retrospective amendment of section 1 (1) of the Constitution which came into effect on 27th April, 1961. The challenge made by the appellant against this legislation is that *inter alia* it is “ discriminatory ” having regard to the terms of section 23. The respondent admits that No. 12 of 1962 is discriminatory and as such offends section 23. Section 23 is one of the specially entrenched sections of the Constitution which requires the special procedure enjoined by section 43 (1) of the Constitution. It is agreed that this special procedure was not carried out. No. 12 of 1962 can therefore only be saved if it comes within the exemption under section 23 (4) (f). Under this section the law on discriminatory legislation is excluded where any law makes provision:

“ whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to

those persons or to persons of any other such description, is reasonably justified in a democratic society.”

It is said that the exemption does not apply because there is no averment or no statement by the Attorney General that there are “any special circumstances” within the meaning of that section which made Act No. 12 reasonably justifiable in a democratic society. Although the Courts are the guardians of the Constitution I believe that in interpreting the Constitution the ground has to be trod warily and with great circumspection. My answer to the argument that no special circumstances were alleged is that it would not be to the point if they were. The Attorney General for Sierra Leone cannot speak for the Parliament of Sierra Leone. Parliament speaks only through the provisions on the Statute Book. The Courts cannot go behind the scenes and inquire what were the motives or policy behind a particular piece of legislation. They can only as a matter of construction decide whether the Act is or is not within the powers of the Constitution. This question must be decided on the terms of the Act in conjunction with the provisions of the Constitution.

Accordingly, the question which has to be considered is whether Act No. 12 of 1962 is a provision whereby persons who are discriminated against are subjected to any disability or restriction which having regard to the nature of the disability or restriction and to special circumstances pertaining to those persons is reasonably justifiable in a democratic society.

As a matter of construction I have no hesitation in holding that Act No. 12 dealing as it does with citizenship is having regard to its nature as affecting a disability as regards citizenship reasonably justifiable in a democratic society. Any democratic society must in the nature of things have control over the qualifications for citizenship of that society. Next there must be “special circumstances pertaining to the persons” discriminated against. I demur to the view expressed that what must be shown is “a change of circumstances” since the Constitution was enacted which would justify Act No. 12. There is no mention of “a change of circumstances” in the Constitution. If the Courts are, as I think they are, precluded from inquiring into the motives behind Act No. 12 I find it difficult to see how the Courts can decide whether there were any special circumstances which prompted the passing of Act No. 12. This is a matter for Parliament. All that is required in my view is that special circumstances must appear *ex facie* of the Act impugned. If they do not then the Act would not be saved by section 23 (4) (f). In my view however there are sufficient special circumstances appearing on the face of Act No. 12 to show that it was reasonably justifiable in a democratic society. These circumstances are the requirement of negro-African descent for citizenship.

The matter can be tested by a reference to section 23 (4) (e) which provides exception where a law makes provision:

“for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency;”.

A law which appeared on the face of it to be passed during a period of public emergency could not be challenged on the ground that it was not reasonably justifiable for the purpose of dealing with the situation. This is a matter for the executive and not for the Courts. There is a whole tract of law dealing with the Defence (General) Regulations passed at the outbreak of the last war in respect of the powers of the executive. It is only necessary

to give one quotation from Lord Greene M.R. in *Carltona Ltd. v. Commissioners of Works and Others* [1943] 2 All E.R. 560 at p. 564 where he said.

“ All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction.”

See also *Point of Ayr Collieries Ltd. v. Lloyd George* [1943] 2 All E.R. 546.

If the Courts are precluded from inquiry into the justifiability of executive acts *a fortiori* it appears to me that the Court cannot inquire into the validity of an Act of Parliament which *ex facie* appears to be within the Constitution. (For the application of this doctrine to delegated legislation see *Riel v. The Queen*, 10 A.C. 675.)

For these reasons I would hold that the Act No. 12 was *intra vires* and I would be in favour of the appeal failing.

NABIEU S. AMADU APPELLANT

AND

AIAH SIDIKI RESPONDENT

AND

AIAH SIDIKI APPELLANT

AND

NABIEU S. AMADU RESPONDENT

(Consolidated Appeals)

[ON APPEAL FROM THE COURT OF APPEAL FOR SIERRA LEONE]

1973 Dec. 5

Lord Diplock, Viscount Dilhorne
and Lord Salmon

Detinue—Illegality: Court will not enforce an illegal transaction. Practice and Procedure: Pleading—not necessary to plead illegality.

The plaintiff claimed the return of a piece of gem stone or £44,000 its value. The defence was a bare denial of the allegations in the statement of claim. The Court gave judgment for the plaintiff for the return of the stone or £44,000 its value. The defendant appealed and sought to rely on the maxim *ex turpi causa non oritur actio* although no defence of illegality had been raised on the pleadings nor argued at the trial.

Held: by the Court of Appeal, allowing the appeal and dismissing the plaintiff's action on the ground that the plaintiff's claim could not properly be entertained by the Courts since it was a blatant attempt to enforce an illegal transaction. (The Minerals Ordinance 1927 (as amended) provides by section 67 that “ no person shall possess any mineral unless he is a lessee of a mining lease, or a holder of a mining right exclusive prospecting licence or a prospecting right or of a licence granted under section 71 or the duly authorised employee of such lessee or holder.” Section 68 provides that “ any person

who, being found in possession of any mineral, does not prove to the satisfaction of the Court that he obtained such mineral lawfully " shall be guilty of an offence.)

Upon further appeal (to the Privy Council)

Held: (1) The clear unequivocal and uncontradicted evidence proved beyond doubt that the stone, the subject matter of the action, was a diamond, and that accordingly the plaintiff was in illegal possession of it. This illegality was at the root of his claim since once the stone was proved to be a diamond, the plaintiff could not set up his claim either for the return of the diamond or for the payment of the proceeds of its sale without relying on illegal possession,

2. In these circumstances the fact the illegality was not pleaded nor argued at the trial is of no consequence. It would have been otherwise if the illegality had sprung from surrounding circumstances set up without warning by the defendant at the trial and with which the plaintiff had had no opportunity of dealing adequately.

LORD SALMON. The plaintiff brought an action against the defendant in October 1966 claiming the return of what was described in the pleadings as " a piece of gem stone " or £44,000 its value. The defence was a bare denial of the allegations in the Statement of Claim. The action came on for hearing on the 18th January, 1967, before P. R. Davies J. The plaintiff gave evidence to the effect that in February 1966 he had found " a piece of gem stone " on the road and had given it for safe keeping to his guardian, the defendant; that later the defendant told the plaintiff that he had sold the stone for £44,000 but in spite of several requests by the plaintiff, the defendant failed to pay the proceeds of the sale to the Plaintiff. The plaintiff then complained to his Paramount Chief. The plaintiff's evidence was corroborated by three witnesses (including the Paramount Chief) who testified that the defendant had admitted to them the relevant facts about which the plaintiff had given evidence. The defendant, supported by two witnesses, denied that he had ever been entrusted with anything by the plaintiff or that he had made any admissions deposed to by the plaintiff's witness. The learned trial judge accepted the evidence of the plaintiff and his witnesses and held that the defendant and his witnesses had lied. Accordingly he gave judgment for the plaintiff for the return of the stone or £44,000 its value.

The defendant appealed from this judgment on the grounds that it could not be supported by the evidence. He also sought to rely on the maxim *ex turpi causa non oritur actio*, although no defence of illegality had been raised on the pleadings nor argued at the trial.

The Court of Appeal accepted all the learned judge's findings of fact but came to the conclusion that the transaction between the plaintiff and defendant was clearly illegal and therefore could not be enforced in the Courts. The appeal was accordingly allowed and an Order made that the proceeds of the sale standing to the defendant's credit in certain banks should be paid over to the Crown. This Order pleased neither the plaintiff nor the defendant and they both appealed to this Board. Their appeals were consolidated. The defendant however has decided, no doubt wisely, not to prosecute his appeal. Their Lordships are of the opinion that the Court of Appeal were clearly right in allowing the appeal and dismissing the plaintiff's action on the ground that the plaintiff's claim could not properly be entertained by the Courts since it was a blatant attempt to enforce an illegal transaction.

The Minerals Ordinance 1927 (as amended) provides by section 67 that " no person shall possess any mineral unless he is a lessee of a mining lease, or the holder of a mining right, exclusive prospecting licence or a

prospecting right, or of a licence granted under section 71 or the duly authorised employee of such lessee or holder."

Section 68 provides that "any person who, being found in possession of any mineral, does not prove to the satisfaction of the Court that he obtained such mineral lawfully" shall be guilty of an offence.

Section 71 provides that "the Governor may issue a licence . . . authorising the person named therein to purchase minerals."

Section 66 provides that for the purpose of the above sections, "'minerals' shall mean any minerals to which the Governor in Council may by Order apply the said sections." The Governor in Council did apply them to diamonds. Accordingly if the stone which the plaintiff said he found in the road and took into his possession was a diamond, he was clearly in unlawful possession of it in breach of section 67 (*ibid.*). The plaintiff's guardian, the defendant, was a drag line driver employed in the Kono diamond mining area of Sierra Leone. There is certainly no evidence that his ward the plaintiff was the lessee of a mining lease or came within the descriptions of any of the other persons authorised to possess diamonds by section 67 (*ibid.*).

It is remarkable that at the trial the judge, counsel and all the witnesses bar one referred to the stone said to have been found on a road by the plaintiff as a "gem stone." It is, however, perhaps not surprising that the defendant was apparently just as anxious as the plaintiff to say nothing at the trial to suggest that the stone was a diamond. It was only "a piece of gem stone," unidentified but found in a diamond mining district and worth £44,000. The defendant no doubt foresaw correctly that if this stone was clearly shown to be a diamond he would have little chance of keeping the proceeds of sale even though the plaintiff's claim to those proceeds would fail. The evidence which did prove that the stone was a diamond and indeed that the plaintiff knew it, did not come from the defendant but from one of the plaintiff's own witnesses—possibly inadvertently. This was the second witness called by the plaintiff who deposed to the fact that, in his presence, the plaintiff told the Paramount Chief that he (the plaintiff) had had a lump of diamond and had given it to the defendant who took the diamond, sold it at Kenema, for £44,000 and deposited the proceeds of the sale with two banks. This witness said that he then fetched the defendant and took him before the Paramount Chief and that the defendant said to the Paramount Chief "I have sold the plaintiff's diamond and I have given him his own portion."

This clear, unequivocal and uncontradicted evidence proved beyond doubt that the stone, the subject matter of the action, was a diamond, and that accordingly the plaintiff was in illegal possession of it. This illegality was at the root of his claim since once the stone was proved to be a diamond, the plaintiff could not set up his claim either for the return of the diamond or for the payment of the proceeds of its sale without relying on illegal possession. In these circumstances, the fact that illegality was not pleaded nor argued at the trial is of no consequence. It would have been otherwise if the illegality had sprung from surrounding circumstances set up without warning by the defendant at the trial and with which the plaintiff had had no opportunity of dealing adequately. See for example *North Western Salt Company Ltd. v. Electro Lytic Akali Co. Ltd.* [1914] A.C. 461. As it is the Courts are clearly precluded on grounds of public policy from entertaining this claim which on the evidence called by the plaintiff manifestly has its roots in illegality.

Their Lordships will accordingly advise Her Majesty that both these appeals should be dismissed.

