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Chapter 1

Introduction

1.1 About This Collection

These cases come from the reading list for Kwame Gyan's *Customary Land Law* class in the fall of 2004. The cases were photocopied (mostly) and taken to business centers to be typed. Therefore, there are a *lot* of errors. Some things are minor, some are obvious spelling errors, sometimes entire words or sentences are ommitted.

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1.2 The Nature of Land

1.2.1 Ollennu's Definiton

The word "land" in law is used to refer to more than just the two-dimensional, tangible surface soil on which people stand or walk. Nii Amaa Ollennu, in his

book *Principles of Customary Land Law in Ghana*, introduces the concept of land in the law as follows:

> "The term "land" as understood in customary law has a wide application. It includes the land itself, i.e., the surface soil; it includes things on the soil which are enjoyed with it as being part of the land by nature, e.g., rivers, streams, lakes, lagoons, creeks, growing trees like palm trees and dawadawa trees, or as being artificially fixed to it like houses, buildings and any structures whatsoever; int also includes any estate, interest or right in, to, or over the land or over any of the other things which land denotes, e.g., the right to collect snails or herbs, or to hunt on land."[1]

Ollennu's definition raises a few important points. "Land" includes things growing on or attached to land, such as trees or buildings. "Land" includes water. In Ollennu's formulation, "land" includes *rights* as well (e.g., the right to hunt or collect snails). Because law is a set of rules, it is useful to think of "land" as consisting of a party's *rights* under a set of rules. Lawsuits do not deal so much with the physical things that a layperson might think of as land — soil, trees, buildings and even snails — as with the *rights* which a party may enforce in court. This is a big change from the normal way to think about land, and rights. Using the word this way, when someone says "X has a land interest in Property Y" is the same as saying "X has a set of rights relateded to Property Y which may be enforced in court." So a precise definition of "land" is difficult, but it encompases rights over a variety of things attached to soil.

1.2.2 Dadzie and Boateng v. Kokofu [1961] GLR 91.

In the Supreme Court

13 February 1961

[**91**]

Cases referred to:
Graves v. Ampimah (1905) Ren. 318; Grif. Dig. 94.

APPEAL from a judgment of the Land Court, Sekondi, (Smith, J.) dated the 22nd January, 1960, *sub nom. Bosomafi v. Kokofu*. The Land Court had dismissed the plaintiffs' claim and reversed the decision of the trial court, the Bibiani Native Court "B". In the Supreme Court, Isaac Dadzie was substituted as first plaintiff for Akua Bosomafi. The facts are fully set out in the judgment.
KORSAH, C.J., delivered the opinion of the court. This is an appeal from the judgment of Smith, J. sitting in the Land Court in exercise of its appellate

[1] NII AMAA OLLENNU, PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA, 1 (Gordon Woodman et al. eds., CAL Press 2nd ed. 1985).

jurisdiction from a judgment in a suite instituted in the Bibiani Native Court "B". The write reads:

> "The plaintiff claims from the defendant judicial relief for the defendant to show cause why the defendant has refused to give to the 1st plaintiff, the successor of late Kwame Adufo, a cocoa farm belonging to the late Kwame Adufo, which cocoa farm situate at Mpokuampa, Bibiani, given to defendant on pledge for the sum of £G7 since sixteen years ago."

The plaintiffs' case briefly stated is that, about three days before his death, Kwame Adufo, who was at the time seriously ill and allegedly suffering from tuberculosis, upon the advice of the defendant (to the effect that he, Kwame Adufo, should return to his native home for medical treatment) was induced to raise a loan of £G7 from the defendant, to enable him to travel from Bibiani in Ashanti to his native home in Southern Ghana. He, however, died without being able to leave Bibiani. As security for the said loan Kwame Adufo pledged his cocoa farm to the defendant. Essie Otuwah, the niece of the said Kwame Adufo deceased, was present and witnessed a paper which was made of the transaction by making her mark and thumb–print thereto; sh had testified that it was a loan transaction and not a sale of the property as alleged by the defendant.

The defendant's case is that the late Kwame Adufo offered to sell the said cocoa farm to him and one Kwasi Buampong, because they were owners of the land on which the farm was situated; after Adufo had satisfied them that the farm was not family property, they agreed to purchase it, and caused a document, exhibit B, to be prepared, which Kwame Adufo executed upon payment of £G7 to him. They had been in possession of the farm; but Kwasi Buampong, the co–purchaser, later sold his interest in the cocoa farm to the defendant for the sum of £G100. The defendant further said in cross–examination that he was not present when **[92]** the document was executed but that it was show to him by Kwasi Buampong. He does not know the person who prepared exhibit B.

It is not disputed that there are three traditional chiefs at Bibiani (representatives of Sefwi Anhwiaso, Sankori and Nkawie) who are the three persons in charge of all the land in the area as representatives of the three chiefs who are co–owners of all the lands in the area; but the defendant contends that although the document relating to the sale of the cocoa farm is not signed by the three representatives it is nevertheless valid.

It will be observed that exhibit B purports to have been executed by persons all of whom are illiterate, but who are alleged to have made their marks thereto, yet, the writer and witness to the marks was not called as a witness now was nay attempt made to prove the execution in any other way whatsoever. The defendant says he does not know the writer and has made no enquiry to find out who he is and where he can be found.

The issue which the native court had to try was whether the transaction was a loan or an outright sale of the cocoa farm, the defence having admitted

that the farm was the property of Kwame Adufo until the alleged transaction. The native court after careful consideration of the evidence rightly accepted the plaintiff's case that it was a loan transaction. After which the burden of proof of the allegation of a sale shifted to the defendant whose duty it became to satisfy the trial native court that a sale took place.

On this point the judgment of the native court stated, *inter alia*.

> "The writer of this document was one J. E. K. Mensah who is alive but was not called to prove the document. The defendant is an illiterate and has himself told the court that he was not present when the paper or the document was prepared nor was he present during the execution of this all–important document. According to the defendant Kwasi Buampong acted principally for himself and the defendant as the defendant was then at Nkawie but the defendant would not call the said Kwasi Buampong to give evidence."

In *Graves v. Ampimah*[2] where an agreement was made with an illiterate person the court held that in the absence of evidence that ti was interpreted to the person before execution, a claim based on the agreement could not be sustained.

The native court also said:

> "On inspection, the court is satisfied that with the size of this cocoa farm, it is unthinkable even to suggest that about five hundred pounds (£G500) should be reasonable to purchase the cocoa farm absolutely. Of course, no mention was made of any Trema or earnest money without which any sale of property is invalid."

This judgment was reversed by the learned judge on the ground that the successor, the first plaintiff, did no herself give evidence. This view we consider erroneous in as much as the niece of the deceased who was present at the transaction gave evidence of matters within her knowledge, whereas the first plaintiff who is successor, was not at Bibiani on the date of the transaction and could not have given evidence of the transaction which is the material issue in the case. The fact that Essie Otuwah, niece of the late Kwame Adufo, was the only witness to the transaction does not detract from the weight of her evidence, which is amply supported by the circumstances under which the loan was sought and given. The defendant did not deny that the late Adufo was at the time of the transaction seriously ill and that he died three days after the loan was given and the farm was pledged. Nor did he deny that the money was intended to be used to defray traveling expenses of Kwame Adufo from Ashanti to Southern Ghana for medical treatment.

As regards the length of time, the learned judge again erroneously regarded sixteen years as a long time for a native pledge and that it is not possible by mere inspection to hazard a guess, after such a march of time, as to size and

[2](1905) Ren. 318

fruitfulness of the farm at the time of the transaction, thus suggesting that the farm might have been improved during the sixteen years. In fact this is the very essence of a pledge of a farm under customary law. It becomes the duty of the pledgee to maintain the farm in a good condition and even to improve it, for that is how the pledgee reaps greater benefit, since he becomes entitled to retain all proceeds of the farm until payment; even extensions to the farm are deemed accretions by customary law.

We accordingly allow the appeal, set aside the judgment of the Land Court, and restore the judgment of the trial native court of first instance—the Bibiani Native Court "B".

Appeal Allowed
Judgment of trial native court restored.

NOTES:

1.) The court in *Dadzie v. Kokofu* recognizes a difference between ownership of the "land" and ownership of the farm at issue in the case. Is that because ownership of the farm is not ownership of some type of "land," or simply because different people may own different "land" interests in the same physical parcel of earth, each with different rights?

1.3 Types of Rights in Land

1.3.1 Wiapa v. Solomon and Akuffo

(1905) Ren. 410 (F.C.)

Full Court, Cape Coast

4 July, 1905

APPEAL from judgment of Smith, A.C.J., at Accra, dated 20th February, 1905.

This is an appeal from the judgment of Smith, Acting Chief Justice, at Accra, date the 20th of February, 1905.

The plaintiffs Wiapa and Obuobi are members of the Nyago family, at Tutu, a town in Akropong. The defendant Akuffo is the Omanhene of Akwapim, and he claims th the land by right of his stool on behalf of all Akwapim. The other defendant, Solomon, claims by purchase from Akuffo as Omanhene. According to the plaintiff Wiapa, Nto, a predecessor of the Nyago family, of Tutu, went to the land in question many years ago. At that time plaintiff admitted that the land belonged to no one. He further stated that he was told that the land was

originally the property of Akwamus, the former inhabitants of the present Akwapim country. Upon these admissions Mr. Sarbah, for the appellants, argued that if this land was no one's land and was within the Akwapim country, it must have been attached to the Akwapim stool, and he enunciated the general principle that all unoccupied land within territory under a paramount stool belongs to such stool. This is practically the principle upon which the Courts of this colony have proceeded from their inception ; and this doctrine has served as a safeguard to the natives against possible Government claims. When Sir William Maxwell's Concessions Bill was before the Government, there was much discussion on the subject, and must stress was properly laid upon the fact that the Courts had always held that there was no unowned land in the colony, and that all unoccupied land was attached to the adjoining stools; this was indeed the foundation argument on behalf of the native chiefs against that Bill, and the Government recognized its force by withdrawing the Bill.

We find the principle set forth in two memoranda which are to be found in Sarbah's Fanti Laws, one by my brother Smith and thee other by the late Bruce Hindel, Attorney General of the Colony.

Though the principle obtains that all the unowned land under the authority of a paramount stool belongs to such stool, in practice this is much modified, at any rate in the Eastern parts of the colony. In these parts each subordinate stool has attached to it large portions of land, apparently carved out of the territory originally belonging to the paramount stool; similarly, families have large tracts of land carved out of the subordinate stool lands, and finally, we get down to individuals with private worship of particular parts of the family land; or private individuals may have part of the stool land not being family land. Any unoccupied land within the recognized boundaries of the subordinate stool land or the family land or private land would, of course, belong to the subordinate stool, or the family, or the private individual as the case may be; but any unoccupied land not being a part of the land of a subordinate stool or family, or a private person would be attached to the paramount stool.

It is clear from the plaintiff's evidence that the land upon which Nto went was unowned, and therefore stool land; whether at the time it was Akim or Akwapim stool land it is not necessary to enquire.

In the circumstances, it was necessary for the plaintiffs to prove that they came into lawful possession of this land. The fact of reasonably prolonged occupation would of itself have been strong evidence that their entry was lawful, but this they were not able to prove. All they could prove was intermittent occupation of one or two indefinite plots of land within the extensive area claimed. That is not sufficient even to entitle them to the particular plots of land formerly cultivated. Then it was suggested that hunting over the land gave them a right of ownership. We do not agree. Subject to the usual toll, the stool lands can freely be hunted over by all the subjects of the paramount stool, but in our opinion hunting can confer no right of ownership as between a stool and a subject. The plaintiffs further argued that they had sold lands there; that would not help their case, as they were selling Nto first went upon it; the land was clearly stool land, and the plaintiffs have never so occupied it as to enable the Court

to say that it has been taken out of that category. In our opinion, judgment should have been given in the Court below for the defendants. We think that the judgment of the Court below should be reversed, and that judgment should be entered for the appellants, with costs here and below, except any costs with respect to the plea of *res judicata* in the Court below, which should be awarded to the plaintiffs.

W. Brandford Griffith, C.J.

Smith, J. adds that he possibly gave greater weight to the evidence of the Akuffo as to hunting and settlement, than the Full Court thinks should have been given.

Costs assessed at £101 2s. 6d.

F. S.
G. K. T. P.

NOTES:

1.) In the first paragraph of the case the court makes reference to a "Concessions Bill." In the late 1800's the colonial government attempted to pass a law which would have vested certain land in Ghana in the British Crown. Citizens of Ghana objected to the proposed bill, partly on the ground that all of the land in Ghana already had an owner[3] (i.e., that there was now unowned land in Ghana for the Crown to take).[4]

The principle that all land has an owner has been the subject of debate. Ollennu refers to this idea as "the first basic principle of our customary land law,"[5] and Woodman seems to agree to its truth.[6] Kludze, however, has written that the principle lacks a solid foundation in the law.[7] Debate aside, the "no ownerless lands" principle has been cited by courts more recently than *Wiapa v. Solomon*. *See* Ameoda v. Pordier, [1967] G.L.R. 479, 491-92.

2.) *Wiapa v. Solomon* also gives an overview of the system of land tenure. The court mentions ownership by stools, sub–stools, families and individuals, each very quickly. The right of subjects to hunt on the land is also mentioned. (But what about Ollennu's assertion that hunting rights are land rights? Does the court here deal with that fully?) The principles expounded in this case are explored in more detail in cases below.

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[3] *See* A.K.P. Kludze, *The Ownerless Lands of Ghana*, 11 U.G.L.J. 123 (1974).

[4] The reason for the bill is unclear: the stated purpose was to prevent improper sale of communally held land for private gain, but the colonial government also stood to profit by through vesting of the land. *See* Gordon Woodman, Customary Land Law in the Ghanaian Courts, 57 (1996).

[5] Ollennu, *supra* note 1 at 4.

[6] *See* Woodman, *supra* note 4 at 54-58.

[7] *See* Kludze, *supra* note 3.

1.4 Terminology for Interests in Land

The proper terminology for land interests in Ghana remains a subject of debate. As seen from *Wiapa v. Solmon*, many parties (stools, sub–stools, families and individuals) can have simultaneous interests in a single physical parcel of earth. The court in *Wiapa* also notes that a stool subject may have to pay a "toll" to the stool, but has the right to hunt on stool lands. Unfortunatly there is not a consistent vocabulary used to describe the various rights and responsibilities that parties may have in relation to the land and each other.

Several writers have directly addressed the issue of terminology.[8] Ollennu names six basic types of ownership of land in Ghana.[9]

There is some statutory authority for categorization and terminology for land interests. In 1986 a law providing for registration of interests in land, the Land Title Registration Law, 1986 (P.N.D.C.L. 152) was passed. Section 19 of P.N.D.C.L. 152 lists the types of interests registerable under the law. In textbooks written since the passage of the law, at least two authors have adopted its terminology.[10]

Following is a general description of the interests listed under P.N.D.C.L. 152.[11] There is debate about the incidences of each type of ownership.

***Allodial Title*:** This is the highest form of ownership. Most often a corporate body such as stool or a family will own this interest.

***Customary Freehold*:** This is the type of ownership which a stool or family member acquires after settling on vacant land held by the group. This is also commonly called the "usufruct."

***Leasehold Interests* and *Lesser Interests*:** The law does not spell out the difference between these two, but customary tenancies such as *abusa* and *abunu* are placed in the latter category.

The details of each type of ownership are found in later cases. Generally, to start making sense of cases it is useful to know that references to "allodial" title are references to the type of ultimate ownership that a stool or family may possess (although it seems that an individual may possess this type of ownership as well). The terms "customary freehold" and "usufruct" are used interchangeably to refer to the interest of a subject or family member in land held by a larger group. Other intrests, such as signed, written leases as between a residential landlord and tenant, or customary agricultural tenancies, are subordinate to allodial and customary freehold interests.

The word "freehold" is used alone at times — it is even listed in § 19 of P.N.D.C.L. 152 as a separate type of interest. The word "freehold" has a special

[8] *See, e.g.* Kwamena Bentsi–Enchill, *Do African Systems of Land Tenure Require a Special Terminology?*, 9 J. Afr. L. 114 (1965).

[9] Ollennu, *supra* note 1 at 6.

[10] *See* Bernard Joao da Rocha, Ghana Land Law and Conveyancing, 1-2 (1995); Woodman, *supra* note 4 , chs. 1-2.

[11] *See* Land Title Registration Law, 1986 (P.N.D.C.L. 152) § 19.

meaning in British common–law, but it does not always seem to carry the same connotations in Ghana. The word "fee–simple" may also be used at times. This word also has a special meaning in British common–law, denoting something like absolute ownership which is commonly held by individuals, but it is probably not a good word to use in Ghana.[12]

[12] *See, e.g.* Total Oil Products, Ltd. v. Obeng, [1962] 1 G.L.R. 229 (In which the court notes that "there is no fee simple in customary land tenure").

Chapter 2

The Constitution

Several Articles of the 1992 Constitution relate to land rights. Article 11 discusses sources of law in Ghana, which is particularly important in land law. Article 20 discusses the government's power of *emminent domain* — the right to compell others to give land to government, and places restrictions on that right. The whole of Chapter Twenty–One deals with various land righte: article 267 deals with stool lands, article 257 with mineral rights (which are separate from land rights), and Article 266 deals with land ownership by non–citizens. Other articles in Chapter Twenty One create a Lands Commmission and discuss stool and skin land.

2.0.1 Article 11 — Laws of Ghana

(1) The laws of Ghana shall comprise-

  (a) this Constitution;

  (b) enactments made by or under the authority of the Parliament established by this Constitution;

  (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.

  (d) the existing law; and

  (e) the common law.

(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.

(3) For the purposes of this article, "customary law" means the rules of law, which by custom are applicable to particular communities in Ghana.

(4) The existing law shall, except as otherwise provided in clause (1) of this article, comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution, and any Act, Decree, law or statutory instrument issued or made before that date, which is to come into force on or after that date.

(5) Subject to the provisions of this Constitution, the existing law shall not be affected by the coming into force of this Constitution.

(6) The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution.

(7) Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall -

(a) be laid before Parliament;

(b) be published in the Gazette on the day it is laid before Parliament; and

(c) come into force at the expiration of twenty–one sitting days after being so laid unless Parliament, before the expiration of the twenty–one days, annuls the Order, Rule or Regulation by the votes of not less than two thirds of all the members of Parliament.

NOTES:

1.) Regarding the definition of "customary law" in Article 11(3): the constitution says that customary law constists of "rules ... which by custom are applicable to *particular communities*" (emphasis added). As it applies to land law, this seems to indicate that rules concerning land will vary according to custom from one area of Ghana to another. What kinds of groups does the phrase "particular communities" refer to? Ethnic groups? Stools? Villages or neighborhoods? Families?

2.) The "common law of Ghana" includes customary law as well as British common law. What about problems of terminology in Ghanaian land law and the conflicts sometimes caused by use of British land law terms and concepts by judges and lawyers. How will judges decide cases where British common–law and Ghanaian customary law conflict?

3.) Laws which existed before ratification of the 1992 Constitution remain valid. Many of these old statutes still have effect in land law. A series of Acts from 1962 are particularly relevant. The Land Registry Act, 1962 (Act 122), the Administration of Lands Act, 1962 (Act 123), section 1 of the Concessions Act, 1962 (Act 124)[1] and the State Lands Act, 1962 (Act 125)[2] are all important in

[1] The remainder of Act 124 has been repealed.

[2] Act 125 has been heavily modified by subsequent legislation, also.

land law.

4.) Of course, the Constitution provides that Parlimentary enactments will superceed customary law rules. Some statutes, then, will modify or remove the rules of customary law developed by the courts.

2.0.2 Article 20 — "Takings"

(1) No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.

  (a) the taking of possession or acquisition if necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

  (b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for.

  (a) the prompt payment of fair and adequate compensation; and

  (b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.

(3) Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.

(4) Nothing in this article shall be construed as affecting the operation of any general law so far as it provides for the taking of possession or acquisition of property.

  (a) by way of vesting or administration of trust property, enemy property or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsafe mind, deceased persons or bodies corporate or unincorporated in the course of bent wound up; or

  (b) in the execution of a judgments or order of a court; or

(c) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants; or

(d) in consequence of any law with respect to the limitation of actions; or

(e) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry; or

(f) for so long as may be necessary for the carrying out of work on any land for the purpose of the provision of public facilities or utilities, except that where any damage results from any such work there shall be paid appropriate compensation.

(5) Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired.

(6) Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such reacquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the reacquisition.

NOTES:

1.) What is the practical import of Article 20(6)? Stools are now trying to re–aquire certain property previously acquired by the government under this clause. Why would a stool do that? Is there an economic benefit?

If the phrase "commensurate with the value of the property" in Article 20(6) means that a party must pay the government the market rate for the property when it is re–aqcuired, then it seems that a party will not realize economic gain from re–aquisition (unless the market has under–valued the property). Would a party ever want to re–aquire property under 20(6) for non–economic reaons (e.g., reasons of individual sentiment or societal tradition)? (Sometimes, in contracts or equitable remedies, parcels of land are treated as unique assets and given special treatment which would not be given to fungible goods.)

It is also possible that the "amount as is commensurate with the value of the property" will be, in practice, less than market price. Should it be?

2.0.3 Article 257 — Public Lands

(1) All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana.

(2) For the purposes of this article, and subject to clause (3) of this article, "public lands" includes any land which, immediately before the coming into force of this Constitution, was vested in the Government of Ghana on behalf of, and in trust for, the people of Ghana for the public service of Ghana, and any other land acquired in the public interest, for the purposes of the Government of Ghana before, on or after that date.

(3) For the avoidance of doubt, it is hereby declared that all lands in the Northern, Upper East and Upper West Regions of Ghana which immediately before the coming into force of this Constitution were vested in the Government of Ghana are not public lands within the meaning of clauses (1) and (2) of this article.

(4) Subject to the provisions of this Constitution, all lands referred to in clause (3) of this article shall vest in any person who was the owner of the land before the vesting, or in the appropriate skin without further assurance than this clause.

(5) Clauses (3) and (4) of this article shall be without prejudice to the vesting by the Government in itself of any land which is required in the public interest for public purposes.

(6) Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.

NOTES:

1.) Article 257(6) vests minerals in the President in trust for the people of Ghana. (It has been held that this is not the of equitable trust which can be enforced in a court. Adjaye v. Attorney Gen., Suit No. C144/94 (**JAD: need to find out which court this is from!**).) It seems that Ollennu's description of land ownership would include mineral rights. [3] Whether that is true or not, the Aritlce 257(6) means that ownership of the soil is separate from the right to harvest the minerals beneath it.

2.0.4 Article 266 — Ownership of land by Non–Citizens

(1) No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana.

[3] *See supra* note 1 and accompanying text.

(2) An agreement, deed or conveyance of whatever nature, which seeks, contrary to clause (1) of this article, to confer on a person who is not a citizen of Ghana any freehold interest in, or rights over, any land is void.

(3) Where, on the twenty-second day of August 1969, any person not being a citizen of Ghana had a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing from the twenty-second day of August 1969, and the freehold reversionary interest in any such land shall vest in the President on behalf of, and in trust for, the people of Ghana.

(4) No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a leasehold for a term of more than fifty years at any one time.

(5) Where on the twenty-second day of August 1969 any person not being a citizen of Ghana had a leasehold interest in, or right over, any land in Ghana for an unexpired period of more than fifty years, that interest in, or right over, any such land shall be deemed to be an interest or right subsisting for a period of fifty years commencing from the twenty-second day of August 1969.

NOTES:

1.) Article 266(1) prohibits the vesting of a "freehold" interest in a non–citizen. Why is the word "freehold" used? Does this mean that an allodial interest can be transfered to a non–citizen? (A similar question arises in terms of Article 267(5) below.) The term "freehold" is not defined in Article 295 of the Constitution, which deals with interpretation. The Land Title Registration Law, mentioned above, does use the word "freehold" as distinct from the allodial interest.[4] P.N.D.C.L. 152 was in force when the constitution was enacted. Does this mean that its provisions should be used to help interpret the word "freehold" in the Article 266(1)?

2.) Article 266(3) vests the "freehold reversionary interest" in the president in cases where non–citizens had freeholds before August 22, 1969. In 2019, the President will get the benefit of these reversionary interests. What does this mean? This "freehold reversionary interest" sounds like what the holder of allodial title would have in stool land where a subject holds a customary freehold. Is this clause giving allodial title to the President, as well as terminating the freeholds held by non–citizens? Regardless of the fine points of terminology, is it likely that the stools or skins who held allodial title to lands affected by Article 266 will try to get the lands back when the leaseholds end in 2019? What arguments could they use to do so? Should they win?

[4]Land Title Registration Law, 1986 (P.N.D.C.L. 152), § 19.

2.0.5 Article 267 — Stool and Skin Lands and Property

(1) All stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with customary law and usage.

(2) There shall be established the Office of the Administrator of Stool Lands which shall be responsible for -

(a) the establishment of a stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from the stool lands;

(b) the collection of all such rents, dues, royalties, revenues or other payments whether in the nature of income or capital, and to account for them to the beneficiaries specified in clause (6) of this article; and

(c) the disbursement of such revenues as may be determined in accordance with clause (6) of this article.

(3) There shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.

(4) Where the Regional Lands Commission fails or refuses to give the consent and concurrence under clause (3) of this article, a person aggrieved by the failure or refusal may appeal to the High Court.

(5) Subject to the provisions of this Constitution, no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.

(6) Ten percent of the revenue accruing from stool lands shall be paid to the office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue shall be disbursed in the following proportions—

(a) twenty-five percent to the stool through the traditional authority for the maintenance of the stool in keeping with its status;

(b) twenty percent to the traditional authority; and

(c) fifty-five percent to the District Assembly, within the area of authority of which the stool lands are situated.

(7) The Administrator of Stool Lands and the Regional Lands Commission shall consult with the stools and other traditional authorities in all matters relating to the administration and development of stool land and shall make available to them all relevant information and data.

(8) The Lands Commission and the Administrator of Stool lands shall coordinate with all relevant public agencies and traditional authorities and stools in preparing a policy framework of the rational and productive development and management of stool lands.

(9) Parliament may provide for the establishment of Regional branches of the office of the Administrator of Stool Lands to perform, subject to the directions of the Administrator of Stool Lands, the functions of the Administrator in the region concerned.

NOTES:

1.) Article 267(5) prohibits the creation of "a freehold interest howsoever described" in stool land. As in Article 266(1), does use of the word "freehold" mean that allodial title can be transfered by a stool? Would transfer of the allodial title *imply* creation of a freehold (that is, does allodial ownership include, as a constituent part, ownership of a freehold, so that transfer of allodial title involves transfer of a freehold — maybe at least where no other freehold exists (e.g., on vacant stool land))?

What about the use of the words "howsoever described" in Article 267(5). These words are not present, for example, in Article 266. Does the difference bear on the alienability of the allodial title?

B.J. da Rocha poses the above question in his book *Ghana Land Law and Conveyancing*.[5] He asserts that in any case, sale of the allodial title by a stool would require the consent of the Lands Commission.[6] He suggests that such consent would likely not be granted, so that as a practical matter the question is moot.[7]

2.) Given da Rocha's point about the consent of the Lands Commission in alienation of stool lands, what is the purpose of Article 267(5)? Is it aimed at restraining the behavior of the stools (i.e., restraining private parties by ensuring that stools do not give away land), or is it aimed at restraining the behavior of the Lands Commission (i.e., restraining the government by providing that the Lands Commission must not consent to grants of freehold over stool land)?

[5] DA ROCHA, *supra* note 10 at 4.
[6] *Id.*
[7] *See id.*

Chapter 3

Allodial Title

3.1 Aquisition of the Allodial Title

3.1.1 Ohimen v. Adjei and Another

2 WALR 275, 1957

Supreme Court of Ghana, Central Judicial Division,
Land Court, Cape Coast (Ollennu J.)

March 14, 1957

[277]

Cases referred to :
(1) *Kuma v. Kuma* (1936) 5 W.A.C. 4.
(2) *Fiscian v. Nelson and Baksmaty* (1946) 12 W.A.C.A. 21.
(3) *Abbey and Another v. Ollenu* (1954) 14 W.A.C.A. 567.
(4) *Lokko v. Konklofi* (1908) Renner, Vol. 1, Pt. 2, 454.
(5) *Golightly and Another v. Ashrifi and Others* (1955) 14 W.A.C.A. 676.

Appeal from a decision of the Swedru Native Court "B" on September 4, 1956, giving judgment for the defendant stool in an action by a plaintiff, on behalf of his family, against the stool to which the family belonged, for a declaration of title to land, an injunction and damages for trespass.

[278] Ollennu J. The plaintiff in this case, suing as head of the Nana Danquah branch of the Asona family of Agona Swedru, sued the first and second defendants respectively as head of the Asona Stool Family and as occupant of the Asona Stool of Agona Swedru. The claim is for a declaration of title, an injunction and damages for trespass. There was no counterclaim.

In their judgment delivered on September 4, 1958, the Native Court made certain specific findings of fact; they also held it to be established law and

custom that undisturbed possession of land for fifteen years would have vested ownership of the land in the person in such possession. They dismissed the plaintiff's claim. The findings of fact made by the court are: that the land in dispute is the property of the Asona Stool, which is occupied by the second defendant; that the plaintiff's family are members of the stool family and have usufructuary rights over the said land, but are not owners in fee simple; that the dispute is res judicata by reason of certain judgments of the Agona State Council, given in a stool dispute; and that the plaintiff has slept on his rights (inf any). The Native court thereupon made an order for an injunction against the plaintiff.

Four grounds of appeal were filed originally and two additional ones were filed subsequently.

The are as follows:

1. Because the Native Court misdirected itself as to the law in holding that the judgments of the Agona State council operated as res judicata, these judgments are being res inter alios acta.

2. Because the native court was wrong in holding that the plaintiffs' family enjoyed only usufructuary rights as members of the same family as the defendants.

3. Because the judgment of the Native Court was against the weight of the evidence.

4. Because the Native Court was wrong in holding as it did that the defendants had been in undisturbed possession for upwards of fifteen years.

The grounds subsequently added were that the Native trial Court misdirected itself by holding that "the plaintiff acted ultra vires since he has no locus standi," and that the trial Native Court was wrong in law in making the following order:

> "Order for injunction entered herein restraining the plaintiff, his servants, labourers, workmen or privies from interfering with the Anarfo land."

Mr. Dua Sekyi, counsel for the defendants, conceded that the order for injunction made in favor of the defendants is wrong since they **[279]** did not file any counterclaim, and that the judgments and orders of the Agona State council, delivered in matters of constitutional nature, cannot operate as res judicata in a land suit. He could not therefore resist the attacks upon the judgment made in the original grounds and in the additional grounds against these two points.

The Native court's statement of law and custom that undisturbed occupation of land for fifteen years vested the person in such possession with title to the land is of course a misdirection. There is no prescriptive right in this country;

undisturbed possession of land by a stranger for however long a time cannot ripen into ownership. See the case of *Kuma v. Kuma (1).* It may, however, work the other way and operate as an estoppel against an owner who has been guilty of laches amounting to fraud. where the true owner sits by and allows a stranger to occupy his land, spend money or energy in improving it in the honest belief that it belongs to him, equity will not permit the true owner afterwards to recover possession of the land. See the cases of *Fiscian v. Nelson and Baksmaty*— (2), and *Abbey and Another v. Ollenu* (3). The correct position is that the true owner loses his right to assert his title and to recover possession of the land; not that the stranger acquires title to it, though in actual fact he does thereby acquire title to the land.

There is evidence on the record which amply supports both findings of the Native court that title – call it fee simple title – in the land is vested in the stool of the second defendant, and also that the plaintiff's family, as subjects of the stool, have acquired usufructuary rights over the said land. Those two findings together raise some very important principles of native custom regarding the nature of the title or interest which a subject acquires in stool land.

There are four principal methods by which a stool acquires land. They are: conquest and subsequent settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, of unoccupied land and subsequent settlement thereon and use thereof by the stool and its subjects; gift to the stool; purchase by the stool. Each of these methods involves either the sacrifice of lives of subjects or the expenditure of energy or contribution of money by subjects, and use and occupation of the land by the subjects. The stool holds the absolute title in the land as trustee for and on behalf of its subjects, and the subjects are entitled to the beneficial interest or usufruct thereof and have to serve the stool. Each individual or family is regarded in the broad sense as the owner of so much of the land as it is able by its industry or by the industry of its ancestors to reduce into possession and control. The area of land so reduced into the lawful possession of the individual or family, and over which he or they exercise a usufructuary right, is usually called his property. It cannot, save with the express consent of the family or individual, be disposed of by the stool. the individual or family may assign or dispose of his **[280]** interest in the land to another subject of the stool and the land may be sold in execution of a decree against the individual, or the family, as the case may be, without the consent of the stool. But he may not dispose the the stool's absolute ownership in int to strangers without the consent and concurrence of the stool.

Where an individual or family in possession abandons any portion of the land in their possession for upwards of ten years, the stool can grant that particular portion to any other subject or to a stranger and such grantee will be bound to perform such services ans pay such sums as may be declared to be performed or paid annually in accordance with native custom. see *Lokko v. Konklofi* (4), *Golightly and Another v. Ashrifi and Others* (5), and see also Sarba, Fanti Customary Law, 2nd ed., pp. 66-67.

It would be repugnant to natural justice and good conscience if, while the Stool can insist upon the services and customary rights due to it from the subject, it could arbitrarily deprive its subjects of the enjoyment of the portions of the stool land in their possession. On the other hand, the only title in land which a subject can claim against a stool is the usufructuary title to the portion of the stool land in his actual possession. If he proves that, he is entitled to a declaration of his title to that land.

It has been argued on behalf of the defendants that the defendants have fro many years made grants of portions of the Anarfo lands, as evidenced by the documents tendered in the case, without objection form the plaintiff's family; the earliest of these transactions was in 1919. But there was no evidence that the plaintiff's family were in actual possession of the particular portions of the land so dealt with by the stool at the time when the stool made the grants of them. The presumption is that the plaintiff's' family had not bee in active possession of those specific portions for a number of years and therefore that the family must be deemed to have abandoned them. In such a case native custom, as I have stated above, empowers the stool to grant the land to others, nd such grants cannot be regarded as inconsistent with the family's rights in and over the portions of the land in their active possession and control.

The point has also been made that members of the plaintiff's family have received compensation from the second defendant's stool for the demolition of the houses they occupy on the family land. It was urged that such acceptance of compensation evidences their consent and concurrence in the disposition of the land by the stool. had the people who accepted the compensation been proved to be the head and principal members of the family I would have no hesitation in accepting the argument, or at least in holding that the acquiesced in the grant by the stool, even though their acceptance of compensation took place after the execution of the lease by the defendants. By native custom it is only the head, acting with the necessary consent, who can bind **[281]** the family. It would be chaotic if any member could compromise the portion [sic] [1] of the family by any act which, while benefiting him personally, was detrimental to the interest of the family as a whole.

It is clear from the evidence on behalf of the defence that the defendants and their witnesses are aware of the rights of the plaintiff's family in the land; but the defendants are insisting on ousting the plaintiff's family from the land because, as stated by the defendants' first witness in his evidence–in–chief, the second defendant, after consultation with his elders, refused to allow the plaintiffs' family to continue in possession " assigning reason that the plaintiff had been at loggerheads with him since the stool litigation." Such a vindictive attitude on the part of the occupants of the stool and his elders towards subjects or members of the stool family is unfortunate. Where, as in this case, land is required for development which will be beneficial to the stool and the community generally, co–operation between the stool and the family to be dispossessed is the best

[1] Here the word "portion" is crossed out, and "position" entered in, in the original from which this was copied.

method of approach, not high–handed action.

As stated above, the only title which a subject has in stool land and for which he can maintain an action against the stool is the possessory title or the usufruct of the land. The native court found upon the evidence that the plaintiff's family has such a title in the land. Consequently they should upon their own findings have entered judgment for the plaintiff. they therefore erred in dismissing his claim.

For the reasons stated I allow this appeal, set aside the judgment of the Native Court, including the orders for costs and injunction, and substitute therefore judgment for the plaintiff for a declaration of his ownership according to native custom of the land in dispute, and a declaration that the lease of the said piece or parcel of land by the defendants without the consent and concurrence of the plaintiff is ineffective as against the plaintiff's family. I am unable to grant the plaintiff the order for perpetual injunction sought, since it appears from the Native Courts (Colony) Ordinance and Regulations made thereunder that a Native court has no jurisdiction to grant the equitable relief of injunction, other than an interim injunction. As an appeal court I an only grant a relief which the court of first instance is capable of granting. As to the claim for damages, no doubt there has been some interference with the plaintiff's possession of the family land such as should entitle him to damages. But in the particular circumstances of this case it will be discreet not to award any damages.

The plaintiff is to have his costs of this appeal and his costs in the Native Court to be taxed.

Appeal allowed.
S.G.D.

3.1.2 Ngmati v. Adetsia & Ors.

[1959] GLR 323

High Court (Lands Division), Accra

29 September, 1959

[324] *Cases cited:*

(1) *Animie II v. Otibro & anor.* (unreported);
(2) *Konor Mate Kole etc. v. Otibo* (unreported);
(3) *Nettey v. Odjidja & anor.* (p. 261 of this volume);[2]

OLLENNU J:

(*His lordship stated the history of the matter, and continued:*—)

[2]Reference in original: the case appears at [1959] G.L.R. 261.

The evidence led by the plaintiff and his witness was that about 200 years ago, while the krobos were still living on the Krobo Hill, his ancestors farmed a portion of the land round about that hill. This was not challenge by the defendants or by the co–defendant. They appeared not to know whether to not the plaintiff's family owned plains round and about the hill. A very feeble attempt was made by the 2nd co–defendant to challenge the plaintiff's evidence as to his ancestors' acquisition of the land.

What the defendants and the 1st co–defendant say is that the whole of the land at Okwenya belong to the Konor of Manya Krobo, and that the plaintiff's ancestors could not have farmed that land to acquire title to the same, they being Yilo and not Manya Korbo subjects.

[**325**] The implication of the tradition as to the acquisition of the lands is that the boundary between the land of the two stool must be identical with the boundary between the farms of the subjects of one stool farming from one direction, and the farms of the other stool farming from the opposite direction to meet the former. The situation was summarized by the 1st co–defendant (Chief Sackitey) in his answer to the Court, as follows:—

> "Both Yilo Krobos and Manya Krobos were occupying the Krobo Hill before they were driven down to he plains. The two Krobos separated when they came down from the hill. The two peoples lived separately on the hill, not as one community. Both the Manya Krobo people and the Yilo Krobo people were forming communities, and their subjects farmed the land round about the hill.
>
> Q. According to custom what would happen to lands which each person farmed in those days the death of that man who farmed it?
>
> A. They would become the property of the descendants of the person who it originally.
>
> "Unoccupied land which is found about an area which a Stool settles upon, and which the subjects of the Stool cultivate, comes to be regarded as property of the Stool. But the portion which any one so farmed also remains ancestral property for his descendant. Both the Yilos and Manyas got the land by migration, and found it unoccupied by any other tribe. From the way in which a boundary between lands of their Paramount Stools can e determined is by following farms boundaries between land farmed by there subjects form opposite directions. The only other way is for the two Paramount Stools to fix (or to have fixed for them) an arbitrary boundary when a dispute arises between the two Stools. Apart from the case which I said came to the Court in 1902, the result of which I said I did not know, and the Jackson Commission of Enquiry into Stool Lands Boundaries, the Manya Krobo and the Yilo Krobo Paramount Stools have not had a boundary dispute to necessitate their fixing an arbitrary boundary between lands of their two stools. Any arbitrary

> boundary between the two Stools is bound to cut through ancestral land of either Manya Krobo families or Yilo Krobo families."

The plaintiff is a subject of the Yilo Krobo Stool and so is the 2nd co–defendant. The first co–defendant is a caretaker of the Manya Krobo Stool lands in the Akuse area, and is defending this suit for **[326]** and on behalf of the Konor of Manya Krobo, through whom all the nine defendants claim.

It was sought to prove, on behalf of the manya Krobo Stool that there is a fixed boundary between Manya and Yilo. In pursuance of that attempt four judgments were tendered in evidence: they are Exhibit "1," Exhibit "3," Exhibit "4," and Exhibit "5"

Exhibit "1" is a certified copy of a judgment of the Privy Council delivered or the 25th July, 1927, in a suit entitled *Mantse Animle II v. Otibo and another*. That judgment confirmed a judgment of the Full Court which had upheld a judgment of non–suit entered against the plaintiff Tetteh Animle II of Osu–Doku. It is wholly irrelevant to this suit; firstly, because it simply non–suited the plaintiff therein, making no declaration in favour of the defendant in that case; and secondly, there is nothing to show that the parities to this suit are the same as, or privies of, the parties to that suit.

Exhibit "3" is a judgment of Dalton J., delivered on the 5th January, 1925, in the Divisional Court in suit entitled *Konor Mate Kole, etc. v. Otibo*, where the Konor of manya Krobo obtained judgment against one otibo of Ous–Doku, for a declaration of title to a certain piece of land specifically described. At a later stage in this matter of that judgment. That judgment also is irrelevant in the present suit, firstly because the plaintiff herein was not the defendant, or privy of defendant, in that suit. Secondly, as will appear presently, the land in dispute in that case does not cover the land which is the subject–matter of this suit. Thirdly, since the defendant in that case did not claim through the plaintiff herein, no estoppel by conduct can possibly arise even if the land in dispute is that case were identical with the one now in dispute in this case (compare *Nettey v. Odjidja & anor.* (p. 261 of this volume).

The observations made respect to Exhibit "3" apply equally to Exhibit "4" and Exhibit "5".

Neither of the parities has relied upon anything in the report of the Jackson Land Boundary Settlement Commission, which was mentioned in passing by the 1st co–defendant; indeed, it has not been shown by any of the parities to this suit that anything in this suit turns upon that report.

The decision in the instant case must therefore be reached upon considerations other than any boundary agreed upon or fixed between Manya and Yilo in any judicial or quasi–judicial decision. The **[327]** defendants submitted that the plaintiff' claim should be dismissed because:

(1) though the is one essentially for trespass, there is no plan of the land in dispute, and the plaintiff has failed sufficiently to identify otherwise the land, subject of the alleged trespass;

(2) there is no evidence of the acts of trespass alleged; and

(3) the admission by the plaintiff that the defendant have been on the land for over 50 years, show that the defendant could not be trespassers.

The submission that an action for trespass cannot succeed without identification to the land alleged to have been trespassed upon, is a correct statement of the law. But a plan of the land alleged to have been trespassed upon is not indispensable; it is mot desirable, but it is not a *sine qua non*. A plaintiff claiming in trespass is entitled to succeed even without a plan, if the oral evidence tendered by him leaves a clear picture of the identity of the land which is in dispute between him and the defendant. In this respect I would refer to the judgment of Dalton J. (Exhibit "3" in this case) where, the absence of a plan notwithstanding, the Court was satisfied that the Manya Krobo Stool was identified with clarity, and the Court entered judgment of the Manya Krobo stool.

The evidence of the plaintiff a stop the land in dispute is as follows:

> "the boundaries of our land are as follows:
> On one side form the Hill to the Okwenya Stream of the Somanya side of the Stream, with land of Kwasi Yumu, on the left side with land of one Kroyo Akumale, and on the right hand side with the land of one Tackie."

There boundaries describing the plaintiff's land was confirmed by the evidence of his witnesses, some of whom are the persons named as owners of the lands which form a boundary with it. Thus his witnesses included P.W. 1 (Kwasi Yumu), P.W. 2 (Obute Tei Tsu), P.W. 3 (Ohene Ologo) and P.W. 4 (Kroyo Akuma Adsagbatsu). The evidence by P. W. 4 that she has let a portion of her land to the 8th defendant for the last three successive years was not refuted, and agrees with the evidence of the 8th defendant as to the number of years he has lived in the area.

As to Okwenya Stream forming the boundary of the lands on its Somanya side, the evidence of the 1st co–defendant and that of the Konor (Nene Mate Kole, D.W. 1) described the Okwenya Stream of forming of the boundaries of the Manya Krobo Stool **[328]** land. This followed the description of the Manya Krobo stool land as claimed in Exhibit "3" by the Konor, which was as follows:

> "One the North it is bounded by Okoi Stream and the Volta River, on the South by the Mutuke Stream, and the Lome Stream, and on the West by Manya Krobo Stool lands. 'Oko' is the same as 'Okwei'."

In view of the method by which the Manya Krobos and the Yilo krobos acquired land in the area, the only way in which the Manya Krobo Stool can defeat the plaintiff's evidence of possession and occupation of a portion of the land is to produce Manya krobo subjects whose ancestors farmed the area in ancient times. No Manya Krobo family has come forward to claim the land in dispute as his ancestral family property. That being so, the Stool, which can

acquired title only through its subjects, cannot resist the evidence of the Yilo Krobo subject whose ancestor's original cultivation of that portion of the land has been established.

I accept the evidence of the plaintiff and that of all those witnesses to who I have referred above, each of who impressed me most favourably as a truthful witness. I must say that the tone of the cross–examination of the witness other than P.W. 2, and specially of the old woman Koryo (P.W. 4, and specially of the old woman Kroyo (P.W. 4) leaves the impression that is not disputed that those name as boundary owners, own land in the area.

I am satisfied

(1) that the plaintiff's ancestors, like many other Krobos—Yilo as well as Manya—in ancient times farmed portions of the land at the foot of the Krobo Hill, and

(2) that the land which the plaintiff' ancestors so farmed is now the ancestral property of this family, and

(3) That that land is as described by him, and confirmed by his witness.

There is no evidence that any subject of the Manya Krobo Stool ever farmed that particular area, and no evidence even that any other subject of the Yilo Krobo Stool farmed that identical area. There (borrowing the words of Dalton J. in the judgment Exhibit "3") I say, "It is true that there is no plan of the area in evidence, which is to be regretted, but under the circumstance set out above . . . for the purpose of deciding the question in dispute in this case, a plain is not essential, although it would undoubtedly have been most helpful" I hold, then that the plaintiff has proved with sufficient clarity the identity of land he claims in this suit.

[329] On the issue of the alleged trespass, the evidence given by P.W. 2 (Obte Tei Tsu) and that given by the defendant and their witnesses is of great significance.

The witness P.W. 2 was very fair in his evidence; he did not hesitate to admit that some of the strangers in the Okwenya area occupy land which belongs to Manya Krobo. But he was emphatic that two year ago the defendants went upon the plaintiff's land, which he said is on the Somanya side of Okwenya Stream, and that they commended to farm it without first getting his (P.W.2's) permission as caretaker for the plaintiff. He therefore reported the matter to the plaintiff. Under cross-examination this witness said:

> "It is true that in addition to the area the defendants have been farming all the time they have been on the land, they have not gone into the plaintiff's land."

The old man Tetteh Kojo (D.W.2), the headman of the village, says that the land on which Okwenya Stream, on the side of it opposite to the old village. Again, most of the defendant sated that the new cultivation (their making of

which has led to his action) were on this stream where P.W2 has built his new village. And D.W.3, Basic Rate collector for Manya Krobo, said that since P.W.2 left the old village he has not known where P.W.2 is, and that he (the collector) has never crossed the boundary of Manya Krobo land shown to him by Tetteh Kojo to collect tolls. But all witnesses who live at okwenya said that P.W.2 has been ling in his new village, which is not very far form the old one. If D.W.3 had gone on that part of the land to collect tolls he would have seen P.W.2 ; the only inference to be drawn from the evidence of D.W.3, therefore, is that the land now occupied by P.W.2 is not a portion of manya Krobo lands.

The evidence of the 1st co–defendant, and of the old man Tetteh Kojo, provides a clue how the defendant went to farm across the Okwe Stream. They claim that that area belongs to Manya. Whilst P.W.2 maintains that is Yilo land, and that he (P.W.2) is liable to pay tolls or Basic Rate to Manya for occupying and farming that area.

I accept the evidence of P.W.2, Obute Tei Tsu, which the new farms made by the defendant (their making of which is the case of the present action) were made by them on the plaintiff's ancestral land. That evidence of P.W.2 further satisfies me that the cultivation in question are separate and distinct from farms which the **[330]** defendants has made on those portions of the land which they had occupied prior to the commencement of action.

The submission of learned counsel that the plaintiff cannot be heard to complain of trespass when he has admitted that the defendants or some of them have lived on and farmed the land is not a fair interpretation of the evidence. Occupation of a portion of land does not necessarily amount to possession and occupation of a larger area of land, unless the whole area of land is under one holding or ownership. The evidence show that the village where the defendants have lived all through the years, and the portions of land owned by the plaintiff's family that the plaintiff stepped in, the plaintiff not having been shown to acquiesce in the defendant's exercising rights of ownership of his land in manner adverse to his title.

I now pass on to the 2nd co–defendant. His case is that the land in dispute is the property of his family, the Padi Keteku, or Ologo family, of Yilo Krobo, i.e. the family of the Paramount Stool of Yilo. He admitted that he is not the head of that family, and has not been authorized by the family to represent them in this suit. Upon that admission I hold that he has no *locus standi* in the case.

But the 2nd co–defendant has a second string to his bow. He claims that all lands in the area, farmed originally by subjects of Yilo Krobo, are his individual property. He says that his ground for that claim is follows. Some time in 1953 one Nana Ofori Aby Adgei, Odikro of Abenase, sued one Kwasi Nwah, claiming the lands from Okwenya to Moyosi. On that occasion the Konor and the elders of Yilo Krobo refused to assist Kwasi Nwah to defend the suit, alleging that the land was unfertile, and not worth fighting for. Upon this, the 2nd co–defendant got himself joined as a co–defendant in that suit, and he defended the suit to a successful end. In support of these contentions, he put in evidence Exhibit (i), being a certified copy of an order of the Land Court made on the 20th November, 1953, Transfer Suit N. 24/1953. But so far from supporting the contention of

the 2nd co–defendant, that exhibit confirmed the evidence given by the plaintiff, viz,. that the Yilo Krobo State at first authorized the 2nd co–defendant to be joined as a party to the suit, not in his private capacity but as representative of the whole of the Yilo Krobo state; but for good reason the State later had him **[331]** removed, and caused one Tetteh Dedu II to be substituted in his stead. The order Exhibit (i) is the order of the Court substituting the said Tetteh Dedu II for the 2nd co–defendant. The 2nd co–defendant thus himself disproved by documentary evidence the case which he tried to make by his oral evidence.

Again, as a result of allegation made by the 2nd co–defendant that he had applied unsuccessfully to the Registry of this Court for a certified copy of the judgment in that case, the Court sent for the case docket. When it was brought, it showed that the case had not been head on its merits, but was struck out for want of prosecution.

But even if the evidence given by the 2nd co–defendant were true, I must confess that I know of no law in this country which would in those circumstances make the land, the subject matter of suit, become the individual property of the 2nd co–defendant.

I have completely exclude form consideration the whole of the evidence, oral and documentary, of criminal prosecutions (either by Yilo or Manya against people farming portions of the Okwenya lands) for alleged trespass.

I have given very careful consideration to the evidence for the defendants and I am satisfied that evidence on their behalf does not in any way weakened the case made by the plaintiff. The best that the defendants did was to show that they did not know that the plaintiff owns any land in the area, that in their belief the whole of the Okwenya land belong to Manya Krobo that it was with the authority of Manya that they made the farms on one and the same piece of land which they have farmed for many years.

I have no hesitations in rejecting the evidence that for 20 years the defendants cultivated just one area of land, and never shifted to another potion. It is incredible that a farmer in this country would make a food–farm at one and the same spot year in, year out, without the piece of land getting exhausted of its fertility, and having to remain fallow for a number of years. When I put this situation to one of the defendants, he immediately realized how ridiculous his evidence was. He then qualified his evidence, and said that he divided his plot of land into two halves, and farmed the portions in alternate years. I do believe that evidence either.

I find that the plaintiff is the owner of the land claimed in his writ of summons. I find also that the defendants have trespassed upon that land, and that they did so upon the instigation of the 1st co–defendant.

[332] There will be judgment for the plaintiff against the defendants, the 1st co–defendant for declaration of title to the land as claimed, and for £50 damages for trespass against all the defendants and the 1st co–defendant jointly and severally.

If the plaintiff had claimed a perpetual injunction he would have been entitled to it, and I would have given it. But he claimed only an interim injunction,

perhaps because the action was instituted in the Native Court, whose jurisdiction to grant an injunction is limited is limited by statute to an interim injunction; no amendment has been applied for. As the suit is determined by this judgment, there would be no purpose in making an order for an interim injunction. I hope, how ever, that no cause will be given him to sue later in the Court for perpetual injunction.

The plaintiff will have his costs against the defendants and 1st co–defendant, fixed at £60; and his costs against the 2nd co–defendant, fixed at £30.

Ed: The following subsequent history appears at [1961] GLR 33:

NOTE

Adetsia and Others v. Ngmati

On the 9th January, 1961, the Supreme Court (van Lare, Granville Sharp and Akiwumi, JJ.S.C.) set aside the judgment of Ollennu, J., (reported at [1959] G.L.R. 323, *sub nom. Ngmati v. Adetsia and others*) and remitted the case to the High Court for rehearing in whole. The Supreme Court said:—

> "Following discussion and upon hearing counsel for the parties it is mutually agreed that in the absence of a plan it is not possible to identify with any degree of certainty the extent or situation of the land in controversy between the parties in this case; on this ground alone it is also mutually agreed that the judgment appealed from cannot be allowed to stand and must be set aside."

NOTES:

1.) Aquisition of Allodial Title: *Ohimen v. Adjei* is often cited for the proposition that there are four ways a stool may acquire allodial title to land:

- conquest coupled with settlement,
- discovery coupled with settlement,
- gift to the stool, and
- purchase by the stool.[3]

2.) In *Ngmati v. Adestia* a stool aquired land because its subjects discovered and settled on the land.

[3] *Ohimen v. Adjei*, 2 W.A.L.R. 275, 279 (1957).

3.) *Ngmati* talks about boundaries between stool lands, saying that the boundaries between stool lands are the same as the boundaries of their respective subjects' farms.[4] It appears that this lends weight to the "no ownerless lands" principle referred to above, but Kluze cites this as a case where the principle was not applied.[5]

4.) The plaintiff in *Ngmati* won at the High Court, with Ollennu saying that "[a] plaintiff claiming in trespass is entitled to succeed even without a plan, if the oral evidence tentered by him leaves a clear picture of the identity of the land in dispute."[6] The Supreme Court, however, found that the boundaries of the land in question were too uncertain to allow a ruling. They set aside Ollennu's decision and remanded the case to the High Court for re–hearing.

Official surveys by the government are a pre–requisite to registration under the Land Title Registration Law,[7] but this law only covers a few urban areas. Boundary disputes over land which has not been officially surveyed are still common.[8] What kinds of evidence are strong enough to stand up in court, in the absence of a site plan created by a licensed surveyor?

3.2 Location of the Allodial Title

3.2.1 James Town (Alata) Stool and Another v. Sempe Stool and Another

[1989-90] GLR 393.

Supreme Court, Accra

31 July, 1990

Appeal against the decision of the Court of Apeal reversing the judgment of Acolatse J at the Divisional Court in an action for, inter alia, declaration of title to James Town stool land.

Amua–Sekyi JSC. The James Town stool has under it three quarters or sections, the occupant of the Alata stool is also the occupant of the James Town stool. The quarters of Alata, Akumajay and Sempe are individually and collectively under the Ga Mantse, and with the quarters of Abola, Asere, Gbese and Otublohum in Ussher Town constitute what is known as Ga-Mashi. The people of James Town lived under the shadow of the English who had entrenched

[4] *Ngmati v. Adestia*, [1959] G.L.R. 323, 325.
[5] *See* Kludze, *supra* note 3 at 132.
[6] *Ngmati v. Adetsia*, [1959] G.L.R. 323, 327.
[7] Land Title Registration Law, 1986 (P.N.D.C.L. 152) § 15.
[8] See Committee On Tenant/Settler Farmers, A Study Of Problems Of Landlords And Tenant/Settler Farmers In Sefwi-Wiawso And Juabeso-Bia Districts, Western Region (2000).

themselves in the James Fort, and those of Ussher Town attached themselves to the Dutch in Ussher Fort.

The claim of the Alata stool to paramountcy over those of Akumajay and Sempe was contested in *Ababio IV v Quartey* (1916) PC '74–'28, 40. In the trial cour, Ababio had obtained judgment against the defendants, who were subjects of Asere, in trespass over land at Oblogo. On appeal he was non-suited by the Full Court on the ground that his claim to represent all the three quarters of James Town was disputed by Akumajay and Sempe. On a further appeal to the Privy Council, the Full Court was directed to make any necessary amendment and deal with the real matter in controversy between the parties. The court comprising Smyly CJ, Watson and Porter JJ found that the claim of Ababio to be James Town Mantse had been established and affirmed the finding of trespass made against the defendants.

Oblogo lies just outside the land in dispute in this case; but Korle Gonno, Korle Bu, Odorkor, Sabon Zongo and Dansoman are within it. All these lands have been lumped together and given the broad name of Lartebiokorshie. They lie on the west of the Korle Lagoon and extend to the Sakumo Lagoon. They may safely be taken to be James Town stool lands; but the question is, to which of the three quarters do they actually belong?

The actions started as a contest between the Crabbe family of Alata and some subjects od Sempe in the Ga Native Court. The suits were transferred to the Divisional Court where the trial took place before Acolatse J with the Alata and Sempe stools as the real contesting parties. The result was the preditable one that Acolatse J found that each stool had proved that certain parts of the land were in their use and occupation. Doing the best he could be adjudged each stool to be the owner of the land so occupied.

Acolatse J delivered his judgment on 10 May 1963. by section 8(1)(*a*) of the Courts Act, 1960 (CA 9), the parties could appeal as of right to the then Supreme Court. The Crabbe family and the Alata stool lodged appeals against the judgment on 22 June and 6 August 1963 respectively. The defendants filed np cross-appeal, but five years later, on 23 April 1968, with the appeal still unheard, they gave notice under rule 16 (1) of the supreme Court [Court of Appeal] Rules, 1962 (LI 218) of their intention to contend at the hearing that the judgment be varied.

Before the appeal could be heard, number of important constitutional developments took place. First, the Supreme Court set up under CA 9 was abolished by paragraph 95 of the Court Decree, 1966 (NLCD 84). Under paragraph 1, a Court of Appeal replaced the Supreme Court as the highest court of the land. Then with the coming into force of a new Constitution on 23 August 1969, the Court of Appeal established by NLCD 84 was abolished and replaced by a Court of Appeal above which was a new Supreme Court. The appeal against the judgment of Acolatse J came before this Court of Appeal which on 13 July 1970 delivered a judgment dismissing the appeal of the Crabbe family and the Alata stool and varying the judgment in favour of the Sempe stool.

Although a further appeal lay to the Supreme Court under article 105 (1)(a) of the Constitution, 1969 the modalities for exercising that right were not finally

determined until the Supreme Court Rules, 1970 (CI 13) and the Courts Act, 1971 (Act 372) came into. Article 105 (1)(*a*) of the Constitution, 1969 provided as follows:

> "105. (1) An appeal shall lie from a judgment decree or order of the Court of Appeal to the Supreme Court,
>
> (a) as of right, in any civil cause or matter where the amount or value of the subject matter pf dispute is not less than such an amount as may be determined by Parliament . . . "

Act 372, s 3 (1) (*a*) also provided:

> "3. (1) An appeal shall lie from a judgment, decree or of the Court of Appeal to the Supreme Court—
>
> (a) as of right, in any civil cause or matter where the amount or value of the subject matter of the dispute or amount awarded or confirmed by the Court of Appeal is not less N¢10,000."

The accrual of the right of appeal was governed by 72 (1) of CI 12 which provided:

> "72. (1) Subject to the provision (2) of section 13 of Part IV of the First Schedule to the Constitution, and notwithstanding any other provisions of these Rules, the right of any person to bring an action in, or to appeal to, the Court in any cause or matter, civil or criminal, conferred by the Constitution or by any other law which has accrued at any time,
>
> (a) after the coming into force of the Constitution; and
> (b) before the coming into force of these Rules, shall be deemed, for the purpose of these Rules, to have accrued on the coming into force of these Rules."

Section 13 (2) of Part IV of the First Schedule to the Constitution, 1969 was inapplicable as it dealt with matter pending before the full bench of the defunct Court of Appeal. And as to the time within which the appeal may be brought rule 72 (2) of CI 13 provided:

> "(2) Pursuant to the provisions of the immediately preceding subrule the time within which any such person may bring an action in, or to appeal to the Court shall be calculated from the date of the coming into force of these Rules."

In *Hammond v Odoi* [1972] 2 GLR 459, CA, it was argued that the commencement date of CI 13 was 25 March 1971. the court rejected this and said the date was 16 March 1971. When the appeal came up for hearing in the Supreme Court: see *Hammond v Odoi* [1982-83] GLR 1215, SC Aseda SC expressed the opinion that the correct date was 25 March 1971. For our purposes, however, the point is academic as the Alata stool having lodged their appeal to the Supreme Court on 8 April 1971 were well within the three months laid down by rule 8 (1) of CI 13.

The appeal was pending before the Supreme Court of the Constitution, 1969 when that court was abolished by the Courts (Amendment) Decree, 1972 (NRCD 101). By section 3 (2) (d) of the Decree the appeal became pending as a review before a revived full bench of the Court of Appeal. As it happened, the review was not heard, and continued to gather dust in the registry until the full bench was again abolished and replaced by the present Supreme Court. By section 5 of the First Schedule to the Constitution, 1979 the review became pending as an appeal before this court.

Coming to the merits of the appeal, it will be observed that Acolatse J who tried the suit had no doubts whatsoever as to how title to land in Accra was to be proved. He said:

> "The claim by each stool must be proved as to which of the two stools has the predominance of its subjects on the land. The test to apply in this case is the principle enunciated in *Anege Akue v Mantse Kojo Ababio IV* by the Privy Council judgment No 101 of 1924 [(1927) '74–'28, 99]. It states that by the custom of the Ga tribe land which had exclusively used by the inhabitants of a particular quarter belonged exclusively to that quarter."

The court of Appeal by its judgment (see *Crabbe II v Quaye; Crabbe v Boye (Consolidated)*, Court of Appeal ,31 July 1970, unreported) refused to accept this and suggested that the proper yardstick by which to determine the rights of the parties was that of original acquisotopm, They said, per Apaloo JA(as he then was):

> "The learned trial judge apparently unable to determine which of the two contesting stools was allodial owner of the disputed land fell on the principle enunciated in *Anege Akue v Mantse Kojo Ababio IV* by the Privy Council 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.' The dispute in this case is not about quarter lands and it is impossible to say on the evidence that any particular portion of the land in dispute was exclusively used by any of the contesting stools or its subjects. The learned trial judge erroneously thinking this was the case, partitioned the land in a manner neither side sought to justify. It was complained on behalf of the co–plaintiff stool that the judge was wrong in adopting this test as it could only be restored to 'when there is doubt as to who

> originally was the owner of the land in dispute.' With this complaint counsel for the co–defendant stool agreed. We share the unanimity of counsel on this but as we have, unlike the learned trial judge, decided who was and is the original owner of the land in dispute this test ceases to have any relevance."

On the finding of fact that neither stool had shown that it was in exclusive possession of the whole land the Court of Appeal was in full agreement with the trial court. If therefore Acolatse J applied the proper test then the interference of the Court of Appeal with his judgment cannot be justified.

Before I deal with *Akue v Ababio IV* (1927) PC '74–'28, 99, I think I ought to consider three cases which were decided earlier in time. In *Solomon v Noye*, 25 May 1880, unreported, referred to in *Kwaku v Brown* (1913) Ren 683, the plaintiff was the James Town Mantse, and he sued on behalf of the three quarters. The dispure wass over land at Marko on the west of the Korle Lagoon. Even though the Akumajay Mantse gave evidence that the land belonged to the Asere quarter, judgment was given in favour of Solomon upon proof that Freeman, his grantee, had been in undisputed possession of the land for over twenty years.

In *Kwaku (Tetteh) v Brown (Kpakpo)* D Ct 25 April 1912, unreported, the Ga Mantse had, on behalf of the four quarters of Ussher Town as well as Akumajay and Sempe granted permission to Kwaku, an Abola subject, to build a house at Chorkor on the West of the Korle Lagoon. The Alata quarter of James Town objected and had the building razed to the ground. Dismissing an action for trespass brought by Kwaku against the Alata subjects, Griffith C J made this all–important pronouncement relative to the land law of the Ga people of Accra. He said:

> "At the present day the land on the land on the other side of the Korle Lagoon is dotted with farms belonging to the James Town people, most of the farms appearing to belong to Alata; no doubt many have been kmade quite lately but some of the Alatas have not only farmed on the land on the other side of Korle for years but with the consent of the Alata Mantse, have built houses thereon and they have not been in any way disturbed ...
>
> In a case of this sort I am not much concerned as to how this possession came about. Until comparatively recently all the land around and about Accra and the other towns was waste land; people dare not live outside towns in unprotected villages as they would have been in great danger of capture by marauding natives. Questions of the ownership of land were probably never raised unless some European wanted a piece of land whereon to build a fort or factory and as the forts and factories were always built close to some town there could have been rarely any question as to whom such land belonged. In the early days I doubt whether the Aseres would have claimed

> any land, except what was quiet close to their quarters, there was no need to claim any land, it was all common property ...
>
> Where there is so much doubt, so much uncertainty, so much indefiniteness and where land has until recently been practically of no value all that the court can do, what they ought to do is to accept accomplished facts, and, whatever may have been the state of things two hundred years recognized that James Town collectively owns land on other side of Korle."

He held that by their exclusive possession of the land for many years the three quarters of James Town had acquired title to the land and that the consent of the Alata Mantse was necessary for the grant made to Kwaku.

In *Hammond v Ababio IV* (1912) D & F ''11–' 16, 17, the Asere Mantse challenged a grant made by the Alata Mantse to the Hausa community of land at Sabon Zongo. The Asere Mantse had the support of the four quarters of Ussher Town as well as of Akumajay and Sempe in his claim that his stool was the original owner of the land. The suit came before Smyly CJ who declared that the traditional histories of the various stools of Accra were so inconsistent and afforded so little help that all he could do was. "to come to existing facts and see whether the plaintiff has made out such a title by occupation as distinct from the alleged historical title as would justify me in granting him a declaration of title to the land in dispute."

He held that by such an examination the plaintiff, Hammond, had failed to make out the title of the Asere stool to the land.

These three cases decided that ownership of land outside Ussher Town and James Town is to be determined, not by alleged historical title, but by proof that the land was in the use and occupation of the subjects of the quarters. What *Akue v Ababio IV* (supra) did was to put the matter beyond argument by placing the seal of the Privy Council on these pronouncements of the Divisional Court. It began as an inquiry into a claim by Sempe to compensation for land acquired at Weija (called Weshing at the time). It is known as the *Accra Water Works Enquiry* and although tried in the Divisional Court before Smyly CJ is reported in (1919) FC 64. The opposer was the Alata stool. At 90 Smyly CJ said:

> "I am forced to the conclusion that the Opposer has made out a clear case that the Weshiang lands and the land at Domiabra Amanfro and Afuamang were exclusively used and occupied by the Alatas, and in accordance with the Custom, as proved by the evidence, as to usage ansd custom of the Gas in James Town, namely that the land so used by a particular quarter belongs to that quarter. I give judgment for the Opposer."

On appeal to the Full Court *sub nom Mantse Anege Akue v Mantse Kojo Ababio IV*, Aitken Ag J deplored "the mass of worthless and obviously perjured evidence adduced before the court in this enquiry", adding "I for one am

determined to rely on accomplished facts where nearly everything else is lies." Michelin J and Gardiner/Smith Ag J expressed similar views and the appeal was dismissed. In the Privy Council, '74–'28, 99, the traditional history, in so far as it was undisputed, and the law were stated thus at 100-101:

> "According to a tradition which appears to 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 these 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 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 consent appears to have been mainly reference to the question of the exclusively 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."

The appeal was dismissed, and the law has stood thus ever since. The court of Appeal in the instant appeal gave two reasons for rejecting this time–honoured test. They are first, that it applies to quarter lands only; and, secondly, there is doubt as to which of the traditional histories is true. The first is clearly untenable because apart from a few family holdings all lands in Accra are quarter lands in the sense of being owned by one or other of the seven quarters rather than by the Ga State. As to the second, the Court of Appeal admitted that the traditional histories were irreconcilable. There was nothing new in this as the tradition of conquest by the Alatas and of original settlement by the other Ga quarters had been gone into and found wanting by the trial judge and by other judges in *Kwaku v Brown* (supra). *Hammond v Ababio IV* (supra) and *Akue v Ababio IV* (supra). The resulting position was summed up by Griffith CJ in *Kwaku v Brown* (supra) in these words:

> "The Aseres were the first occupiers of Accra therefore they were originally recognized as the owners of all the land round about Accra; then the Sempes and Akumajes separated themselves from the Aseres amongst who they had come to live with and located themselves on the other side of Korle Lagoon therefore they were recognized as the owners of certain lands at the other side of Korle which

> used up to that time, to be regarded as Asere land [this the plaintiff admits]: then the Sempes recrossed the lagoon and took up their quarters between the Aseres and the Korle Lagoon therefore they were recognized to be the owners of the contiguous lands which had up to that time belonged to Asere [this the plaintiff admits]: then the Alatas, Sempes and Akumajes united under British protection and, two centuries after the Alatas came, we find the Alata Mantse recognized as the Paramount Chief of James Town claiming holding and giving and permitting the farming and occupation of land on the other side of Korle."

In my view, it was wrong for the Court of Appeal to deal with the matter as though the question had never arisen before. The entire community of Ga–speaking people were immigrants who lived in the shadow of the Dutch, English and Danish forts and under their protection. It is no use pointing a finger at Wetse Kojo and his Alata followers as being foreigners who came here with nothing. The Asere, too brought nothing with them. Therefore, applying Ga custom to the conflicting claims of Alata and Sempe to ownership of all the landbetween the Korle and Sakumo Lagoons, the decision must be, as the trial judge and the Court of Appeal found, that neither stool had proved their case.

A considerable part of the argument before us was concerned with the plea of estopped. It was contended on behalf of the appellants that the Sempe stool were estopped by conduct and *per rem judicatam* from claiming title to the land. The first was pleaded in paragraph 4 of the reply of the Crabbe family and alleged that in *Hammond v Ababio IV* (supra) the Sempe stool had taken sides with the Asere stool. It was repeated in the pleading filed on behalf of the Alata stool. It appears that the Ga Mantse had convened a meeting of all his chiefs, except the Alata Mantse, at which it was agreed that the Asere stool should challenge the right of the Alata Mantse to to make a grant of part of Lartebiokorshie land to the Hausa community. The allegation is no doubt true, but I fail to see how Sempe can be estopped when the Alata stool defended the action as the representative of all the three quarters of James Town.

The second was not specifically pleaded, although in a document filed in the suit notice of intention to seek leave to amend so as to plead it was given. Whether the failure to seek leave was deliberate, as the Court of Appeal declared, or inadvertent, as counsel for the Alata stool suggested, is neither here nor there as the estopped raised would in any case have failed. In *Kwaku v Brown* (supra) the Alata subjects defended the suit in the right of all the three quarters of James Town. Then there is *Akue v Ababio IV* (supra) which adjudged the Alata stool to be entitled to compensation for the land acquired at Weija. However, as Weija is outside the land now in dispute, its bearing on these consolidated cases must be minimal; but it does prove wrong the the assertion by the Court of Appeal that the principles of Ga customary law enunciated therein apply only to quarter lands. Both Weija and Oblogo lie to the north of Lartebiorkoshie and are farther away from James Town. If the law applies in these far-away places then it does at Lartebiorkoshie which is nearer home.

The position of the Akumajays needs to be clarified. They claimed an interest in the land as subjects of the James Town stool. They also asserted that part of their land known as Opete Kpakpo was within the area in dispute. This land had been the subject of litigation between the Akumajay stool and the Abossey Okai family in the Divisional Court in 1945 when McCarthy J found in favour of the stool. That judgment was affirmed by the West African Court of Appeal and the Privy Council *sub nom Nii Abossey Okai II v Nii Ayikai II* (1950) 12 WACA 31 at 37. Surprisingly, the Akumajay stool did not apply to be joined in the present suit until rather late in the day when it could be said with justification that to permit them to do so would unduly delay the trial. Thus, they were compelled to stand by and watch the Alata and Sempe stools' contest for ownership of this large tract of land which included part of their own.

The decision of Acolatse J to parcel out the land between the contesting stools was severely criticized by the Court of Appeal which seemed to think that a finding as to ownership of the whole land ought to have been made in favour of one or the other stool. There was no reason why he should have done so. Both the claim and the counterclaim were for a declaration of title. Such a claim is not only to the whole land but also to every part of it. Therefore, if the court finds that each of the two contesting stools have proved their title to only part of the land it ought to say so and grant a declaration of title to that part. To dismiss the suit in its entirety would be to encourage multiplicity of suits as each stool would be obliged to issue a fresh writ in order to obtain title to the part found to belong to them in the first action. I would therefore allow each stool so much of the land in dispute as Acolatse J found in their favour. If the boundaries are uncertain they are at liberty to apply to the High Court for the appointment of a surveyor to demarcate the areas for them. It follows that the appeal succeeds and the judgment of the Court of Appeal dated 31 July 1970 is hereby set aside.

WUAKU JSC. I will preface my judgment with two quotations. The first is from the Privy Council's judgment delivered on 16 June 1927 in the case of *Akue v Ababio IV* (1927) '74–'28, 99 at 100. Akue is variously spelt as Akwei or Acquaye. The passage reads:

> "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 Alat 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 Quarter."

The other quotation is from the statement by the Crown Counsel, Mr. Coussey, on 16 March 1932 in *Re: Land Acquired for Services of Gold Coast Colony; Sempe Manche and others* [otherwise known as the *Tipping Depot Case*] tendered in the proceedings as exhibit M. In his opening statement he said:

> "The land subject matter of this acquisition has been acquired by Government from Manche Ababio IV of James Town through whom, they now claim. There are three quarters or stools in James Town, (a) the Alata stool, (b) the Sempe stool and (c) the Akumaji stool. Manche Ababio IV besides being the occupant of the Alata stool is also James Town Manche and Head of the three quarters or stools of James Town. This fact has been denied at various times by the Sempes and Akumjis but supported by judgments of this court and also by findings of the Commission of 1893 for Enquiring into Constitution of the Ga State."

It will be observed that the James Town Mantse has dual capacity. As James Town Mantse, he is the head chief of the three quarters, namely Sempe, Akumajay and Alata, and with regard to the Alata quarter, he is their Mantse and by the judgment in *Akue v Ababio IV* (supra) all property belonging to any of the three quarters is vested in him. My brother Amua–Sekyi JSC has delt more or less with the history of James Town, its lands and previous litigations concerning the same. In this judgment I prefer to use the nomenclature "James Town lands" because it was the one commonly used in almost all the previous proceedings. The Alata Mantse in his capacity as James Town Mantse had in various suits defended the title of James Town lands even though opposed by Akumajay and Sempe. Thus in about 1880 in the case of *Solomon v Noye*, 25 May 1880, unreported, the plaintiff claimed a piece of land called Makaw, as James Town stool land. So also in about 1912, in *Hammond v Ababio IV* (1912) D & F '110-'16, 17 the defendant, Mantse Ababio, defended the action as James Town Mantse in a dispute involving a piece of land being part of Lartebiokorshie land as land within James Town lands. In that case learned counsel for the defendant, Mr. Mannerman addressing the court for the defendants stated that the "Land in dispute forms a portion of land belonging to the Sempes, Akumajes and Alatas" and that the Alata Mantse was head chief or king. There is also the case of *Ababio IV v Quartey* (1916) PC '74–'28, 40, the action was one for trespass brought by Mantse Kojo Ababio, suing as Mantse of James Town lands. Even in the case of *Akue v Ababio IV* (supra) Ababio IV claimed the money representing the purchase money paid by the government for certain lands taken by the government for puplic purposes as Mantse of James Town and also as the Mantse of Alata and asserted that he, as Mantse of Alata, was solely entitled to the fund on behalf of the Alatas.

In the proceedings on appeal before us and for first time, the court was called upon to determine as between the Sempe stool and the Alata stool, which stool had acquired the allodial title title to the hitherto James Town lands. The main issues agreed for the trial were therefore these:

(1) Whether the said lands comprised in this consolidated action are James Town *Alata stool lands* or *Sempe stool lands.*

(2) If the said lands are James Town *Alata stool lands*, then whether or not the said stool has granted the said land to the parties claiming title to the lands through the *James Town Alata stool* or whether they are caretakers or licensees on the said lands.

(3) If the said land belongs to the *James Town Alata stool* then whether or not the conduct of the parties claiming through the *Sempe stool* and their grantees is tantamount to a defiance of the said stool's title in the said lands entitling their interest to be forfeited by the said stool.

(4) If the said lands belong to the *James Town Alata stool*, then whether or not the grants to the parties claiming through the Sempe stool are void."

(The emphasis is mine.)

At the end of the trial Acolatse J. dismissed the claims by the co–plaintiff and co–defendant stools for title and held that the claim by each stool must be proved as to which of the two stools has the predominance of its subjects on the land. The test to apply in that case was the principle enunciated in *Akue v Ababio IV* (supra) by the Privy Council. Thereafter the learned judge proceeded to give portions of the disputed land which was exclusively under the stools of Alata and Sempe to each stool. He gave judgment with costs for the defendants in suit numbers 22/48 and 25/48 and the plaintiff in suit number 30/53 with costs. The co–plaintiff and co–defendant were to bear their own consts.

The plaintiff, Nii Yaw Duade Crabbe III and the co–plaintiff, Nii Adja Kwao II, James Town Mantse, appealed against part of the judgment. The co–defendant, Nii tetteh Kpeshie II, Sempe Mantse, did not cross-appeal, but asked the judgment to be varied in his fovour. Several grounds of appeal were argued and in particular that the principles enunciated in *Akue v Ababio IV* (supra) did not apply and that that authority would apply only if there was doubt but not where there is evidence of origin of title. It was argued that the evidence of conquest was so clear that it settled the question who had acquired the allodidial title. In other words learned counsel had argued that it was wrong for the learned trial judge to have apportioned the land instead of granting absolute title to the co–plaintiff. Learned counsel for the co–defendant also argued that the co–plaintiff's claims to title based on conquest must fail if he failed to prove conquest and the claim of Sampe to title based on original settlement, if proved to succeed. He further stressed that "No apportionment should be made because no title should be given on title not sought."

It must be noted that learned counsel for the parties had agreed that the Court of Appeal should itself evaluate the evidence and to make its own findings. To crown it all, both the Alata and Sempe stools asked for leave to amend their respective claims to include the area of land claimed in their evidence but which was outside the original claim. The Court of Appeal acceded to the request.

The Court of Appeal dismissed the appeals by the co–plaintiff and the co–defendant and as argued by counsel for the parties, the judgment of the High Court was varied by deleting from the judgment such parts of it which apportioned various portions of the disputed land to the co–plaintiff and the co–defendant stools. The prayer for variation by the co–defendant was granted and also declaration of title to the area in dispute shown on the plan, exhibit D, and thereon edged green. Costs were also awarded in favour of the co–defendant against the co–plaintiff.

Against the Court of Appeal's judgment, only the co–plaintiff, Nii Adja Kwao II, James Town mantse, has appealed to this court. A great deal of industry was put in the preparation of the appeal by learned counsel for the appellant. Nonetheless, I think that the efforts of counsel are not rewarded as they might wish for, because of the view we have taken of the appeal.

The history of James Town shows clearly that three quarters constitute James Town, namely Akumajay, Alata and Sempe and that their "property" is vested in the James Town Mantse. See *Akue v Ababio IV* (supra). Each quarter can only claim ownership to an area which is in its exclusive possession. It will be wrong for any of the three stools to claim for itself the allodial title to all James Town lands. Upon that, l am also of the view that for the several reasons given above the appeal should be allowed.

The appeal succeeds not on the ground canvassed by the appellant. The co–defendant–respondent agreed with the appellant for the amendment in Court of Appeal for a claim by each side for a declaration of title which was refused by the High Court and also for setting aside of the apportionment which we rule was wrong and as we have restored the judgment of Acolatse J, I would award costs to neither party. Each party to bear his own costs. Any costs awarded in fovour of the co–defendant pursuant to the judgment of the Court of Appeal is to be refunded.

Because of the view taken of the appeal by us, I do not think that it is necessary to consider the many points raised in the appeal. I would however say that a party wishing to seek leave to amend in this court, should come by way of motion supported by an affidavit disclosing sufficient ground and the intended amendment should not be embodied in the party's statement and argued as if it has been granted before applying. The rules committee may have to consider this matter and give the proper direction.

FRANCOIS JSC. I agree with the two opinions read and have nothing useful to add.

OSEI–HWERE JSC. I agree.

AIKINS JSC. I also agree.

Appeal allowed.
L K A

3.2.2 Ameoda v. Pordier and Ameoda v. Forzi and Others (CONSOLIDATED)

[1967] GLR 479.

Court of Appeal

10 July, 1967

[481]

AZU CRABBE, APALOO AND AMISSAH JJ.A.

APPEAL from a decision of Ollennu J. in which he dismissed the appellant's action for an order for recovery of possession of a piece of land, an injunction and damages for trespass. The facts are fully set out in the judgment of Apaloo J .A.

APALOO J.A. This appeal is from the judgment of Ollennu J. (as he then was) delivered in the High Court, Accra, on 30 March 1962, reported in [1962] 1 G.LR. 200. That judgment dismissed two claims brought by the appellant's family against two individuals to recover two separate pieces of land claimed to belong to the appellant's family at Ningo. The actions were consolidated and were numbered as 145/60 and 8/61 respectively.

Although it is possible that there might have been differences between the families of the appellant and the respondents in the past, what appears to have triggered off the present litigation was the refusal of the respondents to give to the appellant's family a cow. It was said by the appellant that an agreement was entered into between their respective predecessors in title by which the respondents' predecessors agreed in consideration of being permitted to live and pasture cows on the lands in dispute to give one cow each to the appellant's family. It was said the predecessors of the respondents did not implement this agreement before their demise and this agreement was sought to be enforced against their successors the present respondents. The latter did not only deny the agreements and their liability thereunder, but claimed that such agreement could not have been made inasmuch as the lands at no time belonged to the appellant's family. The lands, they claimed, belonged to the: stool of Ningo whose subjects their predecessors were and they said they lived on the hind in virtue of their customary right as subjects of the stool. The appellant's family who claimed the lands as their ancestral property, replied to this by orally revoking the respondents' license to remain on the lands. They followed this with a formal solicitor's letter which confirmed the revocation of the licenses and requested the respondents to vacate the land within seven days or face court action for ejectment and damages. The respondents did not comply and the sequel to it was this action in which the appellant's family claimed against each of the respondents, recovery of possession, perpetual injunction and damages.

As the respondents set up jus tertii as a defence, namely, that the title to the lands was vested not in themselves but in the stool of Ningo, it was necessary for this entity to join the action and establish **[482]** this assertion which the appellant's family seriously disputed. This position was appreciated and some

time before the pleadings closed Nene Tei Doku Aguda III, the paramount chief of Ningo, applied to join the action. His avowed object for wishing to do so was to defend the interests of his stool and in paragraph (4) of his affidavit, he says, "That to the best of my knowledge and belief, all that piece of land including Akwaaba and Tekpanya as described on the writ of summons is all Ningo stool land." The application was acceded to and he was accordingly joined to establish his stool's title to the lands in dispute. The appellant joined issue with the stool of Ningo on their claim of ownership and averred in paragraph (2) of the statement of reply that, "the plaintiff emphatically denies that all lands at Ningo are stool or communal lands or both. Ningo lands are owned by various Ningo families and not by the Ningo stool."

Thus as far as the ownership of the lands was concerned, the contest was between the appellant's family and the Ningo stool. Accordingly the learned trial judge was invited to decide as the first' issue in the summons for directions the question, "Whether all Ningo lands are stool lands or Ningo lands are owned by various Ningo families?"

Accordingly, what began as a paltry claim for one cow became a serious land litigation between the appellant's family on one side and the stool of Ningo on the other. The question whether or not the respondents' predecessors agreed to give one cow each to the appellant's family as consideration for being permitted to live and pasture cows on the land or whether they were bound by custom to make such gift, became a secondary issue of relatively minor importance.

When the trial eventually opened, three members of the appellant's family related the tradition of how the whole of the land said to belong to the family came to be acquired. This was that the land was originally discovered by the appellant's ancestor by name Blebo Oketerchi Obunasem. This man was said to be a hunter and the appellant's tradition was that Obunasem killed the wild animals with which the land was then infested and built cottages on the land and generally reduced it into his possession. Evidence was then given of the devolution of this land from Obunasem for seven generations down to the present head of the family. The appellant's family also gave the boundaries of their land. This was before the trial reduced into a plan which was produced in evidence. The plan shows relics and farms of members of the appellant's family.

The appellant's family denied that the lands in dispute or indeed any land at Ningo belonged to the stool qua stool. According to he appellant, all the land is owned by the various quarters and **[483]** families the two words being used interchangeably. No fewer than six witnesses, almost all of them being holders of traditional office at Ningo, supported the appellant's evidence that the Ningo stool as such owned no land at Ningo and that the land is owned and has , always been owned by quarters and families. One of them by name Akwetey Kwaku who said his father was the linguist to the paramount chief of Ningo by name Nene Dzanma, swore that he had it by way of tradition from his father, that at one time, that mantse called all the asafoatsemei of the various quarters at Ningo to a meeting. At this meeting, it was said, the mantse requested the various quarters to place their lands under the stool but this request was declined. This evidence is supported by an annexure to a letter

which Mantse Dzanma of Ningo wrote to the Secretary for Native Affairs dated 17 October 1917 and produced from official sources. In the annexure to that letter (exhibit G2), the mantse sought government's approval for "laws" which he made for the benefit of Ningo. In paragraph (3) of those laws, the mantse sought to vest in himself title to "all lands on the back or round the town" and he was prepared to have them from the owners, as he put it, "whether for sale or lend." This evidence was obviously led to show that the mantse would not have sought permission to vest in his stool what, if the claim of the 'stool is well–founded, belonged to himself.

To clinch his case against the stool, the appellant also referred the court to pp. 29-31 of the report on *Land Tenure in Customary Law of the Non-Akan Areas of the Gold Coast Colony*, Part 1, Adangbe published in 1952 by R. J. H. Pogucki, then Assistant Commissioner of Lands. It would seem that this report was the result of a disinterested inquiry which Mr. Pogucki made into the land tenure of Adangbe areas. Ningo is one such area. The learned author found that in Adangbe areas, the stool qua stool owns no land nor exercises jurisdiction over land within its geographical area. This view, in so far as it relates to the ownership of lands in Ningo, was concurred in by John Jackson. The latter was, for a considerable time, a judge of the High Court of this country and until recently, a land boundary settlement commissioner. Mr. Jackson determined the boundaries of the lands of Shai, Ningo and Prampram and to do this, delved into the history of these people and their land tenure. In his "findings" which were published in the Gazette Extraordinary (No. 1) of 3 August 1956, and to which the learned judge was referred, Mr. Jackson concluded at p. 1053 that:

> "I can find no evidence to justify any finding that any proprietary interest in land, in respect of the land contained within the whole perimeter, as apart from any portion within it, is rested in any of the Shai, Prampram or Ningo Stools qua Stool." **[484]**

He however found, differing on this point from Pogucki, that these stools exercised jurisdiction over the land within its territorial limit. Thus, on the issue of title which was joined between the appellant and the stool of Ningo, the former led positive evidence that he, was the owner of the land and negative evidence that the Ningo stool was not and cannot have been the owner. Although the expressed object of Nene Aguda in joining the suit was to show that contrary to the appellant's claim, the proprietary interest in all land in Ningo and a fortiori the two pieces in dispute was vested in his stool, he led no evidence at all to show this. The result was that at the close of the case for both sides, all the evidence tendered on the very important issue of title was led by the appellant. Yet the learned trial judge felt able to conclude this issue in favour of the Ningo stool and arrived at the rather confident finding at p. 212 of the report that "All lands in Ningo are Ningo stool lands" and at p. 207 "that the land now in dispute is definitely part of Ningo stool land."

Having decided the issue of title adversely to the appellant's family, the judge proceeded to hold that the respondents were not on the land by the leave

and licence of the appellant's family but occupied the land by virtue of their inherent right as Ningo subjects to occupy vacant stool land. If the learned judge had accepted the case of the appellant and had decided that the lands on which the Akwaaba and Tekpanya villages are situated were the appellant's ancestral land, he would have been constrained to make a pronouncement on how the respondent's predecessors came to occupy the land. They must have entered into possession of these lands either because the owners alienated the lands to them by way of gift or sale or merely permitted them to live on the land. On the evidence in this case, the only legitimate finding could have been that the respondents' ancestors were let on the land by the leave and licence of the owners.

The learned trial judge also found against the custom propounded by the appellant, namely, that "if a licensor gives his land to a licensee for cattle grazing, the licensee should give the licensor a live cow as consideration." The judge similarly rejected the appellant's evidence that the respondent's ancestors agreed to give one cow to the appellant's family in consideration of their being permitted to live and pasture cows on the land. This latter finding is a necessary sequitur and follows from the judge's finding that the ancestors of the respondents came on the land in their own right and not with the permission of the appellant's family. But as I said, whether there is such a custom about giving of a cow to a licensor or whether the appellant's family were entitled to claim this as a **[485]** right they acquired ex contractu, mattered little in view of the substantial issue of title which was raised in this case. The appellant's rights to the reliefs which he sought in this action arose by reason of the fact that the respondents deny his title to the land and this act entitles him to eject them from the land and recover damages against them if he succeeded in proving that he was 'the owner of the land and that they occupied it with his permission. Thus, the substantial issue which the learned trial judge had to decide and which he was specifically invited to decide in this case is: Who owns the lands in dispute? Do they belong to the Ningo stool or to the appellant's family? The answers to these questions seem to me to be the open sesame for the determination of the other subsidiary issues which arise in this case.

As I said, the learned trial judge decided the issue of ownership in favour of the stool and following from that, decided all the other subsidiary issues against the appellant. It is the appellant's complaint in this court that the learned judge was wrong in deciding the question of ownership in favour of the stool and that that finding was against the weight of evidence. It is not possible in this case to weigh the appellant's evidence against the Ningo stool's for the very good reason that that stool produced no evidence to substantiate its alleged ownership. The result is that the evidence of ownership is all one way. That however does not oblige the judge to decide the issue of title in the appellant's favour because it was open to him to hold either that the evidence of title produced by the appellant failed to satisfy him, that is, the appellant did not discharge the onus of proving his title or that the stool's ownership was proved by the mouth of the appellant and other evidence led by him. To decide this case simply on the ground that the appellant's action must be dismissed because

he failed to discharge the onus of proof, would have been unsatisfactory since it would not have declared ownership in the stool and would still have left the issue of ownership in abeyance.

As the respondents against whom possession was sought themselves disclaimed any title to the land and asserted it in the stool, it was absolutely necessary to decide as between the appellant and the Ningo stool who is the owner of the land. The learned trial judge concluded the issue of title in favour of the Ningo stool apparently because he thought the evidence led by the appellant and his witnesses proved the stool's case. It is now necessary to consider whether he was right in so thinking.

After giving at p. 203 an unduly wide definition of what is stool land, i.e. "any land in respect of which an occupant of a stool is the proper person to conduct its extra-territorial affairs," the learned judge proceeded to state the four methods by which such land may **[486]** be acquired and for this purpose based himself on *Ohimen v. Adjei* (1957) 2 W.A.L.R. 275. Of the four methods listed by him, the one; which seems to me relevant and that which the judge apparently applied was "discovery of unoccupied land by hunters or pioneers of a stool and settlement thereon by the stool and its subjects." There is in fact no evidence that what is loosely called Ningo land was discovered by a hunter of any stool and that subjects of that stool thereafter settled on that land and thereby stamped it with the character of stool land. The judge seemed to have spelled that from some questions he addressed to the appellant and used his answers as justifying a conclusion that the Ningo land is stool land.

The judge asked the appellant a question to which the appellant replied that, "The Ningo state was founded by one Dzanma,"and that, "My father told me that the said Dzanma alone founded the state before all others came and joined him." The judge then proceeded to ask this pertinent question, "If Dzanma and his people were the founders of Ningo state to whom would the Ningo lands belong originally?" and to this the appellant replied, "The one who first came and settled on the land would own the land up to the boundary with a person from another place who settles on the land next to his." The answer to that question suggests that when the appellant said Dzanma founded the state of Ningo all he meant was that he was the first person to settle on the land which in course of time grew into the town of Ningo. A state, in ordinary language, is an organised political community with an organised government. Salmond defines it as "an association of human beings established for the attainment of certain ends by certain means." If the evidence in this case is any guide, Dzanma seemed to have settled on what is now known as Ningo about 300 years ago, and it seems to me somewhat unreal to talk about the founding of a Ningo state at that , time. That Ningo cannot have been anything approaching an organised political community until comparatively recently, is shown by the fact that in his letter of 17 October 19 17, to the Secretary for Native Affairs, Chief Dzanma of Ningo said he had been elected head chief of all Ningo only the previous month but that prior to that, the town of Ningo had no chief of its own but had been under "Manche Tackie of Accra and Noye Ababio of Christiansborg." I think therefore that the appellant stated the correct factual position when

he said in substance that Dzanma owned as much land as he was himself able to reduce into his possession and other settlers who came after him reduced adjoining areas into their occupation and acquired title to them independently of Dzanma.

The learned trial judge seemed to have put wholly disproportionate weight on evidence given by the appellant and his witnesses **[487]** that in olden days if the people of Ningo were attacked by an enemy, they would request assistance from the chief to repel the enemy, and in particular, he laid great stress on the fact that when there was , litigation between the subjects of Ningo and Ada about land called Wekumagbe, the former reported this dispute to the Mantse of Ningo. The judge thought it unreasonable that the' chief could have had a duty to protect the land without having a corresponding right to its beneficial enjoyment. But, for my part, I cannot see what is unreasonable about the chief who is said to be a "state umbrella" covering all the lands, marshalling' his subjects to defend land belonging to his subjects. But it cannot be supposed that the chief himself would be expected to fight to protect the land. This would ordinarily be done by his subjects, so that in the end, it is the subjects who fight to retain their land. In any event, I should have thought if the subjects owed a duty of allegiance to their stool, it is only reasonable to expect that they would have a correlative right to the protection of themselves and their property from the stool in time of danger. The fact that although the Ningo chief is admitted to be the "controller of all the Ningo lands" he has no beneficial interest in it qua chief, is shown by what happened when the dispute between the Ningos and Adas about Wekumagbe lands was brought to his notice. Hago Taffa testified that:

> "Yes the Adas are litigating with us over the Wekumagbe lands, they claim ownership of it. We reported the matter to the Ningo mantse. He said he does not enjoy anything from Kabiawe tribe, so we should deal with it ourselves. So we are carrying on the litigation ourselves."

The Ningo mantse was not put in the witness-box to deny this evidence.

In sustaining the stool's title to the lands in dispute, the learned trial judge specified certain acts as consistent only with the stool's ownership of the land and inconsistent with the appellant's family's title thereto. For instance, he referred to the evidence that when the government was about to acquire an unspecified part of the land in Ningo, the Ningo mantse made the grant. But this grant (exhibit 3) was, on the face of it, concurred in by almost all the asafoatsemei who were admitted to be the heads of the various quarters. It is difficult to see how it proves that all the land in Ningo belong to the mantse especially if the fact is borne in mind that the mantse himself hails from a quarter which is conceded to own land. The learned judge also pointed to what he described as "uncontradicted evidence" that it was the Ningo mantse who permitted the military authorities to establish a target range and military camp on portions of the land **[488]** in dispute. It is not suggested that any

compensation was paid to and appropriated by the mantse for this nor is there evidence that the appellant knew that the mantse granted permission to the military , authorities to make use of the land. The appellant admitted that "there is a military target range on portion of the land" but he explained that, "I do not know that it was the Ningo mantse who gave that portion to the government. I am surprised to hear that". Nobody was put in the witness-box to contradict that. Yet the learned judge held, to quote his own words at p. 206, "No one ever disputed the right of the mantse to make those grants." It is not clear to me how the appellant could be expected to dispute the granting of permission about which he was unaware. In my opinion, none of these equivocal acts shows that all the land in Ningo belong to the stool. I think the contrary evidence is weighty and impressive.

The elders of Ningo some time in 1958 had cause to desire the, destoolment of the Ningo Mantse Nene Aguda III. Accordingly, on 17 June of that year, they preferred destoolment charges against him. One of the signatories to the charges was Blerbo Oketerchi who is an asafoatse from the appellant's family. The first of the eight destoolment charges alleges, in substance, that Nene Aguda, as trustee of Ningo stool lands in breach of trust, signed a certain document in which he transferred a portion of Ningo stool land to the stool of Prampram. The learned trial judge held at p. 207 that, "That document is an unqualified admission that the lands at Ningo are Ningo stool lands." The learned judge did not give any reason why he thought the document an unqualified admission against interest. One can only surmise that he took this view because the Ningo land was referred to in the document as "Ningo stool lands." The document on the face of it, shows that it was prepared by a letter-writer and was merely marked by Oketerchi. Mr. Pogucki recorded in his report that although the conception of stool land, strictu sensu, is unknown in the Adangbe area, that term is sometimes used as a colloquial expression. It seems to me that that was the sense in which the word "Ningo stool lands" was used in the destoolment charges. In my opinion, it would not be right to hold that an illiterate was liable to lose his ancestral property because a letter writer whom he commissioned to write for him used a colloquial expression whose legal purport such illiterate neither understands nor appreciates. I do not think that the words "stool land" used in the destoolment charges can properly be regarded as an admission against interest binding on the appellant's family and on this score, I find myself in respectful disagreement with the learned trial judge.

What, to my mind, can properly be regarded as an admission against interest binding on the Ningo stool, is the letter of 17 October [**489**] 1917, written by the then occupant of the Ningo stool to the Secretary, for Native Affairs. In the annexure to that letter, the chief of Ningo sought government's assistance to approve a law. which he made for the benefit and good government of Ningo so that" All lands on the back or round the town must be given out to the head chief by the owners (whether for sale or lend) . . . " It cannot be supposed that the first head chief of Ningo was unaware that all Ningo lands belong to himself qua chief. Yet he was seeking authority to take from the owners land which by his description must be vacant land. It seems to me to offend against

reason for a chief to wish to buy or lend from others what belongs to himself. Common sense strongly suggests that the chief of Ningo wrote in that manner, because he well knew that those lands belong to persons other than his stool. A letter written in that manner and in those circumstances, must, to my way of thinking, be an admission against interest. Yet the learned judge held at p. 207 that that document "is not an admission against the interest of the stool," and proceeded to explain away the object and purport of that document by an argument which begs the question. The judge said that to contend that that document was an admission against interest "shows misconception of the customary law with respect to the rights of a subject in stool land." The judge then proceeded by reference to decided cases to state such rights. But whether the lands are stool lands or not was the issue in controversy and to proceed to explain away the document by an argument which assumes that the lands are in fact stool lands would seem to me to beg the question. The learned judge also took it upon himself to explain why Nene Dzanma wrote such a letter well knowing that the land was stool land. I should have thought that the best person to make such an explanation was the present occupant of the Ningo stool who by his own choice was joined to this action. The Ningo mantse elected to offer no explanation about this document presumably because he thought it inexplicable. In my opinion, that unexplained letter is an admission against the interest of the Ningo stool and the learned judge's contrary conclusion is unsound.

As pointed out earlier, Messrs Pogucki and Jackson each in turn made a study of the land tenure ,of Adangbe areas and both were ad idem in thinking that the stool qua stool has no proprietary interest in the land within its territory in these areas. It is the same fact that a succession of witnesses of standing in Ningo asserted before the learned trial judge. Like the oral testimony of the witnesses, the learned judge rejected the opinions of these two gentlemen. With regard to Mr. Pogucki, the judge made a veiled criticism of him because he did not disclose the sources of his information but, in the end, the judge thought he must have been misled by a system of **[490]** land dealing prevalent in some parts of Shai and Manya Krobo, called Huzu. The judge did not say in what respect Pogucki erred in the view he formed of the land tenure. It is not suggested that the re- port was in any other way inaccurate and it must be obvious that Mr. Pogucki would in the course of his research, seek information from knowledgeable persons in the locality. At the time when he made his 'inquiries, there was apparently no dispute and there was no reason why the persons who supplied him with information would wish to say anything other than the truth. I think information gathered by a dispassionate inquirer and reproduced by him into an objective report such as the one produced by Pogucki is more likely to be accurate than inaccurate. In my opinion, the learned judge gave no valid reason for thinking that Mr. Pogucki's view of the land tenure was inaccurate.

With regard to Mr. Jackson's opinion of the land tenure, the judge thought it was so subsequently qualified as to be practically valueless. The judge quoted a long passage from Jackson's findings of what he considered to be the qualification

of his expressed opinion, and said no more about it. With respect, Mr. Jackson did not in fact qualify his view on this matter. Jackson said at an early stage of the inquiry that as "a general rule an Adangbe stool possesses no proprietary interest in its lands." It is the same view that he expressed at the tail-end of his "Findings." What the judge thought was a qualification was in fact Mr. Jackson's view that although the stool qua stool owns no land in Adangbe areas, the stools possess in varying degrees an inherent right to their management and control. That is what Mr. Jackson defined as jurisdictional as opposed to proprietary interest. It is in fact on this point that the view of Pogucki and Jackson diverged. I think the learned trial judge was in error when he thought Mr. Jackson qualified his opinion of the land tenure in Adangbe areas. The result is that both Pogucki and Jackson independently put the weight of their somewhat authoritative opinions behind the appellant and his witnesses who testified that the Ningo stool as such owned no land at Ningo. I think I must therefore concur in the contention of counsel for the appellant that the, learned judge was wrong in holding "that all lands in Ningo are' Ningo stool lands." Indeed counsel for the respondents who for a while argued in support of the judge's finding on this score, in the end, abandoned this argument and frankly conceded that he thought, on reflection', that the learned judge's finding in this respect was wrong.

If the lands in dispute do not and cannot belong to the stool of Ningo to whom do they belong? They cannot be without an owner since it is a principle of customary law that every inch of land in this **[491]** country is owned by a stool, tribe, family or individual. The appellant's family claim that it is the owner of these lands by original settlement. They gave evidence not only of their root of title but the devolution of that land for seven 'generations. The plan which was made pursuant to the order of the court shows that all the acts of ownership performed on this land were made by the appellant's family. There is also reliable evidence that on at least one occasion, they ejected one Tetteh Yumu who trespassed on a portion of the land and was working on it with a caterpillar. A witness by name Tei Nartey Bosobuahene testified to having a common boundary with the appellant's family on the land in dispute and such boundary is shown on the plan (exhibit E). Another witness called Dumah, swore that he owned a cattle kraal on a portion of the land in dispute and his father obtained the land from the appellant's family to make the kraal. That area is called Hanyawayo and appears on the plan. In my opinion, the evidence of title produced by the appellant's family, is as good as 'evidence of title can be. The respondents for their part, admit want of title in themselves to the lands on which the villages of Akwaaba and Tekpanya lie. I think, in these circumstances, the learned judge ought to have adjudged the appellant's family the owner of the land shown in the plan (exhibit E) and edged yellow and in particular, the two pieces in dispute. I do so adjudge them and accordingly answer the first question settled in the summons for directions as follows: The lands in Ningo are not stool lands but are owned by families or quarters and that the lands in dispute belong to the appellant's family.

If that is a right conclusion to reach on the evidence, the question which falls to be answered is : How do the respondents come to be on the appellant's family land? On this, the evidence seems extremely straightforward. With regard to the Akwaaba land, it was deposed that the appellant's ancestor by name Adame permitted Pordier to live on the land and rear cattle. He remained on the land for that purpose for many years and died recently. He at no time disputed the appellant's family's title. His son Nartey Pordier has since his father's death stepped into his shoes and like his father before him, has been rearing cattle on the Akwaaba land until events which gave rise to this litigation.

According to the evidence, the respondent Kudayi Forzi came to live on the Tekpanya land in similar circumstances. His father Forzi was said to have come from Akwiem where he was alleged to have been responsible for causing the death of many persons by juju. He was then said to have been expelled from Akwiem. He therefore came to Ningo and was permitted by the appellant's ancestor by name Gaga Galo to live on the Tekpanya land and rear **[492]** cattle. This he did until his death some years ago. Not only did the ' Forzis not question the appellant's title to the land, but there is evidence that the respondent Kudayi Forzi expressly acknowledged' it. Evidence was given that about five years before the action, one, ' Yumu trespassed at a place just north of Tekpanya and while he was in the course of clearing it with a caterpillar, Kudayi Forzi sent his nephew by name Kweitey Kofi to apprise the appellant of the trespass. The appellant reacted promptly by restraining the trespasser with a customary oath and when he persisted in the trespass caused him to be prosecuted.

By virtue of the permission which was granted to the respondents' predecessors, the latter and after them, their successors, were entitled to live on the Akwaaba and Tekpanya lands as long as they continued to acknowledge the title of the appellant's family. Should they at any time dispute it, the appellant's family will be within their customary rights to revoke their licences and eject them. In the event of their continuing to remain on the land after the revocation of their licences, they would become, in the eyes of customary law, trespassers, and would be liable in damages at the suit of the apell-nlant's [sic] family: see *Kuma v. Kuma* (1936) 5 W.A.C.A. 4. On the undisputed evidence, the respondents denied the title of the appellant's family to the lands in dispute and asserted it in the Ningo stool and as events show, unsuccessfully. They thus obliged the appellant's family to launch expensive litigation to establish their title. The appellant's family were therefore entitled to revoke their licences and request them to vacate the lands. On the unchallenged evidence they did so but the respondents refused to leave. The appellant's family are therefore entitled, as against them, not only to an order for recovery of possession, but an injunction must also go to restrain them after giving up possession from trespassing on these lands. They are also entitled against them both to damages for trespass. Accordingly, in my judgment, the appellant's family were entitled to the remedy which they sought and the learned trial judge was wrong in denying it to them.

As the respondents were admitted to have been on the land for many years and own property there, I think they should be given a reasonable time to vacate

the lands and remove their possessions therefrom. Time will also, I think, enable them to enter, if they so wish, into agreement with the appellant's family as to any terms on which they might be permitted to continue to remain on the lands in dispute. For this reason, I would stay execution in respect of the orders of possession and injunction for a period of six weeks from the date of this judgment. [**493**]

Accordingly, I would allow the appeal and set aside the judgment appealed from. In lieu of it, I would, in suit L145/60, make against ,Nartey Pordier, an order for recovery of possession of all that piece of land known as Akwaaba land and more fully described in the , schedule to the writ. I would also make, as prayed, an order of perpetual injunction restraining the said Nartey Pordier, his agents, servants and assigns from pasturing cows on the said Akwaaba land or in any manner dealing with that land. I would award against the said Pordier £G100 damages for trespass.

In suit No. L8/61, I would make similar orders against Kudayi Forzi and Mauna Forzi in respect of the Tekpanya land and would , award against them damages of a like amount. In both suits, I would grant a stay of execution in respect of the orders for possession and injunction for a period of six weeks from this day.

The appellant's family are entitled against both respondents as well as the Ningo stool, to their costs in the High Court. These are considerable. Using the costs awarded to the respondents in that court as a guide, I would order that the appellant's family recover from both respondents and Nene Tei Aguda III, costs assessed at G800 or N1,600. They will also have their costs in this court.
Azu Crabbe J.A. I agree, and I have nothing to add to the full and well-reasoned judgment of my brother Apaloo. I would also allow the appeal for the same reasons given by him.
Amissah J.A. I agree that this appeal should be allowed. The issues, the law and the evidence have been dealt with by my brother Apaloo with his usual clarity and in language I can hardly hope to equal. However, there is one observation I would like to add. I make it with some hesitation as the learned trial judge is recognised as an authority on this particular branch of the law. I think the learned trial judge was influenced to a considerable extent In his final conclusion by a definition of stool lands which he formulated for his guidance: see [1962] 1 G.L.R.200 at p. 203. To me that definition appears too wide for the purposes of the case he had before him. It took the following form:

> "Now what in customary law is meant by 'stool land'? By stool land we mean, land owned by a community, the head of which occupies a stool, such that in the olden days of tribal wars the said head of the community carried the ultimate responsibility of mobilising the community to fight to save it, and in modern days to raise money from the subjects to litigate the community's title to the land. We may put it in another [**494**] form, any land in respect of which an occupant of a stool is the proper person to conduct its extra-territorial affairs is ,stool land. The occupant of the stool may not be

> the appropriate internal administrative authority, e.g., the stool may not be the appropriate authority to make direct grants of portions of the ' land to subjects, that right may be vested in a subordinate authority, e.g., a sub-stool, quarter, a village councilor in a family; but so long as the extra-territorial relations, e.g., settlement of the boundaries of any particular land with land occupied by adjoining states or communities vests in the occupant of the stool, i.e. in the community generally and not in section of it, that land is stool land."

The first sentence in answer to the question posed by this passage need not raise any eyebrows in a case involving land ownership. But from then on the language used is the language of international relations. It is suggested that if the stool occupant bas the responsibility for conducting the extra-territorial affairs in relation to land then the land is stool land. This may be 'so if the expression stool land is used in a loose sense denoting land under the jurisdiction of a particular stool. For land subject to a stool for the purposes of the conduct of extra-territorial affairs must at least be under the jurisdiction of that stool. But that is totally different from saying that the lands in question are stool lands in the other and more limited sense, namely, that the stool has proprietary rights in those lands. Jurisdictional interest of a stool in land may also carry with it a proprietary interest in the same land. But this cannot be an invariable consequence. This fact appears to have been partially recognised in that part of the definition where the learned judge said that although the stool may be responsible for the conduct of the extra-territorial affairs of the land, it may not be the appropriate authority to make direct grants of portions of the land to subjects; that right being sometimes vested in a subordinate authority,e.g. a sub-stool, a quarter, a village council or a family. A normal incident of ownership is the right to make a grant of the property. When that right is vested in one body, and a subordinate body at that, while ownership is said 1O vest in another, doubts must naturally be cast on the nature of the title of the latter. The right to conduct the extra-territorial affairs of a state (or traditional area) must depend more on the establishment of the fact of complete political control coupled with recognition of this fact by other states with whom relations are entered than on the ownership of the land within the state.

The evidence before the learned trial judge was that the lands in Ningo were not owned by the stool. As has been pointed out in the **[495]** judgment of my brother Apaloo this evidence was supported by the independent investigations of two distinguished jurists made long , before the instant dispute arose. Nor is it a peculiarity of the Ningo Traditional Area (as the states are now called) that bodies other than the stool own the land. Messrs. Jackson and Pogucki had found that the Adangbe Traditional Areas generally ,conform to that pattern. And apparently other non-Akan areas of Ghana also have this system whereby ownership of land is divorced from the jurisdictional interest of the stool over the land.

In Dr. Kwamena Bentsi-Enchill's *Ghana Land Law*, pp. 13-14 appear these passages:

> "To the question, 'Who is the allodial owner of the land?' the answer varied and still varies from state to state and probably depends largely on how each state came to be formed. Most of the principal peoples now occupying the territory of Ghana-or their significant governing elements-migrated into the country between the fourteenth and seventeenth centuries. Some settled in areas where they had to conquer previous settlers; others, especially in the forest belt, appear to have found largely , unoccupied areas. The process of state-building seems to have been activated primarily by the needs of self-defence, as the story of the overthrow of successive hegemonies seems to show. And it could be that lands acquired through the organised effort of an already existing state tended to be regarded as the. property of the whole state community, whereas in case of a state formed by coming together of land-owning communities, the ownership of the land was regarded as remaining with the constituent units."

The learned author continued at p. 14:

> "Thus we find that in some states, such as Akyem Abuakwa and each of the constituent states of the Ashanti Confederacy, the fundamental answer to the question who is the owner of the land is that the land in effect belongs to the state or to the whole community, i.e., that the ownership of the land is vested in the state. This answer might be expressed in a variety of ways, such as, for example, that the land is attached to the paramount stool, or that it is the property of the whole 'oman', or of the 'omanhene', or even of the ancestors of the particular community. However expressed, the basic principle in such areas is that allodial title to land within such a state can be transferred only by the Ohene or omanhene of the state, acting with the consent and concurrence of his principal elders and councilors, i.e., by the 'management committee' of the said stare." **[495]**

Then at p. 16 the author describes the other type of land .ownership in this manner:

> "In most other states of Ghana, there is no such basic notion .of what has been called 'state ownership' above. The principal owners of land-absolute or allodial owners thereof-are clans or extended families, or village communities, i.e., communities or groups smaller than the whole state which have the competence to transfer allodial title through their 'management committees' without reference to any overlord. To be sure, these clans, or extended families, or village communities, as members of a particular state, owe allegiance to the governing authority of the state and are subject to its jurisdiction. And jurisdiction is exercised in ways which have profound

> effects on title, such as (in modern times) legislation concerning forest reserves, town and country planning, conditions of alienation, protection of tenants, and compulsory acquisition; or (in ancient' times) prohibitions as to farming on certain days, the .obligation far military service and contributions in time of war, rights concerning treasure trove and animals killed by hunting. As a result, the distinction between the obligations of allegiance and proprietary rights can become blurred. Nevertheless the title of such families to their land are regarded as independent and allodial."

These passages draw well the distinction between states or traditional areas where the land is owned by the stool and those where it is not. And the learned author throws his weight on this point in support of Messrs. Jackson and Pogucki, who in turn support the plaintiff's case. Where the land is not owned by the states the distinction is equally clearly drawn between the jurisdictional interest of the stool and the proprietary rights of the smaller land-awning communities. That these distinctions exist is, in my view, beyond question. I therefore think that a definition of stool land adopted and applied in a suit involving land ownership which denies the existence of these distinctions, as indeed the definition formulated by the learned judge does, and which practically makes every piece of land aver which a stool exercises jurisdiction, land awned by the stool, must be wrong. Speaking for myself, I find it difficult to accept that the entitlement of a stool to settle the boundaries of any particular land with land occupied by an adjoining state, makes the land whose boundaries are settled stool land. The disputing stools may be doing no mare than settling the areas of their jurisdiction. But the definition makes the right to settle this question the hallmark of ownership by thestool [sic]. **[497]**

An example .of how this definition was applied to the prejudice of the plaintiff in this case may be found in the learned judge's treatment of the destoolment charges which were brought in 1958 against the occupant of the Ningo stool, Nene Tei Aguda III. It will be recalled that one of the signatories to the charges was the asafoatse of the plaintiff's family. After quoting at p. 207 the first charge, which is as follows:

> "That he as Manche (Paramount Chief of Great Ninga and Priest (Wono)), of the State Deity Djangey (Fetish), occupant of the Great Ningo State Stool and a Trustee of Ningo Stool lands therefore charged with the Dual Office and duties of a paramount chief's administration (Manche), and Priest of Fetish Djangey did agree and signed a certain Document with the State of Prampram transferring part or portion of the Ningo Stool land to the Stool .of Prampram and by virtue of the said Document, part or portion of Ningo Stool ,land has been released or added to that of the stool land of Prampram without the knowledge and consent of the Elders and people .of Great Ningo contrary to the oath of fidelity sworn to the State at the time of his installation, that he will never do anything involv-

> ing the State without the knowledge and consent of the Elders and people of the State,"

the learned judge went on to say: "That document is an unqualified admission that the lands at Ningo are Ningo stool lands." I am afraid I differ from this view. The charge can only be regarded in that light if the alleged transaction between the stools of Ningo and Prampram transferred not only jurisdiction over the piece of land referred to but proprietary interest as well. Incidentally, the stool of Prampram, like the stool of Ningo, is one of the stools which both Messrs.Jackson and Pogucki found owned no land qua stools. The charge is, at best, an equivocal statement of the nature of the transaction. The chief is said to have acted ,"as Manche (Paramount Chief of Great Ninga and Priest (Wono)) of the State Deity Djangey (Fetish), .occupant of the Great Ningo State Stool and a Trustee of Ningo Stool lands therefore charged with the Dual Office and duties of a Paramount Chief's administration (Manche), and Priest of ' Fetish Djangey." Was the chief supposed to have transferred the land as trustee or in exercise of his duties "of a paramount chief's administration" ? The passage is not clear on the point. And even if as trustee, is the word here being used in the strict English sense? I am unable to accept this as an unqualified admission that the proprietary as distinct from the jurisdictional interest in the lands vested in the stool. And in so far as the view the learned judge took **[498]** of this charge contributed to his conclusion that the land in dispute is Ningo Stool land, that conclusion must to that extent, be vitiated.

However, as I began by saying, my brother Apaloo has given a, comprehensive review of the reasons why this appeal must be allowed and in those, I concur.

Appeal allowed.
D. R. K. S.

3.3 Alienation of Allodial Title

3.3.1 Golightly v. Ashirifi

[1961] 1 G.L.R. 28.

Judicial Committee of the Privy Council

19 December, 1960

APPEAL (No. 31 of 1958) from the judgment of the west Africa Court of Appeal (Foster–Sutton P., Smith C.J. (Nigeria) and coussey J.A.) reported at (1955) 14 W.A.C.A. 676. The actions under appeal formed part of 25 consolidated actions, the first of which was commenced early in 1940 and the last on the 27th July, 1950. They were tried before Jacson J., and judgment was given on the 31st May, 1951. In sixteen out of the 25 actions appeals were taken to the West African court of appeal which on the 4th March, 1955, affirmed the

decision of Jacson J. on all issues. In the sixteen actions appeals were taken to the Privy Council. The actions dealt with in this appeal were suits Nos. 11 and 15 of 1943, 2 and 7 of 1944, 5 of 1949, 39 and 46 of 1950 and 7 of 1951. This report is concerned only with suit No. 15 of 1943. The facts are sufficiently set out in the judgment of the Privy Council.

S. P. Khambatta, Q. C., John Platt–Mills, Miss Rosina Hare and *J. W. McDonald* (for *Mr. Platt–Mills* on the 15th November, 1960)for the appellants.

Dingle Foot, Q. C., J. G. Le Quesne and *John Baker* for the respondents.

LORD DENNING deliverd the judgment of their Lordships. [*He set out the history of the Korle people and of the previous litigation. His Lordship then dealt with suits Nos. 11 of 1943, 7 of 1944, 5 of 1949, 29 of 1950, 2 of 1944, 46 of 1950 and 7 of 1951. In each case the decision of the trial judge and the West African Court of appeal was affirmed. His Lordship continued*:] *Suit No.* 15 *of* 1943: A family named Okaikor Churu had been in possession of land at Kokomlemle 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, £G100 damages for trespass and an injunction. Later on the Korle priest was apparently joined as co–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 authorizing this building of a house [described] the nature of the trespass was one which has destroyed the character of theland as farming land and was persisted in despite protest . . . I assess the general damages at £G100.
>
> "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 Lordship 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 woudl 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 not been taken to 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 stool had applied to come in as parties and had been refused. Whereas in the 25 consolidated suit the Korle priest no longer claimed to be the absolute owner. He sued and was sued as the "Korle priest for and 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 Mantse 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 proceedings he claimed on behalf of the Korle family or 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 plead 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 acre 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*[9]. 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.*[10] 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 transctions, 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.

[9](1930) 1 W.A.C.A.ṡ87
[10](1916) P.C. '74-'28, 43

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 dept. The West African Court of Appeal, as their Lordships think rightly, disagreed with him in this: but 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.

3.3.2 Ghassoub and Ghassoub v. Sasraku [1961] GLR 496.

Judicial Committee of the Privy Council

24 July 1961

Lord Denning, Lord Morris of Borth-y-Gest and the Rt. Hon. Mr. L. M. D. de Silva

Appeal (N. 38 of 1960) from a judgment of the Court of Appeal (van Lare, Ag. C.J., Granville Sharp, J. A. Ollenu, J.) delivered on the 12th January, 959, (reported *sub nom. Sasraku v. David* at [1959] G.L.R.7) affirming the judgment of Sarkodee–Adoo, J. in the Land Court, Kumasi delivered on the 17th December, 1957 in an action for *inter alia*, declaration of title to land.

W. Jayawardena and *Miss D. Phillips* for the appellants.
H. V. A. Franklin and *T. O. Kellock* for the defendant.

Lord Morris of Borth–y–Gest delivered the judgment of their Lordships. 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 (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 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 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 Omahene of Kokofu was Nana Kofi Adu. But in the year 1951 he was destooled for selling lands. His successor, who was enstooled the same year,

was Nana Osei Assibey II. He gave evidence at the trial and said that at his enstoolment 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 out right sale gula. 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 the (the plaintiff family company) had kept the boundaries of their land cut. He saw a young man with an axc cutting a mahogany tree. Enquiries 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 right 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 Kokofu State, on the 30th October, 1953. By that the Sawmill Company were to be entitled upon stipulated terms to cut down certain prescribed numbers of trees of defined species during the said period. The trees could be felled within the areas of Chempaw lands. That an area of approximately forty square miles which included the lands (approximately eight square miles in area) which the plaintiff family company claimed that the have acquired in or about a year 1925. Not unnaturally the plaintiff family company through their head and representative brought proceedings to the protest what they alleged was their rights. They claimed an injunction to prevent the Sawmill Company from trespassing in their lands. The Sawmill Company were not in a position either to admit or to deny that the plaintiff family has acquire the land which they claimed but 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 the 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 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 provisions of the Concessions ordinance. (Mr. Franklin now submits that the Concessions Ordinance[11] did not apply and was not in force in Ashanti at the relevant time and go further submits that the relevant Ashanti Ordinance[12] should not be so constructed 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 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 stool land has ever 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) the 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 that 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 collaborate 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 been paid any tribute or rent and that though during the years after his entoolment 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–Addo, J. He considered that the evidence overwhelmingly supported the con-

[11] Cap. 136 (1951 Rev.)
[12] Laws of Ashanti (1928 Rev.) Vol. 1

tention that land 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–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 right in regard to the and subject to a revision of the order for costs, dismissed the appeal. Summarizing the main issues Granville Sharp, J.A. said in his judgment:

> "It could not to questioned on the evidence that the three purported sales relied upon by the plaintiff had in fact taken place and it was seriously disputed that guaha had been performed on each occasion. The evidence upon these matters was alienable by sale and if so, whether the sales here on question were carried out without the knowledge and consent of the co–defendant the paramount stool over the vendor stool, the Chempaw."[13]

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 guaha were not proved, (b) that 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 this 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 fact 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 intervention 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 that at the date of the objection raised by the later occupant of the stool, been occupied by the plaintiff family company

[13] [1959] G.L.R. 7 at pp. 10-11

> 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 latches 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 most general terms and would seem to grant them *carte blanche* to wander over the whole length and breath of the Kokofu stool lands and fell wherever they encountered fellable timber, this to the extent of thousands of trees."[14]

The Court of Appeal appear have to 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 referred.

Before their Lordships' Board it was recognized by the appellants that both the Land Court and the Court of Appeal had decided that land in Kumasi 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 advance 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 he Judgments contained neither mentioned 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 either. He was the more content because he sought in turn to contend that the declaration of the title pronounced in his clients favour ought not to bear the limitations referred to in the judgment of Granville Sharp, J.A. in 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 it would be appropriate at this stage of the litigation to embark upon new enquiries or to deal with issues now previously

[14] *ibid* at pp. 14-15

advanced and in regarded 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 approved 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 violable but not void and he contended that they had not been voided. He further contended that in any 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 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 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 had kept the boundaries of the land cut. They had kept boundary mark clear. They had not paid any tribute. They had not paid any 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 Chempaw had collaborated in selling lands. By reason of these various circumstances it was reasonable and permissible for the court to interfere and to arrive at the conclusion that have had been knowledge in the 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.

3.3.3 Aidoo v. Adjei and Others

[1976] 1 GLR 431.

Court of Appeal, Accra

24 February, 1976

APPEAL from a circuit court judgment in an action for inter alia declaration of title to land. The facts are fully set out in the judgment of Apaloo J.A.

APALOO J.A. The dispute in this case relates to a piece of land at Jukwa measuring 200 ft. by 150 ft. and abutting the Cape Coast–Jukwa road. It contains what was described in the site plan as a " residence" and two zinc

sheds. By a conveyance dated 12 October 1960, and made between the Central Property Co., Ltd. Then in liquidation and acting by a Mr. Frederick William Wilson therein described as the liquidator and J. J. Aidoo, the appellant, this plot together with the structures on it were conveyed to the latter "for an estate in possession free from incumbrances Unto and To the use of the Purchaser his heirs, successors according to native law personal representatives and assigns for ever." The evidence shows that before the sale to the appellant, his vendors and their predecessors- in-title have been on the land for nearly half a century. The time was variously put at 1911 and 1912. The structures on the land were erected by the vendors.

Some time in November 1972, the first respondent entered onto a portion of the land and erected on it a "chop bar." When the appellant took issue with him for doing this, he said he was authorized to do this by the second respondent. He is the Omanhene of the Denkyira Traditional Area. The appellant did not accept that the second respondent was entitled to permit the entry on to the land which he claimed as his own. He therefore sued the first respondent and sought against him declaration of title and damages for trespass.

As was to be expected, the Omanhene of Denkyira acting jointly with the Jukwamuhene sought to join the action. They claimed that the first respondent's entry on the land and his erection of the structure complained of, were done with their prior consent. They laid title in the land in themselves and disputed the appellant's right to the reliefs which he sought against the first respondent. Their application was acceded to. On being joined, they filed a joint defence in which they again asserted their ownership. They could not deny that the appellant's vendors were at one time in possession of the land and being an alien company could only have come onto the land by reason of some agreement with the owners. The second and third respondents pleaded that:

> "The co–defendants further aver that there was no formal agreement entered into between the said Central Property Co., Ltd and the co–defendant's but it was mere grant made to the said company with the understanding that whenever the company ceased to function the land would revert to the landlords."

These respondents then disclaimed any knowledge of sale to the appellant and claimed that such sale, if made, was done "clandestinely without the knowledge and consent of the principal owners." They accordingly denied its validity.

The appellant's title having been disputed, he came under an obligation to prove it. He found no difficulty in proving the sale between himself and his vendors. He produced the deed of conveyance. This was regularly executed and duly registered in the Deeds Registry. But it was not enough for him to prove a sale between himself and the Central Property Co., Ltd. He had to show that his vendors were entitled to pass title in the plot to him.

To discharge this burden, he called the properties manager of the U.A.C., a Mr. G. M. Mensah. The appellant's vendors are said to be a subsidiary of the U.A.C. He admitted the sale to the appellant. He also conceded that the land

at one belonged to the stool of Jukwa. But he said that stool made a transfer of the freehold interest to a company called Millers about 1911. The U.A.C. took over in 1929 and have enjoyed undisturbed possession until they disposed of it to the appellant in 1960.

When Mr. Mensah was asked to describe the nature of the transaction between their predecessors, i.e. Millers and the Jukwa stool, he answered, "It was a freehold transfer." When he was asked how he came by this knowledge, he said, "My records say so." The court itself then asked the question, "What records are they?" To this the witness answered, "There is a letter which our chief accountant wrote asking for the title deeds for the freehold property which is the subject–matter of this suit."

The learned judge found that U.A.C. was an amalgamation of Millers and another firm called Russels. When Mr. Mensah was asked whether "your predecessors gave any document with the land?" He answered, "Yes, but we cannot find the document now." In the context of this case, the document referred to can only mean the deed which transferred the freehold interest from the Jukwa stool to Millers. Mr. Mensah was further asked whether they informed the Jukwa stool when they were about to sell the land to the appellant. He said, "No, we did not because we did not have to."

Accordingly, the evidence of title led on behalf of the appellant was this: The plot in dispute was sold by the Jukwa stool to Millers by a document dated 1911. The interest conveyed was the absolute interest. Millers entered into possession of that land and erected buildings and other structures thereon and carried on business activities. In 1929 that company amalgamated with another firm and the U.A.C. was the product of that union. That latter then entered into possession of the land and was handed the document, which evidenced the transfer between the Jukwa stool and Millers. At some point of time, that document was mislaid and could not be found. U.A.C. for itself enjoyed undisturbed possession of this land and in 1960 sold it by deed to the appellant. The latter caused this deed to be stamped and registered and like his predecessors before him, remained in undisturbed possession of the land until 1972 when the respondent entered the land to give rise to this action. Neither Millers, U.A.C. nor the appellant did any act of fealty to Jukwa stool since 1911. None of them paid tribute or was asked to do anything even symbolically to acknowledge title in the Jukwa stool. In my opinion, evidence was placed before the court, which, if not sufficiently answered, entitled the appellant to a declaration of his title to the land.

But that case was not unanswered. It was answered by the Omanhene of Dankyira, Nana Boa–Amponsem III. He disclaimed any personal knowledge of the transaction but got to know of the arrangement by way of tradition when he was installed in 1955. He said his elders told him and it was this: The European company called Millers approached his predecessors and obtained permission to put up structures on the land to carry on cocoa business. Such permission was granted on payment by the company of the sum of £4 13s. and some drink. This payment was made to acknowledge the stool's ownership. This only condition attached to this permission was that "whenever they left the land would revert

to us. There was no formal agreement."

Although the witness said the object of the original grant was the carrying on of cocoa business, the omanhene also said: "They want it [meaning the land] to put up structures in which to sell their goods like prints, hardware, provisions, etc." He said he said about 1972, the first respondent prints, hardware, provision, etc. He said about 1972 the first respondent sought permission from him to make a Chop bar on part of it and he granted this permission. The court itself asked the witness why he permitted the first respondent to enter the land without revoking the license to U.A.C. To this the omanhene answered:

> "The area which I gave to the defendant was bare, it had nothing on it. Since the land belonged to me and since U.A.C. was not using it, I knew it had reverted to me so I allowed the defendant to use it."

No elder of the stool was called to support this permissible hearsay evidence. Faced with this story, the learned circuit judge (Miss Gaisie appeared to have sought some independent evidence confirmatory of the tradition. She seemed to have found it kin the recitals of the deed of conveyance executed between the appellant and U.A.C.'s subsidiary. As she put it, "It is traditional evidence with nothing to test it with but the recitals in the deed on which the plaintiff's claim is based." She discounted the long possession of the appellant and his predecessors by the familiar theory that prescriptive title is unknown to customary law. Having dismissed the appellant's claim to title, she proceeded to give consideration to the claim for trespass which she rightly observed can be founded only on possession. It was "possessory title" that she found to have been conveyed to the appellant. But she declined to find that the invasion of the appellant's possession in the manner testified to trespass because she accepted the omanhene's traditional evidence "that it was a term of the original agreement that whenever any part of the land became vacant, that portion vested in the licensors and they could go into possession." Accordingly, she held that the appellant's claim failed on both counts and she proceeded to dismiss it. It is this decision that the appellant invites us to reverse on the ground that it was against the weight of evidence.

It was urged for the appellant, that the respondent's traditional evidence was in fact unsupported and that the judge placed a wrong interpretation on the recitals and thought them corroborative of the respondent's tradition. The recitals provide that, whereas the company has been in possession of the property hereinafter described for twenty (20) years and upwards without acknowledgment of the title of any other person ..." Of this the judge said, "The only root of title recited was the company's possession of the land for twenty years. This confirms the co–defendant's case that the plaintiff's grantors merely had possessory rights." It was submitted that the judge omitted an important qualification in the recitals on the nature of the possession pleaded, namely, it was stated to be adverse since it acknowledged the title of no one. This, it was urged, was another way of saying they were owners in possession. I see the force of this submission. If at the date of the conveyance to the appellant in 1960, the

U.A.C. could not lay hands on the document of title between Millers and the Jukwa stool, the only root of title that between Millers without providing particulars of it in the recitals. Counsel for the respondents frankly conceded that the judge,s interpretation of the recitals was narrow and that he was prepared to accept than on a proper construction of the recitals, the appellant,s vendors were pleading that they were owners in possession. With that concession, the support which the judge thought there was for the respondents' tradition from the appellant's own evidence, was gone and the omanhene's traditional evidence stood alone.

But it was urged for the respondents that that traditional story the tradition by his elders on his installation in 1955 and one must was probable and was not in fact challenged. Its acceptance by the judge, it was said, justified a finding for the respondents. Two issues arise for consideration on this submission, namely, was the omanhene in truth told the tradition he related in court and if so told, whether the story of the nature of the grant is a reasonable and probable one. According to the omanhene, he was told that he believed it to be true. On 11 December 1972, he instructed a firm of solicitor to write to the properties manager of U.A.C. upon learning of the sale of the plot in dispute to the appellant. His solicitors wrote inter alia:

> "It has come to the notice of our clients that the said piece and parcel of land described above has been sold to one J.K. Aidoo, a former employee of the U.A.C. Ltd. By your agent servant a Mr. Frederick William Wilson of the U.A.C. Ltd. Accra.

We are therefore instructed by our clients to ascertain from you how your company acquired the said land, and also to furnish us with certified true copies of any documents on the land which were made between our clients' predecessors and the Central Property (Ghana) Ltd. A subsidiary company of the U.A.C. Ltd. To enable us advise our clients thereon."

The omanhene, an educated man who appears to have trained in the U.S.A., was shown this letter while in the witness–box and when questioned about it said:

> "I have exhibit B [meaning the letter] in my hand. I caused it to be written to the property manager of U.A.C. This was after the defendant had told me of the difficulties he had with the plaintiff."

It is difficult to reconcile the purport of this letter with a prior knowledge by the omanhene of the nature of the grant between the Jukwa stool and Millers Co. If in truth the omanhene had been told of the transaction between the Jukwa stool and Millers in 1955, this inquiry in 1972 was pointless. He could not have been unaware that the agreement was informal and was not evidenced in writing. He could also not but have felt satisfied that the U.A.C. had committed a breach of faith by alienating the land which is ancestors had merely permitted them to stay on only for the purpose of their business. It was natural that he would feel justly indignant at this conduct on the part of the company and one would expect that

he would express his dissatisfaction to them in on uncertain language. Yet he caused to be written to them a letter whose terms a person ignorant of the true nature of the agreement between his predecessor and Millers could write. That letter makes the omanhene's claim that he was told the terms by which the Jukwa stool g ranted the the land in dispute to Millers difficult to credit. The learned judge overlooked this evidence and omitted any consideration of what effect it would have on the omanhene lone traditional evidence.

That aside, one must consider the probability of the terms of the grant testified to by the omanhene from the point of view of the Jukwa stool and also the Millers Co. On the omanhene's own theory, the plot was required by the company for it's business. It was going to buy cocoa and carry on other business clearly with a view to profit. If it was not an out and - out alienation, is it reasonable that the stool would not have contracted to be paid a period without any worthwhile quid pro quo? And it is agreed that neither Millers nor any of its successor did any act of fealty to the stool nor paid it one pesewa from 1911 to date, apart from the £4 13s. it is said to have paid in 1911. One's experience of customary dealings in land teaches one that the arrangement testified to by the omanhene is an unlikely one.

If it is improbable that the Jukwa stool would have entered into such agreement in 1911, how likely is it that the Millers Co. its part, would accept to invest money in land in which its title is so precarious? Is it reasonable that it would be content to accept only an oral grant of this land and acquiesced in a condition that if any portion of a plot, which is only 200 ft. by 150 ft. was unused, the stool was entitled to authorize entry of that plot by any one it choose? Such and arrangement ill accords with ordinary experience but that is what the judge chose to accept. As the judge put it:

> "Their contention (meaning the stool's) is that it was a term of the original arrangement that whenever any part of the land became vacant, that portion vested in the licensors and they could go into possession. The plaintiff was not in a position to challenge the evidence on the grant between Millers and the co–defendants predecessors, so all that evidence went unchallenged and I accept it."

But what can the land becoming vacant mean in the context of this arrangement? Can it mean that the whole of the 200 ft. by 150 ft. area must be build upon? If that is what it means, then that arrangement is opposed to common sense and is wholly unworthy of credit. If it means the stool could re-enter if it is abandoned, then there is no evidence that it was at any time abandoned. From 1911 to the date of the alleged trespass in 197, it had been continuously in the occupation of Millers and its successors. But the arrangement, which the judge accept, is not the condition testified to by the omanhene. According to his evidence, the land reverted to the stool only if the Millers Co. left it. If the arrangement testified to by the omanhene is true, the Millers Co. and its successors, the U.A.C. was must have regarded themselves as the grateful recipients of the stool's bounty, so to speak. If that be so, are they likely to be so

ungrateful and so unresponsive to their obligations as to sell this plot which the stool allowed them to occupy on sufferance? When the properties manger of the U.A.C. was asked if the company informed the stool before alienating the plot to the appellant, he gave the answer, which only an owner can give. He said, "we did not because we did not have to." In my judgment, the nature and terms of the agreement alleged to have been entered into by the omanhene between the Jukwa stool and Millers is wholly improbable and is one which no stool conscious of its ownership of land would enter into nor would any prudent man of business assent to terms relate in that evidence. I think the learned judge was a trifle uncritical in accepting that wholly unsupported and discredited evidence.

But the judge criticized U.A.C.'s predecessors for what she thought to be the inadequacy of their conduct. She said, "Millers was British firm, and no doubt, if they obtained a freehold interest in that property, they would have taken steps to preserve it." Is unclear what the judge meant by preserving their interest in this context. If she meant they would have ensured that the grant was reduced into writing to put matter beyond bad faith and treacherous memory, then that was met by evidence of the property manger. He said the transaction was evidenced by a document. If preserving in this sense means ensuring it against loss, then the judge must have overlooked the evidence of Mr. Mensah. He swore that Millers handed to U.A.C. the document but that this could not be traced by the latter. It seems that the loss of the document occurred while it was with U.A.C. Counsels for the respondents argued that it was hard to believe that a document in the possession and control of a firm as adroit as U.A.C. could be mislaid. This is a fair–minded observation but one cannot lose sight of the fact that however efficient its methods, U.A.C. is a human organization whose business is carried on by human to attribute perfection to their methods. There is a saying that the best horse may stumble one day and however efficiently U.A.C. conducts its affairs, it is not improbable that its agents may occasionally slip and lose a valuable document. What is improbable, is that a British firm like Millers would wish to invest money, and agree to obtain for their business purposes, landed property on the very tenuous basis implicit in the omanhene's testimony.

The learned judge spent some effort in dilating on the customary notion that prescriptive title is unknown to it and cited legal authorities in support. But that approach seems to me to be beside the point. The appellant's case was not that his vendors acquired tile only by long possession. He produced evidence that his vendors' predecessors that is, Millers bought the land outright and both they and the U.A.C. exercised all the right of ownership, including the right of alienation. The evidence of long undisputed possession was not the foundation of their tile; it was used to buttress it. Indeed the case of *Mieh v. Asubonteg* (963) 2 G.L.R. 37, S.C. which the learned judge sought to distinguish was in point. It was said in that case at p. 41 that:

> "A claimant to title to land may base hid claim entirely on the fact that he has been in uninterrupted possession of the land for a certain number of years, and without proving his source of title, claim to be

> entitled to be declared and owner of the land. This is prescription or *usucapio* as it is termed in Roman law, and the emerging title is described as a prescriptive title. There is of course no such title known to the law of Ghana. On the other hand a claimant to title to land gives evidence of his source of title and relies on his long undisturbed possession as further evidence of his title."

I think this is precisely what the appellant had done. It is wrong to think he relied on anything like prescriptive title. The judge also reasoned that since U.A.C itself had only what she conceived to be possessory title, the operative part of the deed, which conveyed to the appellant "the property herein described in such estate and interest as the company has therein" could only have conveyed possessory title. But it has already been conceded for the respondents that the construction put on the recitals by the judge was faulty and that the title recited therein was ownership in possession. I think the judge's conclusion on this score was also at fault.

In any case, it is difficult to conceive how a deed which conveys "an estate in possession free from incumbrances *Unto* and *To the use of* [the appellant] his heirs, successors ... personal representatives and assign for ever" can be said to convey the very permissive title which the judge, accepting the omanhene's evidence, found. As a purely evidential question, a person in possession of land is presumed to be the absolute owner. That is why any declaration which such person makes that he has a lesser interest is construed as an admission against him or a declaration against interest receivable as an exception to the hearsay rule if he is dead. On the caption dealing with declarations against interest Phipson wrote:

> "And as in the absence of other proof mere possession implies seisin in fee, any declaration of an occupier tending to cut down charge or fetter his presumably absolute interest will be receivable under this head."

(See *Phipson on Evidence* (8th ed.), p. 274) Far from making any admissions against interest, the appellant's immediately vendors and their predecessors–in–title, have held themselves out as owners in possession of the plot in dispute and performed acts consistent with such ownership. In any opinion, the appellant has produced as good evidence of his title to the plot as any one may in this country and should have been adjudged the owner. I do so adjudge him and disaffirm the learned judge's contrary conclusion.

That leaves me only with the damages sought for trespass. In view of my finding on the issue of title, the appellant was entitled as against the whole world to possession of this land. His possession was invaded by the first respondent and was persisted in spite of warning. Even a court order enjoining him from doing so pendente lite, was unavailing. The first respondent admitted that an interim injunction was ordered to restrain him from carrying on his activities on the land. When it was put to him that, "Yet you flouted the order by running

your bar?" his answer was, "Yes, I operate my chop bar in the structure I put on."

There is no evidence of what a "chop bar" is but I think it is a matter of which I ought to take judicial notice. I am not going to assume judicial ignorance of what everybody knows in this country. The operation of a "Chop bar" in a bamboo structure on a portion of land where the appellant has his residential building, will constitute considerable nuisance to him. The second and third respondents on their own showing, authorized this nuisance on the appellant's land. They are all liable to him in damages. In all the circumstances, I would award in favour of the appellant against the respondents, jointly and severally, ¢600.00 damages for this undoubted wrong.

Accordingly, I would allow the appeal and set aside the judgment appealed from together with the order for costs. The costs, if paid should be refunded to the applicant. In lieu of that judgment, I would make a declaration of title of the land in dispute and fully described in the writ in favour of the appellant and also award him ¢600.00 damages for trespass. He will have his costs in this court and in the court below.

ANIN J.A. I agree

FRANCOIS J.A. I also agree

Appeal allowed.
Judgment for the appellant.
J.D.

Chapter 4

The Usufruct

4.1 Introduction

4.1.1 Lokko v. Konklofi

(1907) Ren. 450 (D.C. and F.C.)

Appeal from District Commissioner — Case by consent re–heard by Divisional Court

20th March, 1907

This is an interpleader case. about two years ago the judgment creditor, Lokko, with a view to the raising of a loan of £16. As security, Konklofi offered his land. He told Lokko that the ladn was his own, that his father Jabba had had the ladn before him, and that it had beeen divided between him and his brother Kwamin Kuma. Lokko knew that the judgment debtor and his brother had occupied the land for a long time, that the judgment debtor had a village and cocoa and sugar cane farms upon the land, and that part of the £16 was to pay off a pledge over the cocoa crop—it is possible that he was informed that hte pledge was over the cocoa farm— and in the circumstances Lokko lent the £16, with interest £8, receiving the ladn as security for the loan and interest.

The loan and interest not having been paid, Lokko brought an action in the District Commissioner's Court for his £24. Konklofi does not seem to have put in an appearance, and judgment was given in favour of Lokko for £24 and costs. Konklofi thereupon came to Accra and saw the claimant Bruce, who asked him what he had given as security for the loan. Konklofi said that he had given the land. Bruce thereupon advised him to try and pay the debt so as to free the ladn; that, I am of opinion, is practically what Bruce said. Teh mony was not paid, Lokko took out a write of *fi. fa.*, and Konklofi's village, with his cocoa and sugar cane farms, where attached in execution—the notice of attachment is not clear as to what was attached, but that is all that is alleged to be attached, adn Lokko claims to attach no more.

As soon as the land was attached the Ohene of Berekusu heard of it, through Konklofi or otherise, and he, too, asked Konklofi what he had given as security for the loan. Konklofi explained that he had given his land, and the Ohene advised him to pay the debt and free the land. He also remonstrated with Konklofi for having pledged the land without first telling him, and Konklofi to "pacify" him, gave him a bottle of rum, which was accepted. The Ohene probabbly told Konklofi to go to teh claimant for advice, and Konklofi again proceeded to accra to see teh claimant, who decided to interplead on the ground that the land was attached to the stool of Berekusu, and therefore could not be seized in execution.

When the interpleader came on in the District Commissioner's Court, it was dismissed on the groudn that the claimant was not the right person to bring it. This Court, however, on appeal, reversed that decision, and then, at the request of both sides, proceeded to hear the case itself, iinstead of seending it back to the District Commissioner's Court.

The question to be determined is whethe rhte judgment debtor has such right, title and itnerest in the land in question, and the village and farms thereon, as can be attached in execution.

It is necessary to consider the history of this plot of land. I do not accept all that the claimant and his witnesses stated, and where I do not place credence in their evidence I have to fall back upon inferences and probabilities. the facts are, I beleive, as fowllows:— Some 40 years or more ago Jabba, the fatehr of Konklofi and Kwamin Kuma, came to berekusu Larte Kofi, the then Ohene of Berekusu, and was given teh land in quesiton to work upon. He worked upon it until about 1873 or 1874, or thereabouts, when he died. The ladn was bush land, but porbably he had a small farm there, and the palm trees about the spot were regarded as for his use. His two sons were young men at his death, hardly old enough to have farms of their own, but as they grew older they attached themselves particularly to the land their father had; Konklofi worked one portion of the land and Kwamin Kuma worked the other, a road beign teh line between tehir respective portions. I do not think that Konklofi worked for Lamily as he states. All he wwould have done would have been to give her, as stoolholder, occasional pressents of palm nuts, palm wine, yames, etc. Konklofi had other farms on other parts of the Berekusu land where he worked by way of shifting cultivation, but the land inquestion he permenently settled upon. He made a village on the land, probably about twenty years ago, made a sugar cane farm close by, where the canse would be allowed to grow as long as the soil continued good, and about five years ago made a cocoa farm. He has been in the habit of giving the Ohene and the claimant, as the heads of his family, a small portion of the produce of his shifting cultivation, such as yams, etc., or the bush produce, such as palm nuts and palm wine; he does not give them anything from teh land in question. The land has never been definitely allotted to him as his portion fo the stool land, but it is recognised as his land, and I am satisfied that it could not be taken from him by the stool.

In the first place it is to be noted that this is not family land but stool land. The Berekusu stool has only a limited quantity of land attached to it,

and for that reason it approaches family land more nearly than where there is a large tract of land appurtenant to the stool, but still it is stool land under an Ohene, and the decisions which apply to family houses and fmaily land do not apply in this case. The decisions as to family land, which reach far back, show that the English Courts will not, other than in exceptional cases, permit family property to b e seized in execution. In this way the family reaps the advantage of both the native and English law, without the disabilities of either system. By native law the family property could not be seized for the debto of one of the members, but any member of the family might be panyarred until the family paid the debt and expenses; the English law put an end to the panyarring, but allowed the family to retain the advantage of non–seizure for a private debt. Had section 19 fo the Suprem Court Ordinance, 1876, been in force at the date of the firsst decision, it is possible that the Courts might have invoked the aid fo the concluding words of that section, and have rquried the family to pay, and, in default, have allowed the property to be sold. That course, however, was not adopted, and the law is now settled in favour of family property.

Stool property is on a different footing. I do not recollect ever having heard of family property having been partitions; on teh other hand, it is common in cases before this Court for a person to stay that the land is his because he got it from his father or grandfather. He does not say so in so many words, but it is clear that his father or grandfather first farmed the land, then built a village on it, settled on it, and became in time to be recognized a sthe exclusive owner fo the land. Possibly the first entyr may have been with the consent of the stool, but graudally, without further application to teh stool, occupation ripened into full ownership. In this manner much stool land has become private land. I have never known a case of family land having become private land in this way. Again, one ground of the refusal of the English Courts to allow family land to be seized in execution for the debt of a member of the family, is because it would introduce a stranger into the family. Usually the family property is a house; each room i soccupied by a member of the family; it would be difficult to sell the room occupied by a member, and it would not be fair to the rest of the family to have their privacy intruded upon. So, too, family land is often farmed in common. Stool land is nearer akin to waste land than to family land; subjects of the stool farm where they please as long as they do not disturb other occupiers; they may apply to the stool for land, but often they do not; all that is generally expected of them is to make contributions to tehir particular head. As decisons with respect to family land do not apply, I must consider the case upon its own merits.

A judgment may be enforced by teh attachments of all the judgment debtor's property real and personal (O. 44, r. 5). Where a person interpleads, "if it shall appear to the satisfaction fo the Court that the land or other immovable . . property . . . being in possession of the 'judgment debtor' 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 releaseing the said property from attachment. But if it shall appear to the satisfaction fo the Court that the land or other immovable . . property was in possession of the

'judgment debtor' as his own property, and not on account of any othe person ... the Court shall disallow the claim." (O. 45 r. 25). Now no direct evidence has been called as to whether Konklofi had any property (any right, title and interest) in this land, other than exclusive ownership, which could be sold, but it is nototious that as long as the stool–subject continues to live on or to work land, so long is he entitled to live on and to work that land. Furthermore, the evidence shoes taht Konklofi is entitledk to use his village and farms; as long as he likes he can live n his village, cut his sugar canse ssn dpluck his cocoa, and the stool hodler cannot disturb him. He has, therefore, even assuming the land to be stool land and not his property, a valuable interest in this land. I see no reason why this interest o rproperty should not be seized and sold in execution, and on that ground I am of opinion that the land should not be released.

But the judgment creditor goes further than this and contends that the land is no longer stool prpoerty, that the stool has reclassed its rights over the land to Konklofi.

I will now consider how far that contention is, in my opinion, good.

All the parties concerned are natives, and the transaction was a peculiarly native one. There is, however, as far as I am aware, no procedure in native law similar to our seizure in execution, so that it is not easy to apply native law. But some light may be thrown upon the subject by a consideration fo what would have happened in a case of this sort had it been dealt with by a native Court. When seeking al oan, the native borrower invariably comes pepareed to offer security of some sort: he may have friends ore relations as sureties; or he may give ladn as security; or, in former days, he may have given his body, *i.e.*, he may have agreed to pawn himself to teh creditor in case of a default. In reply to his counsel, the Ohene Kwaku Nyami said that in this case Lokko should have looked to his sureties; but here the land stood for the sureties, and by native law it was to that which Lokko would have looked. It was this which I believe was recognize by both teh claimant and the Ohene when they tld Konklofi to get money and pay the debt and save the land. It was not shifting farm land that he had pledgeed, but land which he had occupied for many years, and which his father had occupied before him, ladn upon which he had built a village and upon which he had permenent cultivation; knowing all this they felt that, however, wrong Konklofi had been to pledge teh land without telling them, nevertheless the pledge was valid. That, I am of the opinion, is shown by their atituted at the time. It was only when the land was attached in execution that the idea occured to claimant that hte land, being stool land, could not be sold. Now if by native law a pledge of such land for a debt was valid, how can it be said that the ladn cannot be attached under a write of Fi Fa?

Mr. Papafio urged that stool land could not be alienated without the consent of the family or the stool hodler and elders. But teh consent need nto be overt, i tmay be implied from circumstances. In teh case of Obobi *v.* Solomon, before the Full Court in 1905, sool land was claimed as agaisnt the stool holder, and it was then held that reasonably prolonged occupation of stool land would of itself have been strong evidence that the occupier had the constent of the stool to occupy. In the present case there has been continuous occupation for about

40 years, and the occupier has been permitted to build a village on the land and to make permenant farms. the presen tis like thousands of similar cases. Stool land has been settled by a father, the son as succeeded, has built a village and has made a hoem on the land; there has been no express alienatoin by teh stool, but there has been recognition of the exclusive occupation. Suppose the Berekusu stool fell into debt? I can quite understand that Konklofi would be expected to share the debt, for he is subject to the stool, but if the stool land were to be seized in execution, can there be a doubt that Konklofi could successfully interplead? As sooon as the Court ascertained that he and his family had had continuous occupation for 40 years or over, and thathe had permenent cultivation upon the land, it would bdecide that he had appropriated that portion of the stool land to himself with the tacit cosent of the stool, and that it was no longer stool property, but his own property.

Whether the stool has impliedly consented to Konklofi appropriating the land as his own, or whethe rthe view be taken that teh tsool is now estopped form putting forward its claim to the land, does not matter, but I am of the opinion that the occupation has been of such continuance and of such a character that hte land must be now deemed to be the property of Konklofi and seizable in execution.

Claim disallowed. Costs for the execution creditor.

(Sgd.) W. Brandford Griffith, C.J.

N.B.—This judgment was affirmed on appeal.

4.1.2 Lokko v. Konklofi (F.C.)

(1907) Ren. 450, 454 (F.C.)

Before Their Honours Sir W. Brandform Griffith (Kt.), C.J., Francis Smith, J., and G. K. T. Purcell, J.

19th May, 1908.

From yesterday.

Chief Justice reads the following judgment:—

In this case the main difficulty has been the reconciliation of English and native law, but a consideration fo the facts and of the practice of the native Courts gives a fair solution of the problem. As soon as the Ohene heard of the attachemlnt of the land in execution he asked Konklofi what he had given as security fo rht eloan. Konklofi explained that he had given his land. The Ohene advised him to pay the defendant and free the ladn. He also remonstrated ith Konklofi for having pleged the ladn without first telling him, and Konklofi, to "pacify" him, gave him a bottle of rum, which was accepted.

When seeking a loan, the native borrower invariably comes pepareed to offer security of some sort: he may have friends ore relations as sureties; or he may give ladn as security; or, in former days, he may have given his body, *i.e.*, he may have agreed to pawn himself to the creditor in case of a default.

In reply to the Court the Ohene said that in this case Lokko should have looked to his securities, but here the land stood for the securities, and by native law it was that to which Lokko should have looked. It was this which I believe was recognised by both the claimant and the Ohene when they told Konklofi to get the money and pay teh defendant and save teh ladn. It is clear, therefore, that by native law Lokko should have looked to his security, *i.e.*, to the ladn. That is what he is doing now. Had the case gone before a native Corut I have not doubt that such a court would have decided that teh Ohene, as head of the trie, must pay the debt, or that the ladn must go to Lokko. Thi sCourt cannot make such an order. But then the Ohene cannot claim the advantage both of English law and native law without their corresponding disadvantages. He cannot say taht the English Court has no power to compel him to pay teh debt, whilst by native law the land cannot caase to be stool property without a formal divestment on the part of the stool holder.

Here one has to reconcile English and native law as far as possible, the case being by neither.

In my opinion the way to r econcile it is to follow what a native Court would do in such circumstances as nearly as possible. "Look to the surities,"' says the Ohene. Let Lokko lok to the land, wheich Konklofi says was hi ssurety. That is precisely what he is doing, in accordance with teh forms and methods of English procedure. By native law Lokko, not being subject to the Berekusu stool, would owe no duties to the Ohene of Berekusu with respect to the land taken, consequently the execution purchaser would purchase the land free from any tidies to the Ohene of Berekusu. If the Berekusu stool suffer damage it must be to Konklofi, who still remains subject to teh stool, that it must look.

Again, I am quite clear, if the Berekusu stool land was being sold in execution for debt, that this Court would hold that Konklofi's land did not pass by such a sale. It would do so upon the assumption taht Konklofi had apporpriated to himself a portion fo the stool land as his own property, and that the stool hodler had acquiesced in such appropriation. For these reasons and for the reasons given in my former judgment I am of the opinion that the land can be sold in execution, and that the Ohene, having declined to pay the debt, Lokko is entitled to sell the land in execution, and the judgment of the Court below should stand.

W. Branddord Griffith, C.J.

19*th May*, 1908.

Smith, J. , concurs, and adds: I will add, it will be observed from judgment that it does not interfere with native law i fit was necessary that a formal meeting should be hled in each case, in case the Berekusu stool land were sold in executoin for a stool debt, the village and farms of Konklofi would also be taken, and Konklofi deprived of them, whereas teh judgemnt protects him and also all members fo the stool under similar circumstances.

F. S.

G. K. T. P.

PURCELL, J. : I am of the same opinion.

Appeal dismissed with costs, £12 2s., for the respondant.

W. B. G.
F. S.
G. K. T. P.

4.2 Incidents of the Usufruct — Possession

4.2.1 Mansu v. Abboye and Another

[1982-83] GLR 1313.

Court of Appeal, Accra

10 June 1982

[1314]

APPEAL against a judgment of a circuit court for, inter alia, a declaration of title to land. The facts are sufficiently Stated in the judgment of Abban J.A.

FRANCOISE J.A. By his writ, the plaintiff–appellant, hereafter called the plaintiff, sought a declaration of title to his family's land at Yarbiw in the Western Region. He pleaded that his ancestors had reduced the virgin forest into cultivation and had been in uninterrupted occupation of it until the trespass complained of.

The half–hearted attempt at a traverse of the plaintiff's claim was exposed in the complete failure of the defence to challenge the plaintiff's boundary neighours who testified in his support and who claimed to be still in possession of their farms. The only witness for the defence dealt the co–defendant a lethal blow when he asserted, "The plaintiff's land is not included in the land of the second defendant."

The co–defendant's case was, however, that as the Odikro of Yarbiw, he was the allodial owner of Yarbiw lands. He had also fought for the release of the lands for the State Farms Corporation which had previously acquired them compulsorily. The lands had reverted to him with the blessing of the town committee, and therefore he had every authority to grant a licence to the defendant to tap and uproot palm trees, perhaps in the better interest of husbandry and for the good of the entire community. He, however, made no claim against the plaintiff for breaches of customary tenure which would justify for feature, nor was he attempting re-possession following abandonment. **[1315]** Indeed, his was the novel proposition that a stool could estreat a subject's land extinguish his possessory title, if land compulsorily acquired were later released, or if the town committee decreed it.

When Mr. Polley, who appeared for the defendants-respondents, hereafter called the defendant6s, was called upon to support the judgment he found his task intractable. For one thing, there was no clear evidence that the plaintiff's land had ever been compulsorily acquired. There were no documents authenticating any acquisition, let alone for release to the odikro. What, however, appears on the record is that the State Farms Corporation, successors to the Agricultural Development Corporation, were once allowed to cultivate a piece of Yarbiw land. It was, however, the unwarranted extension of this unofficial grant that was resisted by the Yarbiw populace. The evidence, however, is that the plaintiff's land never came under the cultivation of the State Farms Corporation. Indeed after prevarication, the co–defendant had had to admit:

> "It is not true that the land being claimed by the plaintiff is part of the vast land not cleared by the State Farms Corporation. I now say the land being claimed by the plaintiff is part of the vast land not cleared by the Stat Farm Corporation."

Like everyone else, the plaintiff had paid his contribution to the funds set up to reimburse the odikro, as custom demand. He had not failed in his obligations, to warrant any forfeiture of his lands. The judgment denying him his claim was a travesty. But one electric stroke the circuit judge was rejecting a hallowed canon of customary law, that stool subjects in possession can only be dispossessed of their usufruct in land with their consent or on proven and uncertified breaches of customary tenure, or upon abandonment: see *Asseh v. Anto* [1961] G.L.R. 103 S.C.; *Amoabimua v. Okyir (Consolidated)* [1965] G.L.R. 59, S.C.; *Kotei v. Asere Stool* [1961] G.R.L. 492, P.C

In my view, the defendants undertook the Herculean task of providing the acquisition and its release. They had the burden of proving the legal consequences of he release and establishing hat it included a reversion to the stool. They failed woefully in the discharge of this duty. In *Ohimen v. Adjei* (1957) 2 W.A.L.R. 275, a case constantly approved by this court, it was held at p. 280, that:

> "It would be repugnant to natural justice and good conscience if, while the Stool can insist upon the services and customary rights due to it from the subject, it could arbitrarily deprive its subjects of the enjoyment of the portions of the stool land in their possession. On the other hand the only title in land which a subject can claim against a stool is the usufructuary title to the **[1316]** portion of the stool land in his actual possession. If he proves that, he is entitled to a declaration of this title to the land."

To the same effect are *Mansah v. Asamoah* [1975] 1 G.L.R. 27 225 at p. 236, C.A.; *Nyaasemhwe v. Afibiyesan* [1977] 1 G.L.R. 27 at p. 31, C.A and *Attah Panyin v. Asani II; Atta Panyin v. Essuman (Consolidated)* [1977] 1 G.L.R. 83.C.A.

On the issue of damage the plaintiff showed that 215 of his palm trees had been uprooted; at ¢4 each that would among to the ¢860 claimed. Neither the sum claimed nor the figure of destroyed palm trees was disputed; the defendants merely contended that the palm trees grew wild, so they belonged to the allodial stool. This overlooked the fact that this was ancestral property stretching back six generations and the palm trees could not in that circumstance be considered to be wild. They grew out of habitation, even if they had not been purposely planted. In any case, the owner of the determinable title at law is the owner of the palm trees: *Atta v. Esson* [1976] 1 G.L.R. 128 C.A.

I would grant the perpetual injunction claimed. In my view the claim for both special and general damages is justified. I would award ¢860 special damages. Costs awarded in the court below is set aside, and if paid should be refunded. The plaintiff is entitled to his costs in the court below and in this court.

COUSSEY J.A. The plaintiff–appellant, hereafter called the plaintiff claimed a declaration of title to land situate at Yarbiw on the basis of the land having devolved on him from his ancestors Ezia Badu. His other ancillary reliefs were for perpetual injunction and damages for trespass. The defendants–respondents, hereafter called the defendants, denied the title of the plaintiff to the land in dispute and it would appear form the averment in paragraph 3 of the defence filed that contend that even if the plaintiff was the owner of the land, he lost any rights he might have had over the land when it was acquired compulsorily for the State Farms Corporation. The learned judge in the court below upheld the contention of the defendants that the plaintiff lost the land after its acquisition by the State Farms; and therefore, when it was given up it reverted to its allodial owner, the second defendant, who thought that as the allodial owner of the wild palm trees, he was right in asking the first defendant to distil gin from the wild palm trees.

On the appeal coming on for hearing, counsel for the defendants was asked to support the judgment. He contended that the land in dispute became estreat to the Yarbiw stool, because upon its release by the State Farms it was agreed that it should revert to the chief of Yarbiw. I find no merit in the submission because it is not supported by **[1317]** the evidence adduced before the trial judge. The evidence does not suggest that there was ever compulsory acquisition of the land for the State Farms Corporation. It appears that the Yarbiw stool offered lands to the corporation for farming but when there was a further encroachment which would have affected farms such as the plaintiffs missioner after various meetings at the regional office. The people of Yarbiw, in fact, made contribution in cash towards the cost of fighting the further encroachment in question. There is not a scintilla of evidence to suggest that the land thereby saved, which included the plaintiff's, became estreated to the Yarbiw stool.

The plaintiff's claim of title to the land was not seriously challenged by the defendants. He proved this claim. The evidence was overwhelming in support of his claim that the land in dispute devolved on him from his ancestors Ezia Badu. The evidence of his boundary owners clearly made definite his land and leaves no one in doubt. I would therefore, declare title of the land in dispute in the

plaintiff and further grant him of perpetual injunction against the defendants. The evidence on the special cost of ¢4 per tree which comes to ¢860. This was not in contention and I will grant it. General damages will be as stated by the president of the court. The judgment of the court and costs below is hereby reversed.

ABBAN J.A. This appeal is from the judgment of the Circuit Court, Takoradi, delivered on 22 October 1979. The appellant (hereinafter referred to as the plaintiff) sued the defendant for a declaration of title, account, damages for trespass and perpetual injunction in respect of a piece of farm land situate and lying at Yarbiw near Apowa in the Western Region. The land in dispute was a portion of Yarbiw stool lands. The occupant of the said land applied to be made a party and he was accordingly joined as a co–defendant.

The plaintiff and his ancestors were the subjects of Yarbiw stool. The plaintiff's ancestor, Ezia Badu, was the person who first cleared the virgin forest on the disputed land. On the death of the said Ezia Badu, one Dufu was appointed customary successor in respect of that land. Various members of the family of the late Ezia Badu had occupied and cultivated the land. The plaintiff as the present customary successor had been in possession of this land for some years before the cause of action arose. In 1972 an attempt was made by the State Farms Corporation to appropriate a large tract of land in an around the town of Yarbiw for cultivation. The co–defendant, as the chief of **[1318]** Yarbiw, and the inhabitants of the town including the plaintiff, opposed the indiscriminate cultivation and petitioned the then Regional Commissioner for the Western Region on the ground that if the State Farms Corporation went ahead and cultivated all the acres of land which it had earmarked for cultivation, little or no land would be left for the people of Yarbiw who were mostly farmers. The timely intervention of the said regional commissioner on 10 February 1972. At that meeting the General Manager of the State Farms Corporation, the co–defendant, the plaintiff and other citizens of the town of Yarbiw were present. The minutes of that meeting were tendered as exhibit D. Later an inspection of the land was carried out by the said regional commissioner. Eventually, the State Farms Corporation accepted the directive of the regional commissioner that it would not extend its cultivation beyond the 10,000 acre which it had already cultivated and also to release all the acres of the land which it had not yet cultivated. The plaintiff's disputed farmland formed part of the acres of land which never cleared or cultivated by the State Farms Corporation. Some five years after the so-called release by the State Farms Corporation, that is, in 1977, the defendant, on the authority of the co–defendant, entered the plaintiff's said land, uprooted 215 wild palm trees and tapped them into palm wine for the co–defendant. The defence put up by the defendant and the co–defendant was summed up in the following paragraphs of their statement of defence:

> "3. The defendant in answer to paragraph 3 and 4 of the statement of claim avers than even if, and it is not admitted, the plaintiff was the owner of the land as claimed, *he lost any rights he might have had over land when the same was acquired compulsorily*

for the State Farms Corporation.

4. That it was through the efforts of Yarbiw Town Committee that the land was released to the chief of the community of Yarbiw.
5. That after the release as aforesaid it was agreed that the land should be vested in the chief of Yarbiw and any member of the community wishing to do anything should approach the chief for permission and authority."

(The emphasis is mine.) The trial judge accepted the defence and entered judgment for the defendant and the co–defendant, dismissing the plaintiff's claim.

Two grounds of appeal were filed, namely that the judgment was against the weight of evidence and that it was wrong in law. Indeed, the judgment was so perverse that counsel for the defendant was rather called upon to support it; but he could do very little to save the **[1319]** situation. The basis for dismissing the plaintiff's claim was most untenable. The trial judge found that all the lands in and around Yarbiw including the farmland in dispute were stool lands and that the plaintiff had usufructuary interest in the disputed land. But contray to the evidence before him, the trial judge further held that there was a compulsory acquisition of all the lands at Yarbiw for the Stare Farms Corporation and when the said corporation later on relinquished its claim over those lands, the lands so released became vested in the co–defendants as the allodial owner. It is pertinent that I quote the relevant portions of the judgment:

> "By exhibit DI this court accepts the defence of the defendants that Yarbiw lands including the disputed land were acquired by the *States Farms and all usufructuary owners including the* plaintiff lost their titles to their lands . . . After careful consideration of the lost the case of the plaintiff is not and that of the defendants, *I have come to the conclusion that the plaintiff is not the owner of the land because it was acquired by the State Farms Corporation and given up later the allodial owner. The plaintiff lost his rights over the said land and after it had been vested in the chief of Yarbiw.* The second defendant (co–defendant) as the allodial owner of the wild palm trees was right in asking the first defendant (the defendant) to distil local gin akpeteshie, fro the wild palm trees."

(The emphasis is mine.)

In the first place, was there in fact any compulsory acquisition of the plaintiffs land at all? The answer is an emphatic NO! Exhibit D1 which the trial judge referred to as evidence of the acquisition was just the record of the proceedings of the meeting that took place at the offices of the regional commissioner. The contents of that exhibit D1 rather made it clear that no compulsory acquisition of Yarbiw lands ever took place. There was no evidence that the state Farms Corporation or its predecessor, the defunct Agricultural Development Corporation, or any authority on its behalf, complied with the provisions which dealt

with the procedures for compulsory acquisition in the country. That is, the said acquisition ought to have been made in accordance with the provisions of the state Lands Acts, 1962 (Acts 125), as amended by the State Lands Acts, 1962 (Amendment) Decree, 1968 (N.L.C.D. 234). By section 1 (3) of the said Acts the publication of an executive instrument designating a certain land as required in the public interest automatically vests the ownership of such land in the ownership of such land in the Republic. The land as acquired can then be occupied by or allocated to any state agency or organization, such as the State Farms Corporation, and it may even be leased to any private individual, under section 5 of the Act. The acquisition operates to bar and destroy **[1320]** all rights and interest that it is only where the acquisition is made strict compliance with the provisions of the said Act that the acquisition can determine the right of the usufrustuary owner in the land. That's is, the acquisition properly made will deprive him of his beneficial enjoyment as well as his possessory right in that particular land. In the present case, there was no shred of evidence that any executive instrument was issued under section 1 (3) of Act 125, as amended, in respect of the dispute land or in respect of any lands at Yarbiw for that matter. On the contrary, it was recorded in exhibit D1 that the General Manager of the state Farms Corporation at the meeting could not produce any evidence, documentary or otherwise, about the so–called acquisition. The relevant paragraph in exhibit D1 reads as follows:

> "The meeting was declared open at 3.15 p.m. by the chairman. *He asked Mr. Butt, General Manager of the State Farms Corporation came to narrate hoe the State Farms Corporation to narrate how the State Farms Corporation came to acquire the Lands belonging to the Yarbiw stool The general manager explained that the corporation inherited the lands from the defunct Agricultural Development Corporation but to the best of his knowledge no documents about the acquisition were available, nor was there any certificate to occupancy.*"

(The emphasis is mine.)

This piece of evidence clearly supports the view that no steps were taken either by the defunct Agricultural Development Corporation or the state Farms Corporation to have the stool lands of Yarbiw properly and compulsorily acquire; and as I have already stated, there was, in fact, no compulsory acquisition of the said lands. The trial judge therefore erred in holding that plaintiff thereby lost his unfructuary interest in the said land.

It is significant to note that learned counsel for the defendants had to concede that there was no compulsory acquisition of any portion of the stool lands of Yarbiw. He was then asked why the defense pleaded compulsory acquisition in paragraph 3 of the statement of defense. Learned counsel was at paints to admit that it was an erroneous plea. It might have been an defendant and the co–defendant failed to establish the loss of the plaintiffs usuffructuary interest in the disputed land through compulsory acquisition.

The trial judge, as I have already indicated, found that the plaintiff was the usufructuary owner of the land in dispute, a fact which was amply supported by the evidence. Sine there had never been any compulsory acquisition of any land so the plaintiff did not at any **[1321]** time loss his usufructuary title in the disputed land, the question of the plaintiff land reverting to the co–defendant as the allodial owner could not have arisen. Apart from the so–called compulsory acquisition, the co–defendant attempt to show that there was an agreement that after its realize the whole land should be taken over by him. The plaintiff denied the existence of such an agreement of any sort. This is what the co–defendant said, "it is true that I beat gong gong, to the effect that the remaining land belonged to me ... The plaintiff has not entered into contract to give his land to me."

In my view, there was no legal justification for the trial judge's holding that the plaintiffs land reverted, on its release, to the co–defendant as the allodial owner. The plaintiff, as a usufructuary owner, cannot be ousted from the land by the co–defendant in an arbitrary manner. Some of the cardinal incidents of the usufructaury interest are that the usufructaury has exclusive possession and enjoyment of his portion of land, and he cannot capriciously be divested of this interest by the stool; neither can the stool alienate that portion of the land to any other person without the prior consent and concurrent of the usufructuary: see *Ohimen v. Adjie* (1957) W.A.L.R. 275. At p. 279 of the judgment the learned judge said:

> "The stool holds the absolute title in the land as trustee to and on behalf of its subjects, and subjects are entitled to the beneficial interest or usufruct thereof and have to serve the stool. *Each individual or family is regarded in the broad sense as the owner of so much of the land as it is able by its industry or by the industry of its ancestors to reduce into the lawful possessions and control. The area of the land so reduces into lawful possession of individual or family, and over which he or they exercise a usufructuary right, usually called his property. It cannot, save with the express consent of the family or individual, be disposed of by the stool.* The individual or family may assign or disposed of his interest in the land to another subject of the stool and the land may be sold in execution of a decree against the individual, or the family, as the case may be, without the consent of the stool. But he may not dispose of the stool's absolute ownership in it to strangers without the consent and concurrence of the stool."

(The emphasis is mine.) See also *Baidoo v. Osei* (1958) 3 W.A.L.R. 289 and *Atta Panyin v. Ashanti II* [1961] G.L.R. 305. It can therefore be seen that the usufructuary interest is potentially perpetual. So that apart from the statutory powers for expropriation or acquisition as **[1322]** provided in Act 125, as amended by N.L.C.D. 234, the interest of the usufructary can be determined only by his consent abandonment or upon failure of his successors. All these

conditions were absent in the present case. Consequently, the plaintiffs land could not be said to have reverted to the co–defendant. That being the case, the plentiff was in full and exclusive control and possession of his said land at the time the co–defendant authorized the defendant to enter upon it and to uproot those palm trees. Since the entry was without the permission of the plaintiff, the defendant's conduct constituted trespass.

The defendant, for all intents and purpose, ought to be treated as the agent of the co–defendant, especially having regard to the fact that the proceeds which the defendant realized from the sale of the palm wine were admittedly paid over the co–defendant. The co–defendant must therefore be held vicariously liable for the consequences of the trespass committed by the defendant In other words, both the defendant and the co–defendant ought to be condemned, jointly and severally, in damages to the tune ¢750. In addition, they should be called upon to account for the value of the 215 palm trees. I am aware that the palm trees in question were wild oned. But that does not make any difference. The allodial owner, without the permission of the usufructuary owner has no right to the econo,mic trees on any land which is in the possession and control of the usufructuary owner, whether those economic trees were cultivated or grew on the said land without " the intervention of human labour. "Ollennu in his book entitiled the *Principles of Customary Land Law* made this quite clear, at p. 59 of the said book where he stated:

> "Another important incident of the determinable titile is the right to palm and cola nut and other economic trees of the land. In all parts of Ghana where the oil palm tree and other species of palm grow, it is the owner of the determinable titile in land, and he alone who is vested with the right to harvest the fruits, to fell the palm trees or to tap wine from them. Niether the owner of the absolute title nor the owner of the sub-absolute title can go upon land to harvest cola nuts, palm wine or fell palm trees for palm wine. They may request the owner of the determinable title to supply so many pots of palm wine or a quantity of palm nuts or cola nuts as customary services, but they are not permitted by custom to go upon land in ppossession of a subject to take any of these things."

Dr. S. K. B. Asante in the *Property Law and Social Goals in Ghana* 1844-1966 also shares the same view but ha further goes to include timber. At p. 61 of the book the learned author states: [**1323**]

> "It need hardly be stressed that the usufructuary is entitled to income of the land. This may take the form of prescribed proportion of agricultural produce under an *abunu* or *abusa* tenancy, or rent accruing from a lease, or the consideration for the grant of license or the "brute product" of the arising without the intervention of human labour such as palm–nuts, cola nuts and timber."

The plaintiffs' evidence that the defendant uprooted 215 palm trees and that the value of one was ¢4 was never challenged. The defendant and the

co–defendant, are therefore accountable to the plaintiff in the sum of ¢860. Furthermore, the plaintiffs request for perpetual injunction should be granted. He must also be granted the declaration of title which he sought since it was established that he was the usufructuary owner of the land. In *Ohimen's* case (supra), the learned judge at p. 280 observed:

> "On the other hand the only title in land which a subject can claim against a stool is the usufructuary title to the portion of the stool land in his actual possession. If he proves that, he is entitled to a declaration of his title to that land."

For the above reasons, I also agree that the appeal should be allowed, and the judgment appealed from set aside, including the order for costs; and in substitution thereof judgment is entered for the plaintiff against the defendant and the co–defendant jointly and severally for (a) a declaration of title to the disputed land as described in the writ of summons, (b) ¢860 being the value of the palm trees unlawfully uprooted and tapped into palm wine, (c) ¢750 as damages for trespass, and (d) perpetual injunction restraining the defendant and the co–defendant, their agents, servants, labourers or workmen from entering the disputed land or from having anything to do with same.

Appeal allowed.
Judgement for the plaintiff.
J. A. A.

NOTES:

1.) *Mansu v. Abboye* says that once a subject acquires a usufruct, the stool cannot re–enter the land or grant it to another party without the consent and concurrence of the subject. *See Mansu v. Abboye*, [1982-83] G.L.R. 1313, 1321.

2.) The court also says that the interest of a usufructuary is potentially perpetual — and that it ends only in three cases:

- When the subject consents to transfer the interest.
- When the subject abandons the land, or
- When there is failure of the subject's successors.

Id. at 1322. What about the discussion in the following case of the duty to perform customary services? If a subject fails to do that, would that also terminate the usufruct?

4.2.2 Total Oil Products Ltd. v. Obeng and Manu [1962] 1 GLR 229.

In the High Court, Accra

5th April, 1962

[230]

ACTION by plaintiffs for declaration that a grant of land to them by a transferee of a stool subject is invalid because it was done without the consent of the stool, and for return of moneys paid in pursuance of the said grant.

OLLENNU, J. [*His lordship narrated the fact as set in the head note and continued:*] the first point to be considered is the position of the second defendant, and no tortuous act has been committed by the second defendant against the plaintiff–company. Therefore no cause of action is disclosed against him; the suit against him is therefore frivolous.

On the suit generally it was submitted by counsel for the plaintiff that:

(1) the conveyance by the second defendant to the first defendant is null and void, because it as made contrary to section 75 (1) of the Local Government Ordinance;[1]

(2) The lease by the first defendant is also null and void by reason of the said section 75 (1) of Cap. 64; and

(3) By the nature of the deeds of conveyance exhibit C and exhibit E between the second defendant and the first defendant, the second defendant forfeited his usufructuary or determination title to the land as a subject of the stool.

I shall deal with each of these points in turn.

Section 75 (1) of the Local Government Ordnance relied upon to sustain the submission that the transfer of the land by the second defendant to the first defendant is void, reads:

> "75 (1) Any disposal of any interest or right in land which involves the payment of any valuable consideration or which could, by reason of its being **[231]** to a person not entitled by customary law to the free use of land, involve the payment of any such consideration, which is made:—
>
> (a) by a stool; or
>
> (b) by any person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment of any consideration or in exchange for a nominal consideration;

[1] Cap. 64 (1951 Rev.)

> shall be subject to the concurrence of the Urban or Local Council, as the case may be, for the area concerned, and shall be of no effect unless and until such concurrence has been obtained and certified in writing under the hand of the chairman or clerk of the council."

Since the disposal in the case was not made by a stool, the part of the section which is relevant to this case is subsection (1) (b). The important words therein are:

> "Disposal ...made by a person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment of any consideration or in exchanges for a nominal consideration."

The right of a person by customary law to free use of land is limited to land in its natural state, *i.e.* land which ha nothing but natural products thereon, not land which has been developed by human skill, industry or capital. No person is entitled to the free use of a coca farm made by another, or to the free use of any house built by another person. Therefore in my opinion the restriction upon disposal of land which is made by section 75 (1) of the Local Government Ordinance applies only to undeveloped land; land with only natural products thereon, but not otherwise. Furthermore, as the subsection (1) (b) shows, the section does not apply to land of consideration other than nominal.

Now the evidence on the record led for both the plaintiffs and the defendants shows that the land belonged originally to a subject, one Yao Kyeame or his family; that it was the said Yao Kyeame who gave it to the second defendant; that at the time of its transfer to the second defendant the land was a farm with cassava and some coca trees growing on it. The second defendant gave evidence which stands uncontradicted that Yao Kyeame sold the land to him, and in addition to the purchase prince he paid Yao Kyeame £G6 for cutting the coca tree on the land, and he thereafter gave drink of 24s. To the Tafohene in accordance with custom when he was about to start build on the land.

Again according to P.W.3, the languish to the Tafohene; the transfer of the land to the second defendant took place twelve, thirteen or more years ago. According to the second defendant he erected a dwelling-house on the land after the sale of it him, and that building was occupied by tenants for at lest twelve years prior to 1960.

Three important facts are proved by the evidence, they are :(1) the transfer to the second defendant must have been made over ten years ago, *i.e.* prior to the 12th January, 1952, the date on which the Ordinance, Cap. 64, came into force; (2) the second defendant acquired possession of the land for a consideration other than nominal, in addition to the nominal consideration of 24s. To the stool to inform the Tafohene that he was going to build on the land; and (3) that the land was developed land.

Since the transfer of the land Yao Kyeame to the second defendant was prior to the date the Ordinance came into force, it was not in any way **[232]** affected

by the ordinance. Secondary, since the second defendant paid consideration for the land, and since the land he sold to the first defendant was developed land, the Ordinance dose not affects the alienation of the said land.

Again, the first defendant got possession of the land upon payment of a consideration other than nominal — *i.e.* £G250. Therefore the demise he made of it the plaintiffs does required concurrence as stipulated in section 75 (1).

On the third point counsel for the plaintiffs submitted that by customary law a stranger or subject forfeited his usufructuary title to land when he denies the title of his grantor. He therefore submitted that to the first defendant that: "And also the *habendum* in exhibit E; "To have And To Hold ... Unto And To The Use of the said Purchase his heirs executors and assigns in fee simple", show that the second defendant claimed to be owner in fee simple and also purported to convey the fee simple in the land, a title which he as a subject of a stool. Counsel therefore submitted that by tempting to convey the fee simple in the land as shown by the deed exhibit E, the second defendant denied the title of the stool, and thereby forfeited his usufructuary title to the land as a subject.

With due deference to learned counsel, I must say this submission shows confusion of thought. Than only way in which a subject can be said to have denied the title of his stool to land in his occupation is where he claims that the land he occupies belongs to a stool other then the stool to which he is a subject, and that he holds the land as grantee to title of the stool. The second defendant has never made any such allegation.

Here it is appropriate to point out that the *habendum* which the solicitor who drew the conveyance exhibits C put in that document is as follows: "To Have And To hold ... unto and the use of the Purchaser his heirs, personal representative, and assigns". He did not add the words "in fee simple". It was counsel for the plaintiffs who, advising that the document exhibits C did not now seeks to avoid toe documents, exhibit C drawn by E upon which he now seek to avoid two documents, exhibit C drawn y another solicitor as well exhibit E drawn by himself. I do not see how he can do that.

But apart altogether form the impropriety in the matter, the submission that a fee simple title in the land is versed in the stool, and that the use of the words fee simple is essential in a conveyance of land by the holder of the usufructuary title is misconceived. There is no fee simple in customary land tenure; all the effect that a conveyance which purports to convey the fee simple in land in Ghana has is to pass the highest estate or interest vested in the transferor; and since the highest title which a subject of a stool can own in the stool land is the usufructuary or determinable title, the only which passed the said exhibit C and exhibit E is the usufructuary title which was vested in the second defendant. On this point see *Addai v. Bonsu*[2]. There a person who was only a licensee paying tribute and therefore had the usufructuary title in a certain land **[233]** vested in him, purported a in this case, by deed to convey the fee simple in the land to the vendee. The Supreme Court held that all that deed conveyed was

[2][1961] G.L.R. 273.

the vendor's usufructuary title. In the course of their judgment their lordships said[3]:

> "We think not withstanding the nature of the interest which Hamidu purported to have conveyed to the plaintiff he could not law convey more than plaintiff, exhibit B, upon which the plaintiff relies for his title, purports to convey a 'fee simple' but there is no doubt that Yadiga did have that kind of interest in the farm and he could not could not therefore convey a fee simple to the plaintiff. The estate which Yadiga inherited from his late brother Salifu and which the Ahfu Native Court decreed in his favour, cannot be different from that which his deceased other Salifu Moshie in relation to the disputed farm and his successor Hamidu Hamidu Yadiga could not be inn any better position. Yadiga could only sell to the plaintiff and the plaintiff therefore bought a usufructuary right only and not a fee simple in possession as the deed of conveyance purports to show."

Therefore the submission the conveyance by the second defendant to the first defendant exhibits C and E are null and void, is without substance.

Counsel for the plaintiffs next raised a number of other legal points which we should now deal with. He submitted that since the days of tribal wars are long past and gone, and therefore a subject of the stool stool or to be called upon to lay down his life to acquired land for the inherent right to exclusive use of a portion of the stool land which he reduces into his possession by his industry, is now at the will of the stool and therefore the stool could alienate land in the possession and occupation of a subject without reference to the subject–owner or his grantee. Unfortunately for counsel the evidence given by his own expert witness on custom, and the evidence generally, completely shattered that submission to piece. His third witness, linguist to the Tafohene, gave the impression in his evidence in chide that all lands at Old Tafo on which petrol filling stations had been built were granted to the companies concerned direct by the Tafo stool, and that individuals who owned farms or building on those lands were not consulted, and that upon the grant the grantees on those lands were not consulted, and that upon the grant the all that all lands at Old Tafo on which petrol filling stations had been built were granted to the companies. The evidence given by P.W.1, the linguist to the Okyihene, P.W.2 the Okyi State Secretary, and P.W.3 linguist to the Tafohee, as to custom conforms to the well–established principle of the customary law, the namely that a stool cannot alienate land in the possession of a subject without the consent of the subject : see e.g. *Golightly and Ors. v. Ashrifi and Ors.*,[4] *Ohimen v. Adjei and Anor.*[5]

[**234**] Again, it was submitted that by customary law, the second defendant lost his right to the land by pulling down his building on it, because that act

[3] *ibid.* at 275.
[4] (1955) 14 W.A.C.A. 676
[5] (1957) 2 W.A.L.R. 275.

amounted I customary law to abandonment, and therefore the transfer to the first defendant is without effect, as a the date of the transfer, the second defendant had more interest in the land which he could convey. There are two complete answers to this submission: (1) the buildings were in existence in June, 1960, the date on which second defendant made the transfer to the first defendant. This fact is emphasised in the lease exhibit J drawn by the very counsel who made the submission. In the said lease he made provisions for the mere fact that buildings erected on the demised land. Secondly, the mere fact that buildings go into ruins or are pulled down dose not constitutes abandonment. Thus the State Secretary P.W.2 corrected the evidence he had earlier given on this issue. He said: "I would correct the evidence I gave in chief. I now say that a subject dose not by custom loses his rights to building land simply by reason of the fact that his building goes into ruins or because he breaks it down." Abandonment has a special meaning in customary law. Mere negligent or non-user of lands for a period however long does not by itself or constitute e abandonment. Some act or conduct must be exhibited by the owner which shows intention not to use the land any longer: see *The Shai Hills Acquisition*.[6]

Counsel next submitted that by customary law, a subject is not entitled to alienate his determinable or usufructuary title in the land to any one without prior consent of the stool. He was referred to a number of decisions of this consent of the stool. He was referred to number of decision of this court of the Court of appeal, of the West African Court of Appeal, and of the supreme Court, which have held the contrary, and to the evidence given by one of his expert witness on custom, P.W.I the linguist to the paramount Stool of Akim Abuakwa, where that witness said:

> "The main concern of the stool I alienation of land by a subject is that the stool should not lose its right to customary services from the purchased who comes to occupy the land, be he a subject or a stranger. The right which a subject by birth enjoys is also enjoyed by people who acquire the rights of a subject by adoption, *i.e.*, a stranger purchaser whom the stool admits to performance of customary rites."

Counsel then modifies his original his submission and said that although a subject may alienate his usufructuary title to a stranger, if the instrument of transfer did not clearly state the customary rites which would be obligatory upon the purchaser, the sale would be null and void *ab initio*. He submitted therefore that since the first defendant is an Ashanti man, not a subject of the Akim Abuakw stool, therefore a stranger in Akim Abuakwa, the sale of the land to him is null and void *ab initio* because there is nothing in any of the two deeds of conveyance, exhibit C and exhibit E, stipulating the specific customary rites which would be expected of him, the first defendant, to render to the stool. He cited the support of the proposition.

[6]Land Court, Accra, June 3, 1957, unreported.

Based upon the said judgment of the privy Council, counsel further argued, though not in so many words that if the conveyance to the first defendant is held to be valid, then he, the first defendant would be in the position a subject of the stool having s usufructuary title in the land and that by customary law the denies of it to the plaintiff–company, **[235]** strangers to the stool, without the prior consent of the stool are null and void, and the plaintiffs are entitled to a refund of all money they had paid on the transaction to the first defendant. I shall dispose of this last argument first before going back to the former.

I agree that a transferee is no better position than the subject–transferor. Now the law as to the right of the subject to grant a lease of the land in his occupation is well settled. Lease of land by a land; it dose not therefore require the prior consent of the stool: see *Thompson v. Mensah*[7] and the cases there cited. The lease exhibit F is therefore valid.

One cannot help observing that exhibit E one of the documents which counsel or the plaintiffs contends is null and void by reason of the fact that it does not contain any clause which clearly sets out the specific customary rites and services which the stranger-transferee would be obliged to perform for the stool, is a document, which as earlier pointed out, was prepared by the very counsel who now allege that it is was drawn purposely to cure defects in exhibit C. If, as submission by counsel, on inclusion of the particulars he alleges were essential to make the title of first defendant for the particulars in exhibit E, or is the submission on this point only an ingenious and bright idea which has recently come into the mind of counsel? But that is only the way.

The passage I the judgment of the Privy Counsel which counsel land the plaintiffs relied upon his submission reads as follows:

> "Their lordship have been referred to a series of decisions in the Land Court in recent years, affirmed on occasions by the Court of Appeal, from which it appears that the usufructuary right of a the stool is not a mere right of framing with no right to alienate. Native the has progression, into an estate or interest in the land which the right of the paramount stool to his own, so long as he alienate it to 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."[8]

The question is, who is to make the provision for commuting the customary services, is it the subject–transferor, is he in a position to say the form into which the stool would like the services commuted? Or is it the stool to whom the services are due who would settle the form in which the services are to be commuted? The answer to this question is to be found in some of the judgments of the Land Court and the Court of Appeal to which their Lordships in the Privy Council referred. We will refer to just three of those cases. In *Thompson* v. *Mensah*,[9], the Court of Appeal stated the law as follows:

[7](1957) W.A.L.R. 240.
[8][1961] G.L.R. 492 at p. 495.
[9](1957) W.A.L.R. 240 at pp. 249-250

> "... the correct statement of the native custom is that a usufructuary title can be transferred without the consent of the real owner provided the transfer carries with it an obligation upon the transferee to recognise the title of the real owner and all the incidents of the subject's right of occupation, including the performance of customary services to the real owner."

[236] Then in *Baidoo* v. *Owusu*[10] the Land Court stated the customary law in the following words:

> "By native custom the subject is entitled to alienate his usufructuary title in the land without express permission of the stool so long as the alienation carries with it an obligation upon the transferee to recognise the title of the stool and to perform the customary service due to the stool from the subject occupant. Where the transferee is a stranger, *i.e.*, a non–subject of the stool, it is customary for the stool to commute the customary services which so devolve upon the transferee to a tenancy agreement of some form or the other, since by native custom ti may sometimes be undesirable,indeed sacrilegious, to admit the stranger transferee to performance of customary services for the stool, for example, in an Akan State it would be undesirable for a stranger to a tribe whose custom is circumcision to perform rites connected with the stool, and vice versa in a Ga Adangbe or an Ewe State for a stranger to a tribe whose custom is non–circumcision to perform customary rites for the stool, in either case it will mean desecration of the stool. Therefore, unless he is formally admitted to actual performance of the customary services or his occupation without performance of the services is acquiesced in by the absolute owner in such a way as to amount to laches, a stranger transferee of the usufruct from a subject should enter into a tenancy agreement of some sort with the absolute owner."

The same principle was applied in *Wutor* v. *Gyebi*[11] These judgments make it quite clear that it is the stool whose duty it is to commute the customary services, certainly the commuting is not the responsibility of the subject–transferor. Of course the transferor may introduce the transferee to the stool. But as shown by the notice exhibit A, tendered by the plaintiff–company through the State Secretary, the usual custom is that when a stool notices a stranger on a portion of the stool land the stool calls upon him to come for consideration of his case as to whether the stool would admit him to performance of the customary rites to the stool, or whether the stool would commute the services.

Since tribal wars have ceased to exist, a subject is no longer liable to be called upon to lay down his life to win more land for the stool, or to protect land. Therefore the general form which the customary services take are provision of

[10](1957) W.A.L.R. 289 at p. 291.
[11]1954) Oll.C.L.L. 193; affirmed, Court of appeal, April 5, 1960, unreported.

foodstuff, firewood or some other articles to the stool at the feasts of the stool, at annual festivals, or when necessary, contributions to funds for financing litigation in respect of land. With the rapid developments taking place, it soon may happen that the performance of the customary rites to the stool and litigation in respect of stool land may be financed from a central fund to which all the dwellers, subjects and strangers alike, within the territorial limits of the stool l and are bound to contribute. In such a case since the contribution by the subject to that fund amounts to performance of customary rites to the stool, the compulsion upon the stranger too to contribute to that same fund would amount to the stool admitting him to actual performance of the said customary services. In that case subjects and strangers within the particular area would have equal responsibilities towards the stool in respect of stool land; in that case the alienation of land by a subject to such a stranger would be on exactly the same principles as alienation by a subject to a subject.

[**237**] And now to exhibit J, the lease which the Tafohene purported to grant to the plaintiff–company. That is a lease by a stool to a stranger of land in the possession of a subject of the stool or his grantee. Upon the well–established authorities, *e.g., Golightly and Ors.* v. Ashrifi and Ors.[12] *Ohimen* v. *Adjei and Anor.*[13] *Thompson* v. *Mensah*[14] and *Baidoo* v. *Osei and Owusu*[15] the lease exhibit J is null and void, and passed no interest in the land to the plaintiff–company. At this stage it is appropriate to refer to another Akim Abuakwa case on this issue: *Awi and Ors.* v. *Okyere and Ors.*[16] The land, subject–mater of that suit, is Akim Abuakwa Benkumhene stool land. The defendants were subjects of the stool in occupation of the land having farms and villages or cottages thereon. The Benkumhene acting with customary consent and concurrence, *i.e.*, of his elders and of the paramount stool sold that land to the plaintiffs who were strangers. The defendants refused to quit the and, whereupon the plaintiffs sued them in Akim Abuakwa Native Court "A" New Tafo for recovery of possession and trespass, contending that they had acquired good title to the land because the sale of it to them complied with all the requirements of a sale of stool land by the stool to a stranger. The native court who were the repositories of the customary law dismissed the claim of the plaintiffs, and stated the customary law as follows: "It is absolutely against the Akyem Abuakwa customary law to sell the farm of a native to a stranger by the stool." That judgment was upheld, on appeal, by the Land Court which said, *inter alia*:

> "In my opinion it is a correct statement of the native custom that the stool cannot dispose of, or otherwise alienate stool land in the possession or occupation of a subject without the consent and concurrence of that subject. That principle of native custom is now well–established."

[12](1955) 14 W.A.C.A. 676.
[13](1957) 2 W.A.L.R. 275.
[14](1957) 3 W.A.L.R. 240.
[15](1957) 3 W.A.L.R. 289.
[16]Land Court, Accra, November 24, 1958, unreported.

Realising that by going behind the first defendant to take a lease from the stool, his clients had denied the title of their said landlord and exposed themselves to forfeiture of their tenancy, counsel was at great pains to explain that his clients were obliged to resort to that measure because the first defendant would not take any steps to ensure that his clients would have quiet enjoyment of the land. This explanation, however, is not borne out by the evidence, oral and documentary. The lease exhibit J was executed on the 22nd of October, 1960, and ti was not until the 8th November, 1960, that the solicitors for the plaintiffs wrote the letter exhibit G to inform the first defendant that his clients had been ejected from the land. Then the first defendant by his letter exhibit H of the 23rd November, 1960, requested the solicitors of the plaintiff–company to supply him with particulars of the ejectment of his clients so that he, the first defendant, might take appropriate steps, but he received no reply to his request. Fortunately the first defendant has not counterclaimed for forfeiture of the lease he granted to the plaintiffs, therefore the lease said about this aspect of the case, the better.

The plaintiffs have miserably failed to establish their case, and their failure must be visited with inevitable legal consequences. Each of the claims made by the plaintiffs is dismissed, and judgment entered thereon for the defendants. The defendants will have their costs fixed at 150 guineas inclusive.

Action dismissed.

NOTES:

1.) A subject owes customary services to a stool as a condition of gaining a usufruct. *Total Oil* says that it is the responsibility of the stool, and not the subject, to commute the customary services in the case that the subject makes a grant of the land. *Total Oil Prods., Ltd. v. Obeng*, [1962] 1 G.L.R. 228, 236. What does this mean? How involved is the stool in each individual land transaction? The plaintiff claimed that a transaction in which the deed did not contain written provision for the customary services was void. *Id.* at 234. The court rejected this proposition. *See id.* at 235-36. What must the stool do to guarantee provision of customary services by a grantee? Does the stool have any sort of "veto power" at the beginning of the transaction, if a satisfactory agreement for provision of customary services cannot be reached? Or does the stool have to sue after the fact if the transferee's performance is unsatisfactory?

Budu II v. Caesar, [1959] G.L.R. 410 (*infra*) seems to limit the role of the stool in transfers of land held by a subject. How do the limitations on *Budu II v. Caesar* fit with the role of the stool in commuting the customary services?

2.) The question of whether a stool's consent is required for alienation of a subject's usufruct has recieved different answers over time. Woodman suggests that the doctrine espoused in *Total Oil* was the creation of Ollennu, J., in the 1950's. *See* WOODMAN, *supra* note 4 at 102-03. Woodman's claim is that

Ollennu began to hold this way in cases a few years before *Total Oil*, and that his opinion was adopted by other courts. *See id.* According to Woodman, however, earlier cases had held that a stool's consent was required for alienation of a usufruct. *See id.* If it is true that Ollennu created this doctrine out of whole cloth, so to speak, that may be consistent with the philosophy expressed in both *Total Oil* and the next case, *Atta Panyin*, that customary law must change with the times.

3.) On the subject of the fluid nature of customary law, does the constitution have anything to say? Does the description of customary law, in Article 11(3), as law which is "by custom applicable," give any guidance as to whether, and how much, courts should recognized "changes" in the customary law?

4.2.3 Atta Panyin and Another v. Nana Asani II; Atta Panyin and Another v. Essuman (Consolidated)

[1977] 1 GLR 83.

Court of Appeal, Accra

25 June 1976

[**85**]

APPEAL against a judgment of Owusu J. in an action inter alia injunction and possession. The facts are fully stated in the judgment of Francois J. A.

Brodie Mends for the appellants.

J. Mercer for the respondents.

FRANCOIS J. A. This is an appeal against the decision of the late Charles Owusu J. sitting in the Cape Coast High Court, in two actions which were consolidated for trail. The first of these suits was filed in February 1963 by the plaintiff–respondent, Nana Asani II, Ohene of Bedum, on behalf of his stool subjects against the defendants–appellants, abusuapanyin Atta pinyin and Nana Amuakwa VI, presenting the stools of Ewumaso [**86**] and Breman Asikuma, respectively. The respondent sought an order of the court declaratory of his right to a quiet sojourn on the appellants' Adumegya Bedum land upon payment of annual customary tribute. He also sought a protective injunction to shield his subjects from the harassment to which they had been subjected by the appellants. He Breman Asikuma Native Court B (subsequently transferred to the Cape Coast High Court for trial) the appellants had obtained a declaration of their title to Bedum land but failed in their bid to restrain the respondent and his subjects from entering the land. It was the respondent's case that that earlier prayer for an injunction sought against him was couched in such wide terms as to embrace not only his people, servants, agents, tenant and workmen, but "all others claiming right of access to the said piece or parcel of land derived from [him] the defendant."

It was the respondent's further case the, since that decision in 1961, the appellants had refused to accept the yearly tribute offered but had embarked upon a course of systematic harassment calculated to obtain a relief the court had significantly denied them, namely, the ejectment of the respondent and his people from the land. In the first of the consolidated suits therefore, the respondent sought to challenge the appellants' conduct and bring it to a halt.

The appellants agreed in the main with the averments pleaded by respondent which briefly recounted the history of the grant, the conditions attached thereto, to genesis of the 1958 action, and its conclusion in 1961 with the declaration of ownership in favour of the appellants and the refusal of the court to grant an injunction or exact forfeiture against the respondent and his subjects provided annual tributes were paid.

The appellants, however, controverted three specific matters. First, that the original grant vested any power in the respondent to alienate land especially to strangers without their consent. Second, that they had refused to accept annual tributes, and third, that they had molested the respondent. In turn they pleaded that the respondent in breach of his obligations under the grant had placed tenants on the land and goaded them into denying their over lordship. They contended that four of such tenants had been successfully sued in the High Court, Cape Coast, but had truculently refused to attorn tenant. Relying on these judgments the appellants counterclaimed for recovery of possession, an order upon the respondent's tenants to attorn to them, and an injunction against the respondent and his people from setting foot in the area. In issue for trial, consequently, were the matters above adverted to but more particularly the effect of the 1961 judgment of Adumua–Bossman J. reported as *Atta Panyin v. Asani II* 1961 G.L.R. 305.

In the second of the consolidated suits filed on 23 February 1966 the appellants used one Kwame Essuman (hereinafter referred to as Essuman) a tenant of the respondent. The claim derived its substance from the refusal of Essuman to attorn tenant to the appellant in terms of an order contained in a judgment of Charles J. of 1 December 1962. Essuman resisted this claim and denied the Charles J. judgment any validity, **[87]** relying on the derivative sub–title of the respondent. The appellants replied that the 1961 judgment of Adumua–Bossman J. (as he then was) estopped the respondent from litigating the issue.

On 14 February 1968, the two suits were consolidated for trail. As both parties relied largely on the judgment of Adumua–Bossman J. and to a lesser extent on that of Charles J., the evidence was extremely succinct. The argument in the trial court, rehearsed again in this court, was directed to the true construction and effect of these judgments. Counsel for the appellants in a fulsome and impassioned plea, exhorted this court to construe the judgment of Adumua–Bossman J. at its face value and to resist any temptations to interpolate. He argued that the late eminent judge did not lack clarity on legal issues and was the champion and best advocate of his own views. Any annotation of his judgment would consequently be unwarranted. It is readily conceded that it would be wrong to read into a judgment more than what an articulate and clear minded judge had inscribed. It is recognised also that Adumua–Bossman J., as was his

wont, expressed his views forcefully with perception and at some length and his judgments betrayed no ambivalence on controversial issues. Consequently, this appeal must turn to a large extent on the true unvarnished interpretation of this judgment: specifically the nature of the appellant's holding as a stool tenant of a customary estate from the appellants. Adumua–Bossman J. was at great pains to trace the development of customary estates in Ghana. In his judgment of 1961, aforementioned, he examined in depth the right the usufructuary subject acquires in his holding in land and after examining critically the extent or quality of the respondent's usufructuary title in the light of decided authorities, concluded in favour of the respondent in upholding his right to remain on the land and deal with it. This appeal must determine whether the matters so examined came to a finality to preclude their further agitation, and sustain the plea of estoppel.

Our inquiry begins therefore with an examination of the respondent's usufructuary interest, and the first consideration is the nature of the grant the respondent's ancestors received from the appellants' forbears, some three hundred years ago.

There is no dispute that the radical title lay in the appellants. The 1961 judgment confirmed this. Equally uncontroverted is the term of the grant that the respondent should annually pay the appellants £G2 8s. 4d., and offer yams and sheep for the privilege of staying on the land with his subjects. The question, however, posed on these facts is whether the respondent was the possessor of a bare licence or a usufructuary title. For a mere occupational licence, denudes the grant of powers of control and disposition and seriously curtails and circumscribes the ambit of alienation.

The nature of such distinctive rights was examined in *Yartey and Oko v. Construction & Furniture* (*West Africa*), *Ltd.* [1962] 1 G.L.R. 86, S.C. where the Supreme Court laid down the test, that usufructuary title exists only where *possession, control and management of the land has been* vested in the grantee. Possession in that context being equated with prolonged **[88]** and effective occupation. The question now is whether upon that test the respondent's holding qualifies as a usufructuary interest. Even at the start of this examination it is wise to bear in mind the paramount importance of clarity and consistency in defining indigenous concepts. This caveat was given by Lord Maugham in *Oshodi v. Balogun* (1936 4 W.A.C.A. 1, P.C. where he deplored the inconsistency in terminology with regard to ownership and usufructuary title and prayed for statutory intervention to regulate the position. While endorsing the opinion of Lord Dunedin in *Oshodi v. Dakolo* [1930] A.C. 667 at p. 668, P.C. that: "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 not fee simple, but only a usufructuary title," Lord Maugham explained that usufructuary title could only legitimately exist in that context if contrasted with the title of the whole family unit which could claim the fullest beneficial rights. Loose terminology is also criticized in the Privy Council case of *Enimil v. Tuakyi* (1952) 13 W.A.C.A. 10 at p. 14 where Lord Cohen said:

> "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 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 ... 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."

The call to the legislature to step into the breach has fallen on deaf ears, but fortunately, subsequent decisions of the courts have partially remedied this. Some of these authorities will presently be discussed, but it must be said now that the evidence does not suggest that the grant made three centuries ago was restricted in any way. Indeed documents tendered by the appellants themselves, exhibits B, B1 to B12 and exhibit D show that the respondent had been dealing with and managing the land to the fullest extent for at least a quarter of a century without let or hindrance. Assuming no waiver applies, the gravamen of the appellants' case in that if the respondent is permitted to put tenants and strangers on the land, it would give him rights over and above what was contracted for in the original grant and would in effect equate him with a titular overlord. The sort of situation was described by Graham Paul C.J. in *Manuel v. Dokubo* (1944) 10 W.A.C.. 47 at p. 60, where a grantee aspired to obtain a:

> "higher right over the land than that given by the ordinary well-known and judicially recognized tenancy under native law and custom, **[89]** namely that the occupation was to be confined to himself, his family, his house members and successors and that he could not put strangers on the land—the right to put strangers on the land or collect rents being the well–known right of the absolute owner and not of the tenant under native law and custom. This is fundamental and recognized through West Africa."

And I *Zahri and Kassab v. Denkyira* [1961] G.L.R. 419 where Ollennu J., as he then was, said at p. 423:

> "But where a limited owner in denial of the title of the holder of a higher title in the land, *e.g.* where a tenant, abusa or otherwise, denies the title of his landlord, holding himself out as able to transfer a higher title deliberately offers to transfer that higher title, he, the limited owner, renders himself liable to forfeiture of his estate of interest in the land."

And again in *Bassey v. Eteta* (1938) 4 W.A.C.A. 153 at p. 155 where it was held that a letting by a grantee to a stranger by the strict rule of native law and custom entails forfeiture but "in practice the Courts grant relief against such forfeiture usually upon the terms that the letting shall hold good and the grantee shall pay over to the grantor a proportion of the rent received . . . "

These cases were indeed illustrative of fundamental principles of land holding in Ghana. But they are hardly apposite in their application to the instant case. In the present case, the grantee was stool which in its own right had subjects and strangers. Such strangers' holding, ensuring future customary services; the allocation being the quid pro quo for their fealty and all its entails, within the territorial and jurisdictional areas of the stool. Further the presumption remained undisplaced that the original letting took cognizance of future dealings of the grantee with the land; consequently any subsequent letting did not constitute a derogation of the grant. Secondly, since the grantee contracted to pay a yearly tribute, it could be rightly urged that this fee covered and exhausted any other form of rent that could legitimately be exacted as the grantee stool was in the position always to provide customary services. Thirty, the issue where both rent and tribute were payable, was properly before Adumua–Bossman J. who was seised of it and had made a final pronouncement thereupon which could not be reagitated.

It will be observed that Graham Paul C. J.'s view in the *Manuel* case (supra) was not vindicated by the majority of the West Africa Court of Appeal for the simple reason that the issue was res judicata and not legitimately be reopened. The criticism is more telling in the instant case where from the pleadings and evidence the very question of alienation to strangers was canvassed before Adumua–Bossman J. whose considered judgment was not appealed against. Significant, for instance, are the admissions of the first appellant elicited in cross–examination as follows:

"*Q.* You are aware of the case decided by Adumua–Bossman J. between you and the people of Bedum?

A. Yes, I am aware. **[90]**

Q. In the case part of your claim was that the defendant and his people, servants, agents, tenants, workmen and all others claiming right of access to the said piece or parcel of land derived from the defendant be restrained on oath from interfering or in any was dealing with the land the subject-matter of the dispute?

A. That is correct.

Q. And the court gave judgment against you in that claim?

A. Not, but I was not allowed to eject them.

Q. At the time of the suit these people you term strangers were already on the land?

A. I did not know until after the case and I invited them.

Q. The land has been in the hands of the Bedum people for about 300 years?

A. That is correct.

Q. After the war between your people and Bedum people you made Bedum people to pay annual tribute to you?

A. The Bedum people have been paying tribute from time immemorial until recently when they refused to pay."

A cursory reference to the judgment of Adumua–Bossman J. reported in [1961] G.L.R. 305 demonstrates the falsity in the appellants' contention that the original complaint did not relate to alienation to strangers and that they were not aware of the presence of strangers. The headnote to that report at pp. 305–306 reads:

> "In the late 1950's the Bedum stool [i.e. the respondent stool] began to allocate portions of the land to strangers without reference to the plaintiff or the co–plaintiff, claiming that the Bedum stool is the owner of the land. Whereupon the plaintiff instituted the present action for declaration of title to the land, recovery of possession and an injunction."

Although the pleadings in the original action are not available, paragraph (5) of the statement of claim was reproduced at p. 307 in the Adumua–Bossman J. judgment as follows:

> "Of late the defendant [i.e. the respondent] has been asserting title of ownership to the said land, and threatens to discontinue the payment of the tribute aforesaid. The defendant in assertion of his unfounded claim to ownership of the said land *has been alienating portions of the said land without the consent of the plaintiff's stool*."

[91]
(The emphasis is mine.) In an amended defence the respondent pleaded in paragraph (4) (as reproduced at p. 308 of the report) that:

> "Defendant in answer to paragraph 5 avers that the land in dispute is vested in the stool of the defendant, and further that the defendant had performed acts of ownership by alienating portions of the said *land to his subjects of his stool and other licensees and strangers for upwards of 300 years, incurring pecuniary responsibilities thereto, to the knowledge of the plaintiff herein, without any protests or objection from either of them or both*."

(The emphasis is mine.) It is obvious Adumua–Bossmua J. considered the issue of unauthorized alienation to strangers and concluded his judgment by granting the appellants ownership of the land while at p. 316 dismissing "that part of the claim for an order to restrain the defendant and his people from dealing with the land." Adumua–Bossman J. stated earlier that the appellants' claim was completely misconceived and repeated this former observation in slightly different language at p. 314:

> "The authorities are many that where an owner has made a customary grant whereby he has conferred possessory or usufructuary interest right or title on another, he, the owner of the reversionary or radical title has not right to interfere with the possessory or usufructuary owner's occupation and use of the land."

The learned judge proceeded to review a number of cases and concluded at pp. 315-316 that:

> "Such being the clearly evolved principles applicable, it is clear the plaintiffs' are not entitled to the order to restrain the defendant and his people which they claim by their writ and statement of claim . . . because no good or sufficient cause or ground for making such an order has been established before me."

It cannot therefore in truth be said that the judgment did not deal with so prominent an issue as alienation to stranger. It is also furtherest from the truth to urge that such alienation came to the notice of the appellants after the said judgment. Assuming that the issue of alienation to strangers a had not been so distinctly raised and equally decisively determined, the appellants would still fail In the application of customary rules to a grant of this kind. For customary law abhors the placing of fetters on a usufructuary title other than the obligation to provide commutable services. A distinction must here be drawn between cases relied on by counsel like *Kuma v. Kuma* (1938) 5 W.A.C.A. 4, P.C. and *Ado v. Wusu* (1940) 6 W.A.C.A. 24 which turn on the denial of the existence of the overlord's title. In those cases it was sought by mere length of occupation to establish title adverse to the owner's. these were clearly breaches of customary tenure. In this case the radical title of the appellants is not in issue nor in jeopardy having been settled by the Adumua–Bossman judgment of 1961. An original grant to the respondent, qua stool, and its subjects has also been conceded. The issue for resolution was therefore **[92]** the quantum of the grant. It is in this context that the appellant's qualification to the grant to the effect of precluding alienation, must be viewed. Can the restrictions urged as fetters to alienation be valid?

In *Thompson v. Mensah* (1957) 3 W.A.L.R. 240, the Court of Appeal considered that question and in a significant passage said per Ollennu J. at p. 249:

> "It may be argued that when a subject obtains the express consent of the stool to occupy stool land, the stool can attach conditions to such

> occupation, and one of such conditions may be a prohibition against alienation of the usufructuary title without the previous consent and concurrence of the stool. In my opinion such a condition will be void and unenforceable since it will be a violation of the subject's inherent right to occupy stool land without any burden except the recognition of the title of the stool which carries with it certain customary services."

Also in point is the opinion of Coussey J. (as he then was), in the unreported judgment of the West African Court of Appeal, Civil Appeal No. 107/49 of 15 January 1952, an extract of which appears in Ollenu's *Customary Land Law in Ghana*, p. 59:

> "usufructuary title can be transferred without the consent of the real owner, provided that the transfer carries with it an obligation upon the transferee to recognize the title of the real owner, and all the incidents of the subject's right of occupation, including performance of customary services to the real owner."

In sum, it seems to me, that there can be no breach a priori. Alienation can take place without the overlord's prior consent but a subsequent refusal to provide the services custom demands can be visited by invoking customary sanctions. Hence the rule that alienation of a determinable estate even to a stranger can only be voidable and not void ab initio, and if the overlord fails to seek avoidance of the infringement of his residual rights of which he is aware, timeously, he would be estopped by acquiescence: see *Buor v. Bekoe* (1957) W.A.L.R. 26 and *Bayaidee v. Mensah* (1878) Sar.F.C.L. 171.

The extent of an indigenous usufructuary interest has been recently considered in a number of cases. Adumua–Bossman J. in *Panyin v. Asani II* (supra) reviewed a number and it was considered at length in Lord Denning's statement of the law in *Kotei v. Asere Stool* [1961] G.L.R. 492 at p. 495, P.C. That statement will bear repetition:

> "Their Lordships have been referred to a series of decisions in the Land Court in recent years, affirmed on occasions 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 and 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* **[93]** *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 had disposed of it by will, which in some circumstances he lawfully may do. The law o the subject is developing so rapidly that their Lordships think it wrong to limit the right of the plaintiffs [to farming only] in the way that Jackson J. did."

(The emphasis is mine.) If alienation by a subject to another is permissible without the consent of the paramount stool on the basis that "the fellow–subject will perform the customary services," how much more alienation by a grantee stool which exists in perpetuity and can be called upon to provide the customary services any time. The payment of tribute is, in a measure, an assurance that service will be rendered when demanded.

In a progressive society which aims at throwing off the shackles of commutation of services take? The extension favoured by Ollennu J. (as he then was) in *Total Oil Production Ltd. v. Obeng and Manu* (1962) 1 G.L.R. 240 C.A. and *Baidoo v. Osei and Owusu* (1957) 3 W.A.L.R. 289 to prescribe the following at p. 236:

> " Since tribal wars have ceased to exist, a subject is no longer liable to be called upon to lay down his life to win more land for the stool, or to protect land. Therefore the general form which the customary services take are provision of foodstuff, firewood or some other articles to the stool at the feasts of the stool, at annual festivals, or when necessary, contributions to funds for financing litigation in respect of the land. With the rapid developments taking place, it soon may happen that the performance of the customary rites to the stool and litigation in respect of stool land may be financed from a central fund to which all the dwellers, subjects and stranger alike, within the territorial limits of the stool land are bound to contribute. In such a case since the contribution by the subject to that fund amounts to performance of customary rites to the stool, the compulsion upon the stranger too to contribute to that same fund would amount to the stool admitting him to actual per same fund would amount to the stool admitting him to actual performance of the said customary services. In that case subjects and strangers within the particular area would have equal responsibilities towards the stool in respect of stool land; in the case the alienation of land by a subject to such a stranger would be on exactly the same principles as alienation by a subject to a subject."

[94]

These prophetic words are with us already. If customary law is not to remain static, but advance with the times, the direction indicated in the *Total Oil* case (supra) must be nurtures and stimulated. Commercial necessity and the socio–political drive for unity dictate such courses. The *Kotei* case (supra) and *Total Oil* case (supra) advocate the unfettered and the fullest extension of

usufructuary rights. To the same end is the decision of this court in *Robertson v. Nii Akramah II* [1973] 1 G.L.R. 445 at pp. 454-455.

The net results is that whereas the appellants as overlords cannot re–alienate to another person without the consent of the respondent tenant, the contrary cannot hold good if there is provision for the commutation of services, and if the respondent's tenancy has not been determined.

The consideration of the usufructuary title, in its original concept and modern extension with reference to old authorities has been extensive though I hope not unduly so. It has been undertaken because it seems to me necessary for a proper evaluation of the adumua-Bossman J.'s judgment and the resolution of the problem posed in this case. Confession must also be made to a predilection to accord the early decisions the utmost respect unless it is plain that they have been overtaken by changed circumstances or their eroded by contrary decisions and subsequent legislation.

I turn now to the issue of res judicata: In determining whether res judicata applied, a preliminary examination of the subject of the previous litigation is called for. To set our sights right, this passage from the judgment of Deane C.J. in *Ababio v. Kanga* (1932) 1 W.A.C.A. 253 at p. 254 seems apposite. There the learned Chief Justice said:

> "Now the first requisite in a case of this kind is to be clear about our terminology. Estoppel *per rem judicatam* is the rule that a final decision of a Court of competent jurisdiction once pronounced between parties cannot be contradicted by any one of such parties as against any other of such parties in any subsequent litigation between them respecting the same subject matter. The word parties must be taken as including privies, a privy being a person whose title is derived from and who claims through a party."

And in *New Brunswick Rail. Co. v. British French Trust Corporation, Ltd.* (1939) A.C. 1 at pp. 19-20, H.L. Lord Maugham explained the doctrine further in the following words:

> "The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."

The whole controversy must be open to final adjudication. A piecemeal approach is not permitted. Thus the established rule that not only substantial issue, but all matters that impinge on the issue are properly the subject of res judicata.

[95] It is clear therefore that a party is not entitled to impeach a judgment on evidence not given in a former trial. In *Ojo v. Abaidie* (1955) 15 W.A.C.A. 54 at p. 55 Coussey J.A. approved the statement of Romer J. in *Shoe machinery Co. v. Cutlan* [1896] 1 Ch. 667 at p. 672 denying a party the right to adduce new evidence to impeach a former judgment:

> "If they were held to be so entitled , I do not see how there could be any finality of the questions in an action ... According to this contention the defendant might try his case piecemeal ... and when he was defeated he might then raise other points at his leisure, and might in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion the defendants are not entitled to do that ... he is bound to put his whole case before the Court; and if he does not do so, then it is his own fault or his misfortune. He cannot be allowed to put part of his case, or to put his case in and incomplete manner."

The principle is further illustrated in *Humphries v. Humphries* [1910] 2 K.B. 531, C.A. where a plaintiff successfully sued for arrears of rent under a lease. Further rents having accrued the plaintiff sued again. The defendant then for the first time pleaded that the lease did not satisfy the requirements of section 4 of the Statute of Frauds, 1677 (29 Cha. 2, c. 4). It was held that as the defendants had failed to raise this defence in the former action he was precluded form raising it in the second action. See also *Oloto v. Williams* (1944) 10 W.A.C.A. 23.

It seems to me the elements required to establish res judicata were abundantly in evidence. The parties and their prives were identical. There was a final conclusive judgment of Adumua–Bossman J. which was not appealed against. It determined the proprietary rights and interest of the parties. Those issues are being re-asserted and re–agitated in a form which is only a variant of the former action but with the same tell–tale hue. The whole policy aspect of res judicata with its aim at finality would be subverted if the appellants were permitted this second throw of the dice. The principles restated above are clearly discernible in the case of *Larinde v. Afiko* [1946] W.A.C.A. 108. There a plaintiff claimed tribute from the defendant, his tenant, for use of land granted him, and damages for unlawfully reaping palm nuts on the land. The defendant pleaded estoppel by record with regard to the second claim urging that an earlier 1925 judgment had denied the plaintiff the identical relief sought. In the subsequent appeal sustaining the defendant's case, the West Africa Court of Appeal held at p. 109 that the earlier judgment made it:

> "quite clear that in the 1925 suit there was in issue before a competent Court between the present Respondent and the present Appellant (through his licensees) the same question as is now raised, namely whether the present Appellant as a tribute–paying tenant of the present Respondent had the right under Awori custom to reap palm nuts on the land of which he was tenant either by himself or by his licensees.
>
> **[96]** The 1925 judgment decided rightly or wrongly that the present Appellant had that right and on this question it is abundantly clear that it constitutes *res judicata* between the Appellant and Respondent ... The Respondent cannot be allowed to found on the part of

> the 1925 judgment that suits him and to ignore it so far as it disposes of the other question in the present case."

Again in *Smith–Mensah v. Yartel* [1962] 1 G.L.R. 238, S.C. the matter that came before the Supreme Court for determination was the effect of a plea of res judicata on issues that could have been raised in an earlier suit but were not. In that case, the plaintiff initially failed because proof of his title was held defective. On appeal this decision was reversed and the plaintiff's title was sustained. The defendant then submitted to the payment of amounts representing fixed annual rent. In a subsequent claim by the plaintiff in 1957 based on this victory, for an account of a two-third's share of "tolls properly due and payable," it was held that the 1945 action not only operated as an estoppel against Yartel was liable to pay only the fixed sum of £G5, described in the 1945 action as a ground rent and it is clear on the evidence that this action only arose because Yartel defaulted in these payments. van Lare J.S.C. put it thus at p. 240 of the report:

> "As the learned judge of the Land Court, Cape Coast, relied on the 1945 proceedings and judgment (exhibit C) as an estoppel against the defendant asserting claim of ownership to the land, he ought to have equally considered that the plaintiff is also estopped from now putting up a claim to two–thirds of tolls collected from canoes on the beach, because in 1945, the claim against the defendant was for only £G5, a year, for three years, ... being arrears of what was due and payable. We notice further that that claim suggested a fixed sum, amandzi, *i.e.* recognition fee, which that word in the Fante language imports and it is described as a ground rent in exhibit C. The plaintiff is, therefore, in our view also estopped from putting up a different story as to the nature of what the defendant has to pay annually to the plaintiff-family."

In considering the relief of an injunction which the appellants put forth in their counterclaim the trail judge, Owusu J. said as reported as reported in [1971] 1 G.L.R. 166 at p. 171:

> "To allow the counterclaim is to re-open one of the issue that was before Adumua–Bossman J. in (1961) and which was ably considered and decided upon by the court. In my view the defendants are estopped by the judgment of Adumua–Bossman J., dated 1 June 1961, from re–litigating the very issue as the possession and perpetual injunction."

[97] The learned judge had the strong views of Smith J. in *Sappor v. Narnor* (1949) D.C. (Land) '48-'51, 197, on a similar problem to draw inspiration from. I am of the opinion Owusu J. was right and must be upheld. This aspect of the appeal fails.

Turning to the second consolidated suit and the effect of the judgment of Charles J. ordering Essuman to attorn tenant to the appellants, I am of the

view that this cannot sustain a plea of res judicata against Essuman and his grantor, the respondent, in view of the existence of the earlier judgment of Adumua–Bossman J. It must be remembered that the judgment was one of many judgments in favour of the appellants against tenant farmers of the respondent. Quite apart from any legal inference that may be invoked by the earlier judgment of Adumua–Bossman J., the subordinate and restricted title of a tenant cannot delimit a paramount title: see *Ababio v. Kanga* (supra).

It is urged with some force that the effect of the judgment of Charles J. was to render ineffective the earlier judgment of Adumua–Bossman J. This is not to say that the judgment of Charles J. was given per incuriam as urged by counsel but rather that Charles J. erred in effectively setting aside a judgment of a court of co–ordinate jurisdiction, and that constitutional proprieties forbid this, as was said in the following unanimous judgment of the West African Court of Appeal in *Anane v. Efriyea* (1940) 6 W.A.C.A. 169 at p. 171:

> "And equally absurd it seems to us that a Court's solemn judgment on a definite issue—specifically by both parties referred to the Court for decision separately and distinctly form the rest of the case—should, by reason of the particulars Judge's departure to another Division, become set aside tacitly and without the intervention of any tribunal having power to set it aside. This is quite different from a case where a competent Court of Appeal sets aside the judgments of a lower Court final or interlocutory and orders a complete new trial."

In my view Charles J. completely misconstrued the 1961 judgment of Adumua–Bossman J. when he failed to distinguish the distinct strands of the claim before the learned judge and their respective resolution. The claim for title did end in the appellants' favour; the respondent failed in his bid to establish a grant because his grantees were not clothed with sufficient authority to dispose of stool land. The court however found that the respondent had genuinely been misled into thinking his document of title conferred proprietary rights. In those circumstances he could not be said to have asserted adverse title to be visited with the sanction of forfeiture.

But there was the other strand. That was the claim for injunction which Adumua–Bossman J. rejected and in the resolution of which he examine at considerable length and with respect very masterfully, the extent of the respondent's usufructuary interest. It is this consideration that led him to hold that that usufructuary title could not be impeached **[98]** upon the evidence led. Charles J. further failed to note that the very issue of alienation to strangers had been raised before Adumua–Bossman J. as this judgment has been at pains to show. Adumua–Bossman J.'s decision was not appealed against and was consequently decisive of the rights of the parties. This is what led Owusu J. to hold as follows as p. 175:

> "Kwame Essumang, the defendant in this suit is a stranger farmer who derived his title from th Bedum stool, He was on the land

> prior to the commencement of the action before Adumua–Bossman J. which declared a possessory title in the Bedum stool. Since the Adumua–Bossman decision in 1961 estops the Ewumaso and the Breman–Asikuma stools form denying the possessory tights or the Bedum stool, the judgment in the Asikuma–Ajumako–Enyan Local Court on 29 March 1962, ordering the defendant to approach the plaintiffs for the purpose of entering into a tenancy agreement and the subsequent appeal No. 16/62 before Charles J. on 18 December 1962 are null and void".

This conclusion of Owusu J. is right and must also be upheld. The appeals in the consolidated suits fail and are hereby dismissed.

AMISSAH J.A. I agree.

SOWAH J.A. I also agree.

Appeals dismissed.
S.Y.B.-B.

NOTES:

1.) In this case the usufruct was granted from one stool to another, rather than to an individual. If stool A grants a usufruct to stool B, and stool B allows its members to settle on the land, what interest to the members of stool B thus acquire?

2.) At one point the court says that a grant of a usufruct is "voidable" rather than void if the grantee does not perform the customary services. *See Atta Panyin v. Nana Asani II*, [1977] 1 G.L.R. 83, 92. Recall that *Total Oil* says it is the responsibility of the stool, and not the subject, to commute the customary services. *Total Oil Prods., Ltd. v. Obeng*, [1962] 1 G.L.R. 228, 236. It seems that all of the responsibility for commuting customary services — from determining what arrangement will be made to litigation if the arrangement is broken — is placed on the stool.

3.) The court quotes Ollennu's opinion in *Total Oil* for the proposition that changes in customary services may eventually amount to contribution to a central fund, *Atta Panyin*, [1977] 1 G.L.R. 83 at 93, saying "[t]hese prophetic words are with us already." *Id.* at 94.

Has everything Ollennu said come to pass? How does the government's collection and distribution of stool land revenue relate to Ollennu's preduction? Ollennu was writing in 1962, the same year that the Administration of Lands Act, 1962 (Act 123) was passed.

4.2.4 Adjei v. Grumah

[1982-83] GLR 985.

Court of Appeal, Accra

14 December 1982

[986]

APPEAL from the judgment of the High Court, Sunyani, allowing an appeal against the decision of the trial district court wherein the plaintiff was given judgment in his action for, inter alia, general damages for trespass against the defendant. The facts are sufficiently set out in the judgment.

Adamu–Bossman for the plaintiff.

No appearance by or on behalf of the plaintiff.

[987] JIAGGE J.A. delivered the judgment of the court. This appeal is from the judgment of the High Court, allowing in favour of the defendant, an appeal against the decision of the District Court, Grade II, Goaso. The plaintiff's claim was for general damages for tress and specific damages for the crops destroyed on the land is dispute.

The plaintiff, a "stranger" at Mim claim that he rendered services as the chairman of the Mim Town Board claimed that he married a wife from Mim. He applied to the Mimhene for land to cultivate and after paying the customary fee of N ¢5 and a bottle of schnapps, he was granted virgin forest land on which he planted cocoa and other crops. He alleged that the defendant entered his farm and damaged 100 cocoa trees.

The defendant denied the allegation and asserted that he purchased the virgin forest land for N¢80 from the Mimhene and that he destroyed no crops because the area he cultivated was virgin forest land. The Mimhene, giving evidence for the defendant, admitted that he and his elders sold to the defendant virgin forest land within the area granted earlier to the plaintiff. The Mimhene claimed that he in 1967, ordered an inspection of the area granted to the plaintiff for farming in 1951: that upon the report received, he and his elders decided to re–enter and sell the virgin forest land which the plaintiff had failed to cultivate to anyone requiring land for farming. The plaintiff for about twenty years after his acquisition was able to cultivate only a small portion of the area granted to him.

The Mimhene asserted that according to the local custom the stool had the right to re–enter a stool land that was not acquired by purchase. Whenever there was failure to develop to within a reasonable time after the land had been acquired.The Mimhene asserted that the stool re–entered the virgin forest land appurtenant to the plaintiff's secondary forest on the ground that the plaintiff failed to reduce the in dispute to actual possession within the twenty years of the grant and that the stool had the right of re–entry even for much shorter periods of default.

The district court accepted the evidence of the Mimhene but held that the court was not satisfied that the right on failure to cultivate was made known

to the plaintiff. He held: "I accordingly find that no condition of forfeiture for non-development was attached the land to the defendant without justification." He found that, "the plaintiff was in actual possession of the entire land granted to him because his labourers were clearing portions of the land and actually working on it ..." The district court gave judgment in favour of the plaintiff.

[**988**] On appeal, the High Court held that the district have found that the area in dispute was virgin forest land, erred in coming to the conclusion that there was trespass. The High Court held also that the plaintiff was never in actual possession of the virgin forest land and that he had no "physical control" over the area in dispute. The appeal was allowed and the judgment of the district court was set aside.

The grounds of appeal argued before this court were that (1) the judgment was against the weight of the evidence and (2) that the judgment was bad in law. Counsel for the plaintiff–appellant (hereafter called the plaintiff) argued that before the re–entry, the plaintiff should have been called upon to show case why the uncultivated land should not be taken away from him and that in spite of the local custom the plaintiff should have been heard. Counsel conceded that one could not tie down virgin forest land for long periods without cultivating it. He submitted, however, that notice of re–entry should be given in any case.

Re–entry of virgin forest stool land is distinguishable from forfeiture of stool land from a subject in occupation. Forfeiture is regarded as an extreme punishment for misconduct or denial of allegiance to the stool. Before such extreme punishment is inflicted on the occupier, the chief and the elders may at their discretion decide on an inquiry to offer the occupier an opportunity to state his case. Re–entry of virgin forest stool land is in my view a realistic customary approach to development of the land.

In this case, the trial court found that the plaintiff was a stranger–farmer who was treated as a subject of the stool. That being so, he must be presumed, as a subject of the stool, to know the local custom on re–entry of the stool land. There is nothing on record to rebut this presumption. The principle of customary law that a subject of the stool acquires a determination or usufructuary title in the stool land he occupies does not apply to virgin forest land on which he expended no labour. The principle is an equitable one rooted in actual possession. It creates an encumbrance or burden on the absolute title of the stool, and vests the subject in occupation with a possessory title that prevails even against the stool itself. The very nature of this possessory title precludes any extension of the principle to cover area of virgin forest land not reduced to actual possession.

Notice of re–entry to such areas may be desirable but failure to do is so not fatal nor can it defeat the customary right of the stool to re-enter and re–locate virgin forest land where there has been a default in its development. It is unreasonable, I think to permit large tracks of virgin stool land to lie idle while stool subjects and other seek land to cultivate or otherwise develop. The customary [**989**] right of re–entry of stool land ensures development within reasonable period after the grant of land.

We find no merit in this appeal and we dismiss it.

Appeal dismissed.
D.R.K.S.

NOTES:

1.) This case is at odds with the holdings above, which indicate that once a stool has granted a usufruct, it cannot re–enter the land. In *Adjei v. Grumah*, the stool *was* allowed to re–enter land after it had been granted. Why? Two factors seem to be present:

- The occupant was not a subject, and
- The land had not been cultivated.

The court emphasizes that the grantee was "treated as a subject," so that the holding did not depend on the fact that he was actually a stranger. *Adjei v. Grumah*, [1982-83] G.L.R. 985, 988.

In any case, when is such cultivation required? What counts as "cultivation?" In an urban setting, would this case imply that a subject must erect a building on land within a reasonable time? Is the intent of the parties at the time the grant is made a factor? What about the price paid for the land? (Here, the parties disputed the price. *See id.* at 987. It seems that the court was sympathetic to the stool for a variety of factors: the grantee was not a subject, a small price was paid and the stool's subjects needed land. In another case where land had remained undeveloped, but where the "equities" differed, would a court hold the same way? This case is from the Court of Appeal. Maybe the Supreme Court would have a different view?

4.2.5 Summary

The state of law regarding alienation of the usufruct seems to be that:

The Stool May Not Alienate a Subject's Land: *Mansu v. Abboye*

The Stool Is Responsible for Commuting Customary Services: *Total Oil v. Obeng*

A Usufruct is Voidable, Not Void, if Customary Services Are Not Performed *Atta Panyin v. Nana Asani II*

A Stool May (Sometimes) Re-enter Uncultivated Land *Adjei v. Grumah*

4.3 Incidents of the Usufruct — Enjoyment

4.3.1 Norquaye–Tetteh v. Malm & Anor. [1959] GLR 368

In the High Court (Land Division), Accra

9 November 1959

OLLENNU J.

(*His Lordship stated the facts and continued:—*)

It is admitted by the plaintiff's that Nii Abose Okai was a competent authority to convey Akumadjaye Stool land, and that consequently Exhibit "1" executed by him is a valid document. And, of course, it is admitted by the defendants too, that Nii Ayikai being the occupant of the said Akumadjaye Stool is a competent authority to alienate lands of the stool, and that, in consequence, Exhibit "B" and Exhibit "C", executed by him, are both valid documents.

Counsel for the plaintiff's submitted, however, that the land in dispute could not be the identical land which Nii Abose Okai had granted and conveyed to the late Henerike Cornelius Malm, because

(1) There are no data on the plan attached to Exhibit "1" which identify the land subject matter of that deed, with the land in dispute,

(2) The report Exhibit "A" issued by the Registrar of Deed, when a search was made in his registry against the lands subject matter of the suit, showed that it was affected only by the deeds of the two plaintiffs Exhibit "B" and Exhibit "C", which means that Exhibit "1" and Exhibit "2" which are registered, are not deeds in respect of the identical land, for if they were the report Exhibit "A" would have so indicated, and

(3) That Nii Ayikai, the occupant of the Akumadjaye Stool, had himself given evidence identifying the land in dispute as that in respect of which he had executed the deeds Exhibit "B" and Exhibits "C".

Counsel submitted that in these circumstances the *onus* was upon the defendants to prove by positive evidence of occupation that the land in dispute was the identical land which the stool by the deed Exhibit "1" (which is prior in time to Exhibits "B" and "C") had granted to the defendants' predecessor in title.

Upon the assumption that the onus is upon the defendants, Counsel for the plaintiff submitted that the defendants has failed to discharge that *onus*, because the only evidence which they led of their occupation. Of the land was evidence of the existence of three mango trees on the land, the fruits of which they allege they have been harvesting. Counsel submitted that harvesting of the fruits of the mango trees on the land is not sufficient evidence to show that the land is in the possession of the defendants. In support of that submission, Counsel

referred the Court to the opinion expressed by Jackson J. in his judgment of the 31st May, 1951, in the Kokomlemle consolidated case where he said:

> "There is some evidence, but evidence of a very vague nature, as to locality, and to which I have referred before, which was the subject of an action in which the Native Tribunal held, and quite correctly, that Tettey Addy defended in his personal capacity alone, and had destroyed certain trees to the north of Ring Road, which the Native Tribunal adjudged had been Kotey's property. The situation of these trees had never been evidenced to me with any particularity, and as Mango and Cashew trees abound through the lands and have been propagated in the past rather by the acts of nature than by the industry of men, I do not think that such a casual act of possession (i.e. a habit of collecting fruits from particular trees) is very cogent evidence of the interest in land claimed by Kotey, i.e. a right to sell without leave or license of anyone."

Quite property, Counsel urged this opinion of the learned Judge in the learned Judge in the hope that it might have persuasive force with this Court; he did not quote it; of course, as a binding authority. I must say, with great respect to the learned Judge in that case, that I am not at all persuaded by that opinion: firstly, because the evidence in the instant case does not warrant that opinion; and secondly, the opinion shows that the attention of the learned Judge could not have been directed to the customary law of this country relating to tenure of stool land, as will appear presently.

Now, even if the *onus* were firstly upon the defendants (which in my opinion it is not) to establish their defence against the plaintiffs' claim, and not upon the plaintiffs to show their case must succeed by reason of its own strength, it must be pointed out that the harvesting of the fruits of the mango trees is not the only evidence of possession tendered by the defendants. There is also the evidence of the pillars fixed by the late Malm to the four corners of the land, which evidence I accept. Three of these pillars remained in position up to a short time before the incidents which led to the institution of these suits. There is also the evidence, not seriously challenged, of the farming of the land by the late Malm, and by labourers for and on behalf of the 1st defendant. Finally, there is the evidence that the caretaker used to have the land kept clean of weeds. All of this evidence I accept.

The true position is that, although the documents Exhibit "B" and Exhibit "C" are valid documents, they can be effective to transfer title in the land to the plaintiffs if (and only if), at the dates of their execution, the lands which each purports to convey were vacant stool lands. If at the date of the execution of these deeds the lands were in the occupation of a subject of the stool, or of a stranger to whom the stool had already granted them, those documents would be incapable of conferring title in the lands upon the plaintiffs, the validity of their execution notwithstanding. In my opinion the *onus* is upon the plaintiff to satisfy the Court that the lands were vacant lands at the date when the stool

purported to convey them by Exhibit "B" and Exhibit "C". they cannot succeed on their claim if they fail to discharge that *onus*, and, if they so fail their claim cannot succeed, even if the defendants are unable to prove that they themselves have ever been in possession of the lands.

I shall now examine the evidence led on behalf of the plaintiffs to see whether or not they discharged the *onus* upon them.

(*His lordship examined the evidence accordingly, with special reference to the existence on the land of three fully grown mango trees, The learned Judge continued:—*)

From the evidence led on behalf of the plaintiffs; portions of which I have quote above, I find the following facts; Although mango seeds may germinate by the act of nature, the trees cannot survive on the Accra plains, an develop to become fruit-bearing, without industry of man. They would perish at a very early age if they were not so preserved. They truth is that such trees generally sprout up in cultivated area, and are looked after by the owners of the farms in which they germinate. Therefore, the existence of trees like mango or cashew on land overgrown with weeds is *prima facie* evidence that the area where they are found is a farmstead, once under cultivation by the person who now harvests their fruits.

It follows that mango trees would be grown on land only by the man in possession of that land; and if a mango tree happens to grow on land it would be no one but the possessor of the land who would display the industry necessary to keep it alive. For an owner of land would not normally permit a stranger, with no interest in his lands, to come upon it year in year out, to cultivate a mango tree which had sprouted up on the land by the act of nature; nor, when the trees is grown up, would the owner of the land permit the stranger to harvest the fruits of that tree of economic importance.

In my opinion, therefore, harvesting the fruits of mango trees is very congent evidence of the interest which the man who so harvests the fruits has in the land on which they grow.

By customary law a stool cannot make a valid grant of any portion of its land on which there exist economic trees like mango and cashew. This is a well–established custom which is based upon another very sound customary law, namely, that any subject of a stool is entitled to occupy a vacant portion of the stool land, and to become the owner of the usufruct thereof. His occupation and possession may be by cultivating it in one form or another, by building on it, or using it in any other way in which an owner would use his land. A subject in such possession may alienate that possessory title of his, either to another subject or to a stranger; or he may lease it, so long as such alienation or lease carries with it the obligation to recognize the allodia ownership of the stool. By custom a stool cannot alienate its absolute title in such a portion of the stool land without reference to the subject or grantee in possession. The person in possession might have obtained the land by grant direct from the stool, or grant from a subject of the stool who had occupied the land when it was vacant. There is not doubt that both P.W.1 (Nii Ayikai II, the occupant of the stool) and P.W.3 (the Linguist of the stool) are well aware of the principle

of the customary law that where there are economic trees (such as mango trees) on stool land, that is prima facie evidence of possession of the land by a subject or a grantee; and that the stool, by customary law, is not entitled to alienate that land without reference to the owner of those trees, who is deemed to be in possession of the land. Nii Ayikai, in fact, said that if he had been informed of the existence of the mango trees on the land he would not have granted that portion of the land to the plaintiffs.

In the case of the Abose Okai lands the need to observe this principle of the customary law is all the more imperative for two reasons: (1) because the Mantse knows that the former caretaker of the land (Nii Abose Okai) had validly alienated portions of the land, but unfortunately he (the Mantse) upon his own admission does not know the particular areas which Nii Abose Okai had so alienated; and (2) because, as the Linguist stated, mango and cashew trees are the only valuable trees on Abose Okai lands, and owners attach great importance to those trees, implying that there must be some one who asserts a right to the land on which such trees are.

I believe Nii Ayikai when he says that if the people whom he sent to demarcate land to the plaintiffs had told him on their return that there were grown-up mango trees on the land he would not have granted that land to the plaintiffs without first finding who the owner of those trees was. And I have no doubt that if he had had the opportunity to make enquiries about the ownership of those trees, he would have discovered that the land on which they grew was one of the portions of his stool land which former caretaker (Nii Abose Okai) had already alienated.

Again, I believe the evidence of the 1st defendant that her father (the late H. C. Malm) submitted the documents Exhibit "1" and Exhibit "2" to Nii Ayikai, and that the documents remained with the Mantse for about six months before she (the 1st defendant) and her father went and collected them. But I am satisfied also that they did not go with the Mantse or any representative of his to point out the particular land to him. Consequently, although I believe that Nii Ayikai was siesed of the knowledge that H. C. Malm owned a portion of the Abose Okai lands, I believe also that Nii Ayikai was not aware of the identity of the said land.

The evidence of the Surveyor(P.W.2) and that of the Linguist (P.W.3) show that they knew, or ought to have known, that the existence of the mango trees on the land is very positive and cogent *prima facie* evidence that someone was in possession and occupation of the land. Had they made enquiries they would have discovered who that person was, and what the nature of his interest in the land was, and this unfortunate litigation would have been avoided. The reason which the surveyor gave for his failure to make investigations was that it was not his duty to make such enquiry, or even to ascertain who owned the lands adjoining the one he was demarcating. This, in my opinion, is very strange, because one on the requirements of customary law relating to a grant of land is that the grant should be given wide publicity in the locality where the land to be granted is situate. The owners of the adjoining land have to be invited to be present at the demarcation, for agreement on the boundaries, so as to avert the

possibility of "granting" land already belonging to another person, or trespass upon adjoining lands in the ownership of another.

The reason which the Linguist gave for not trying to find the owner of the mango trees was that they were not sent to look for vacant lands to demarcate. He was requested simply to accompany the surveyor, who knew the point to which land had been granted and who would point out a place to be demarcated. The inference to be drawn form the evidence of these two witnesses—the surveyor and the linguist—is that their instructions were simply to act upon a plan showing areas which Nii Ayikai had granted and areas, he had not yet granted, and to demarcate a portion of the latter to the plaintiffs. But, as was evidenced by the Mantse (Nii Ayikai), the plan in the possession of stool showed only those areas which he (Nii Ayikai) had granted—not those already granted by Nii Abose Okai. The stool, therefore, acted recklessly when, in spite of the existence of the three grown-up mango trees on the land (which was very positive and cogent evidence of the possession and occupation of the land by somebody), and in spite of the knowledge that Nii Abose Okai had granted other areas, it granted the land in dispute to the plaintiffs. The plaintiffs, with full knowledge of the existence of the mango trees, took a risk in accepting the grant of such lands.

I am satisfied upon the evidence of the first plaintiff that their first attempt to exercise open acts of occupation of this land was the erection of the barbed wire fence round the plot of land, and that act was immediately resisted by the defendants, who thereupon put up a sign–board on the land giving the name of the owner in possession. I am satisfied that the plaintiffs have never had undisturbed possession of the land in dispute, or any portion of it.

The only evidence before the Court as to how the three mango trees came into existence on the land and who has been harvesting the fruits of those trees, is the uncontradicted evidence given by the defendants. I accept that evidence. I also accept the evidence of their other acts of possession of the land, which also stands unrefuted.

Exhibit "A", the report of the Registrar of Deeds in respect of instruments affecting the land in dispute, satisfies me that the document Exhibit "1" could not have been mentioned in that report for the reasons given in note (b) of column 9 thereof, because Exhibit "1" was registered prior to the 1st October, 1948, vi., on the 7th January, 1938. I am also satisfied that the document Exhibit "2" could not appear in Exhibit "A" because it was not tendered for registration until the 3rd December, 1958, that is after the 18th November 1958, the date on which Exhibit "A" was issued.

Although the plan attached to Exhibit "A" does not contain suffient data to make it easy to identify the land to which it related with the land in dispute, the defendants have produced evidence which satisfactorily proves that the land which Nii Abose Okai granted to the late H. C. Malm under Exhibit "A" and which H. C. Malm and those claiming through him have occupied since the date of the said grant, is the land in dispute. The defendants have therefore discharged the onus which lay upon them to prove their possession and occupation of the said lands. I am satisfied that the 1st defendant and her sister Louisa

Tagoe(nee Malm), as grantees of their father the lat H. C. Malm under Exhibit "2", were in lawful possession at the date when the plaintiffs entered upon the land and attempted to exercise acts of ownership on it. I am therefore satisfied that in addition to being validly executed, the deed Exhibit "1" effectively conferred good title in the land upon the 1st defendant and Louisa Tagoe (nee Malm). The entry of the plaintiffs upon the land, therefore, was trespass in the plaintiffs.

In suit No. 130/1958 the claim of the plaintiff Davis Quao Norquaye–Tetteh is dismissed, and judgment entered for the defendants on the said claim. On the counterclaim in that suit, there will be judgment for the 1st defendant Anna Malm and her sister Louisa Tagoe (nee Malm) against the plaintiff David Quao Norquaye Tetteh for declaration of their title to the land in dispute, and £G25 damages for trespass.

The defendants will have their costs against the plaintiff in suit No. 129/1958, agreed at 50 guineas inclusive. They will also have their costs against the plaintiff in suit No. 130/1958, agreed at 50 guineas inclusive.

4.3.2 Atta and Others v. Esson

[1976] 1 GLR 128.

Court of Appeal, Accra

5 December 1975

Appeal against a decision of the High Court in favour of plaintiff in an action for damages for trespass and appeal injunction. The facts are sufficiently stated in the judgment of the court.

J.B. Short (E.F. Short with him) for the appellants.
Ampiah for the respondent.

Amissah J.A. delivered the judgment of the court. The plaintiff and his family have been declared by a series of judgment and an arbitration award to be tenants in perpetuity of the first defendant's family in respect of a large piece of land in the Central Region. In spite of these judgments the plaintiff and his people have been denied the quiet enjoyment of the of the land which they feel themselves entitled to. The latest act of the defendants which precipitated this action was the felling of palm trees which the plaintiff claimed his family had cultivated on the land. On account of this alleged interference with the plaintiff's family right, the plaintiff brought this action claiming damages from the defendants and a perpetual injunction restraining them and their agents from having anything to do with the land. The case came up for trial before Archer A. (as he then was) sitting at Cape Coast in 1968. At the trial, counsel informed the court that they had agreed that a point of law which would dispose of the whole case be taken first. That preliminary point which was taken, arises out of the following pleadings of the parties. By paragraph (10) of the statement of claim, the plaintiff pleaded:

> "That in spite of all these consent judgments, awards and orders the defendants have unlawfully entered the said land without the plaintiff's consent and permission felled over 400 palm trees which the plaintiff's family had cultivated on the land in dispute. The value of one palm tree is at £G2."

In answer to this pleading, the defendants stated in paragraph (6) of their defence.

> "The defendants say that in view of customary law which empowers a landowner to enter upon his land in the possession of another as tenant to collect palm nuts or enjoy palm and other indigenous edible trees on the land, the defendants can exercise the right to enter the said land for that purpose and are therefore not liable to the plaintiff as claimed in any amount or at all and thereupon join issue with the plaintiff."

The defendants in agreeing that a decision on the legal point raised by these pleadings would dispose of the case before the court, admitted that the plaintiff and his family were their tenants and further that they, he defendant, had entered on to the land occupied by the plaintiffs family and cut down the palm trees as alleges. Moreover, the defendants concern was not with distinction between palm trees already on the land before the tenancy was created on the hand and palm trees planted by the tenant after the tenancy. To the defendants, in either case the landlord was entitled to the palm trees on the land. Therefore they did not in their pleadings specifically deny the claim of the plaintiff that his family planted the palm trees. In view of the pleadings quoted above and of counsel's agreement that a decision on the legal point arising therefrom disposes of the whole case we are bound to accept that the palm trees in this case were planted by the plaintiff's family as claimed.

Did the defendants have this right they claimed or not? No less an authority than Sarbah supports their contention. In his *Fanti Customary Laws* first published in 1897 he said (and I quote from the third edition (1968) at pp. 69-70):

> "The original or his successor can at any time go upon and retake possession of the land as soon as the tenant asserts and adverse claim to it. In the absence of such adverse claimed he cannot disturb the quiet enjoyment of the tenant, without prior notice to the tenant that he requires the land. Where, however, there are palm trees on the land, whether planted by the owner of the land or by the tenant, the landowner has full right, at any time he pleases, to cut trees or gather any nuts therefrom. Custom does not permit any person to be improved out of his land, and palm trees not only improve, but also enhance the value of lands.
>
> Where nuts from palm lands are manufactured into oil, the owner of the land receives half of the oil, and the oil manufacturer the other

> half, and the expenses of preparing the oil if equally shared by them. If instead of oil manufacturer, the is extracted from the palm–trees, palm–wine, the owner of the palm–trees is entitled to one-fourth of the proceeds of such palm–wine, the person who fells the palm trees and prepares the wine is entitled to one–fourth of such proceeds, and the person who sells such palm–wine is entitled to half of such proceeds. According to a well–known practice of the Law Courts, each palm0-wine is valued at twenty shillings."

This statement of the law seems to have obtained in more recent times some end endorsed from Bentsi–Enchill. At p. 398 of his *Ghana Land Law* he said: "Income–yielding shrubs and trees already on the land, such as palm trees, kola, and timber generally, are understood to belong exclusively to the landlord." Bentsi–Enchill, it appears was not prepared to go the lengths which Sarbah did because he limited the landlord's rights to economic shrubs and trees "already on the land." And his statement was made when discussing the arrangement "where the tenant is given virgin land to bring into cultivation. On the proposition that the landlord was entitled to the fruits of economic trees planted by the tenant on the land, Bentsi–Enchill expressed no view. Sarbah's proposition cannot, therefore, be said to have got the unqualified approval of as modern a writer as Bentsi–Enchill.

In spite of the opinion of such a formidable jurist as Sarbah to the contrary, Archer J. decided in *Esson v. Attah*, High Court, Cape Coast, 20 June 1968, unreported; digested in (1968) C.C. 125 that the defendants were not entitled to cut the palm trees on the land occupied by the plaintiff's family. It is because of that the present appeal been brought before us.

The pith of the learned trial judge's argument in rejecting the opinion of Sarbah is contained in the one sentence which said that: "It sounds unreasonable indeed that where a tenant has by his own labours planted palm trees his landlord should indiscriminately enter the land and cut the palm trees any time he pleases." Like Archer J., we do not wish to cast doubt on the distinction and learning of Sarbah. Indeed the learned judge accepted that what Sarbah wrote might have represented the customary law embodies the rules of conduct of the people at a particular time. These rules represents what is reasonable in any given situation in the society. Customary Law therefore, must develop and change with the changing times. What was reasonable in the social conditions of the nineteenth century would not necessarily be reasonable today. A contrary theory would ensure that the customary law becomes ossified and incapable of growth to meet new challenges and demands. No proposition would be more out of records with the hopes aspirations of Ghanaians today than that a landlord who has spent no effort whatsoever towards that end should enter and collect at will the fruits of the labour of his tenant. Who amongst us would today be prepared to take land to cultivate on that basis? We cannot imagine an arrangement more ruinous of agricultural enterprise, subversive of expansion and consequently prejudicial to national development than that.

One point taken by Mr. Short, counsel for the defendants, was that the decision of Archer J. was given per incuriam inasmuch as the court failed to consider the case of *Egyin v. Aye* [1962] 2 G.L.R. 187, which, being a decision of the former Supreme Court of Ghana, was binding on it. van Lare J.S.C. giving the judgment of the court in that case had said at p. 194, "It must be appointed out that the felling of palm trees is by customary law exercise of unequivocal acts of ownership reserved only to an owner of land, or a pledge holding of the owner: *Ashon v. Barng* (1897) Sar.F.C.L. (1st ed.) 132 at p. 135). Mr. Short relied on this statement in support of the argument in favour of the landlords right to economic trees.But that statement has to be considered in the context in which it was made. *Ashon v. Barng* (1897) Sar.F.C.L. (3rd ed.) 153 was a case to determine the right as between an owner of the land and his pledgee to cut down palm trees on the land pledged. Redwar Ag.J. at p. 156 found by preponderance of evidence that "the custom is clearly and satisfactorily proved ..." The owner's claim for damages in trespass against the pledgee "had a legal right to do what he had done ..." Far from the case showing the owner's invariable right to fell palm trees whoever had possession over the land and whatever the terms of possession it shows that as between the owner and his pledgee, the customary law then it shows that as the owner and his pledgee, the customary law then recognized the right of the pledgee to cut the palm trees. *Egyin v. Aye* (supra) on the other hand was a case in which two persons, one of whom had no title, disputed the title to land. The fact that one of the disputants had pledged the land and that his pledgee felled the palm tress was used evidence determining the issue of ownership in favour of that particular pledgor. In neither case was there an issue as to whose was the right as between an owner and his tenant to fell palm trees on the land. The decision in *Egyin v. Aye* did not, therefore, Archer J. from taking the view that he did.

We have no doubt that customary law today would not permit a landlord to enter onto agricultural land granted to his tenant to gather the fruits of economic trees planted on it by the tenant. We would understand a principle which forbids the tenant from committing such waste on the land as would destroy or reduce the value of the reversionary interest of the landlord. But the maxim, if maxim it be, that, "custom does not permit any person to be improved out of his land" used to justify what in modern eyes looks no less than a landlord's charter for plunder, appears to us, however beautiful it may sound and whether representative of the values Ghanaians in the nineteenth century, totally indefensible today. We accordingly agree with the conclusion of Archer J. that the landlord is not entitled to palm trees on the land whether planted by them or by the plaintiff's family, we hold that this appeal must fail.

Learned counsel for the defendants has argued that is Sarbah's proposition was wrong no court has so declared before, and, therefore, presumably persons were entitled to act in accordance with Sarbah until a court declared to the contrary. We do not think so. We think but the customary law as stated by Sarbah became outdated and ceased to be law as soon as conditions in society changed so as to make it unreasonable for persons to conduct themselves by it. It is, therefore, not necessary for the society to await a court's ruling before

deciding to act in a manner contrary to a rule of conduct which has become unreasonable.

But what of the part of the customary law as stated by Sarbah which gives the right to economic trees already on the land to the landlord? The objection, in those cases to that leg of Sarbah's rule on the ground that it acts as a disincentive to economic progress is not as strong. And there are considerations why we cannot say that aspect of the rule has been or must be discarded. Archer J. in holding that the enjoyment of economic trees like palm belonged to the tenant unless expressly reserved by agreement between the parties to the landlord relied on a passage in Ollennu's book on the *Principle of Customary Law in Ghana*. That passage which appears at p. 59 of the book reads as follows:

> "Another important incident of the determinable title is the right to palm and cola nut and other economic trees of the land. In all parts of Ghana where the oil palm trees and other species of palm grow, it is the owner of the determinable title in the land, and he alone who is vested with the right to harvest the fruit, to fell the palm trees or to tap wine from them. Neither the owner of the absolute title nor the owner of the sub–absolute title can go upon land to harvest cola nuts, palm trees for palm wine. They may request the owner of the determinable title to supply so many pots of palm wine, or a quantity of palm nuts or cola nuts as customary services, but they are not permitted by custom to go upon land in possession of a subject to take any of these things."

The learned judge seems to have equated the expression "the owner of the absolute title" used by Ollennu in this passage to "the landlord" in our present classification, and the expression "the owner of the determinable title in the land" appearing in the quotation to our "tenant." With all due reference, we do not think that Ollennu was here discussing the ordinary relationship of the landlord and tenant. His concern for the moment was with the various degree of ownership recognize by the customary law and their incidents. Thus he spoke of "the owner of the absolute title" who would be the allodial owner of the land like stool and "the owner of the determinable title" who would be a subject or family member properly on the land. The passage referred to therefore, does not contemplate incidents attached to the right of a tenant under an ordinary tenancy. That aspect of the matter is dealt with by Ollennu in chapter 6 of his book on tenancies. At p. 87 of the book, the learned author says:

> "Except by special agreement, palm trees, kola nuts and such fruits are generally excluded from the operation of *abusa* or *abunu* tenancy, and that is so even though in the process of the cultivation and maintenance of the *abusa* or *abunu* farm, the tenant must work which must improve such trees growing in the farm, *e.g.* he must trim palm trees from time to time, or clear the bush round such trees. These trees ate the special prerogative of the owner of the determinable title. It is he alone who has the right to the fruits.

> The tenant may pick a few fruits for his personal consumption, but he should not harvest them for sale, and he should not without the express authority of the landlord fell any oil palm tree, agor palm, dawadawa tree or shea butter tree."

The distinction in Ollennu's terminology between "the owner of the determinable title" and "the tenant" is brought out clearly in this passage. And as between these two it is not the tenant who has the right to the fruits of economic trees on the land.

In the present case, the relationship between the plaintiff's and the defendants families is such as may well justify the finding that the plaintiff's family were the owners of the determinable title in the land. They certainly were not ordinary tenants. They were tenants in perpetuity. The consideration for their right to occupation was the payment of 27 shillings, that is two cedis 70 pesewas, yearly.

Arbitrators have held that the plaintiff's family should join the defendants together "in sharing debts, performing funeral obsequies, and any other family transactions together as their ancestors were doing." And in that case, the adoption of the statement of Ollennu which gives the enjoyment of economic trees on the land to the owner of the determinable title in order to vest such enjoyment of trees already on the land in the plaintiff's family cannot be objected to. We believe it was on the basis that the present plaintiff's family had such title to the land as would warrant their being designation as owners of the determinable title according to custom that the learned judge drew his general conclusion that "a tenant in perpetuity is entitled to the palm trees on his tenancy and that the landlord has no right whatsoever to enter the land and cut palm trees or to collect palm nuts unless such rights have been expressed reserved to him by agreement between the parties." We are however, anxious that the generality of that holding should not be considered as applying to the ordinary customary tenancy agreement over land on which already existed economic trees like the palm or kola tree. The customary rule in that respect, allocating the fruits not to the tenant but to his landlord has not been shown to be unreasonable. Ollennu whose statement of the ;aw impressed the learned judge as the modern exposition of the law, confirms, as we have seen, the view that except by special agreement, the enjoyment of the fruits of these trees continues with the landlord. We have no cause to differ from that view. That rule must, therefore, be accepted as still governing the relationship of landlord and tenant.

Archer J. adjourned the assessment of the amount due to the plaintiff for the felling of the palm trees and of the damages for trespass against two of the defendants to a later date thereby giving the parties the opportunity to agree between themselves on the damages. He did not grant the perpetuity injunction requested by the plaintiff to restrain the defendants and their agents from having anything to do with the land in question. That relieve aspect of the case was dealt with Baidoo J. who awarded ¢400.00 for the palm trees felled and ¢200.00 as general damages awarded for trespass. He also granted the perpetual

injunction against the defendants asked for. The defendant's argument against the damages awarded was not such a complaint of excessiveness of amount; it was that as no court had previously declared the principle under which they acted, we remain unpersuaded by their argument on this point. But they have argued further that as the landlords, the grant of a perpetual injunction against them from entering their own land was wrong. Mr. Ampiah for the plaintiff has handsomely conceded this point. He observed that this was inconsistent with the ruling of Archer J.

In the circumstances we would allow this appeal to the extent of canceling the order for a perpetual injunction otherwise we would dismiss the appeal.

Appeal dismissed subject to canceling grant of order for perpetual injunction
S.Y.B.-B.

Above: rule that stool got econ. trees wb ruinous to modern agriculture.

4.3.3 Thompson v. Mensah

3 W.A.L.R. 240, 1957

Court of Appeal (Granville Sharp J.A., Ollennu and Smith JJ.)

November 28, 1957

OLLENNU J. In this issue on October 20, 1955, the plaintiff claimed a declaration of title to a piece of land situate on Ring Road, Accra; recovery of possession of the land, mean profits, and an injunction. The land is fully described in the writ summons. The statement

And march 29, 1945, executed in his favour, as the May 3, 1944, Halm Owoo, and as to the second and third, by one J.kofi Parry. On February 15, 1956, the plaintiff filed an amendment to his statement of claim wherein he pleaded that his vendors, the said Halm paragraph 3 he averred that the defendant had erected buildings on the said land in spite of being warned of the plaintiff's title to it.

By his statement of defendant pleaded that he entered upon the eland under a grant by the Atukpai family, and that he was in negotiations with the Korle Webii to perfect his ownership. In the summons for directions, filed on November 22, 1955, the plaintiff asked for an order that the only issue to be tried was: "That the vendor [I think he proper owners of the land Court, on November 30, 1955, in consequence of an amendment to the summons for directions setting down the following as the only issue for trial, namely: "that at what time defendant derive their title from the same vendors¿"

In short the issue raised on the leadings is whether the plaintiff acquires title to the land under the deeds pleaded. Hearing of the case commenced on October 11, 1956. Counsel for the plaintiff opened the case in the following words:

"We have documents showing our title to the land; also show document of our vendor; covered by *Gologhtly v. Ashrifi* (1); hold defendant's vendor no right; also pleads land granted to him for farms"

The evidence given by the plaintiff at the trial was short. It is as follows, leaving out the formal parts.

"I bought land plots on Ring Road. I produce my convinces April 26, 1944 May 3, 1944 and March 29, 1945-Conveyances by Halm Owoo and John Parry. My Vendors gave me deeds. Grants by Korle Webii. I know defendant. I warned him to keep off land He did not.

Cross - examined:

"Korle We the owners? Yes. You rely on their grant alone? Yes Case about land "Kokomlele Case"? Yes Your land is in that area involved in that case? Yes.

Some of lands belong to kotey family? Not near me. Dis Ga Manche concur in grant? I didn't know. Ask him to? No.

Gbese Manche? He said to aright. Didn't sing? No."

That was all the evidence the plaintiff gave. The case had to be adjourned that day to October 18, 1956, at the plaintiff's request, on the grounds that his witness, the Korle Priest, was not in court. On October 18, 1956, the case was again adjourned at the instance of the plaintiff, as he said he was ready to proceed. It was adjourned to November, 1, 1856.

When the hearing was resumed on November 1, the plaintiff called three witnesses, the Korle Priest, was not in court. On October 18, 1956, because they were not then in existence. And when they came into existence the statement of claim was never amended in order to plead them. Moreover, the plaintiff in his evidence had said that he relied solely on the grant by Korle Webii for his title. Under Order 19, r.4, of Supreme Court (Civil Procedure) Rules, 1954, a party must plead all material facts upon which he relies to sustain his case, and outhunt to be allowed at the trial to lead evidence in proof of matters not pleaded: see the case of Phillips (2). Again there was no proof of the execution if either of those two documents. The said deeds purport to have been made by Nii Ayitey-Adjin," which seems to indicate that they are not originals. The fact that these documents were admitted without objections is in my opinion, immaterial. Each of these two documents purports to convey stool land in the municipality of Accra within the Ga State for valuable consideration. Therefore each if them requires the consent, first of the Ga State Council, as provided by the State councils (Southern Ghana) Ordinance, s. 16 (1) and secondary of the Accra Municipal Council as provided by the Municipal Councils Ordnance s. 73 (1). On the face of each of the said documents it is clear that they do not comply with the said statutory requirements. Each of the documents is therefore null and void and of no effect. Upon the assumption that those documents are valid, Mr. Asafu-Aadjaye for them appellant submitted that they confirm the title of the plaintiff's vendors, Kofi Parry and Halm Owoo. I do not think this argument s maintainable, those two men, Kofi Parry and Halm Owoo, had, by the deeds of conveyance pleaded, and parted with the whole of their right, title and interest, if any, in the land to the land to the plaintiff as long ago as 1944

and 1945. What title had they on October 31, 1956, which ago as 1944 and 1945? What title had they on October 31, 1956, which can be confirmed? None whatsoever.

Leaned counsel also submitted that the confirmations given relate to 1944 and 1945. What title had they on October 31, 1956, which can be confirmed? None whatsoever.

Learned counsel also submitted that the confirmation given relate to 1944 and 1945 to give effect to the conveyances made by the Acting Korle Priest to Halm Owoo and Kofi Parry. In my opinion, judging from the recitals, those documents were not intended to have retrospective effect. But should I be wrong in that opinion I would say that the effect of the document would have to be determined n accordance with principles of native custom applicable to the Kokomlemle lands as laid down and fact found in the judgment in the case of Gologtly and Another v.Ashrifi and Others (1) (Popularly known as the Kokomlemle Consolidated Cases) a case upon which the appleant much relied.

The material decisions in that case are:

(1) That outright alienation of the Kokomlemle lands cannot be effected except by the prior consent of the Ga and Gbese Stools and Korle We; (2) That the Kotey family, by ancient grant, are entitles to a defined peroration of the Kokomlemle lands; and (3) That the three controlling powers, the Ga and Gbese Stools and the Korle We, cannot alienate any portion of the land without obtaining the consent and concurrence of individuals or families, being subjects of the Gbses Stool, who are in occupation, or of strangers who have properly been granted some interest, is it farming or occupation interest in the land.

The land in dispute in this case is proved to be within the area adjudged to belong to the Kotey family. Applying these principles and faces, I have arrived at the following conclusions: (a) With or without the confirmation of the Gbese Stool the alienations of the land by the Korle Priest are not in conformity with the first principle and are therefore void in that the deeds show alienations of the absolute ownership without the prior consent and concurrence of the absolute and such consent has never been consent and concurrence of the Korle We, they were without he consent and concurrence of the Kotey family, who are adjudged to be in possession thereof an ancient grant, and they are therefore of on effect.

Thus in either case those documents vest no title in the grants named therein, i.e., Kofi Parry and Halm Owoo, and consequently the plaintiff acquire no title under those deeds of conveyance executed in his favour by the Kofi Parry and the said Halm Owoo.

Counsel further referred the court to the finding in the said Kokomlemle Consolidated Cases that the land adjudges to belong to the Kotey family cannot be alienated by transfer of right, meaning use fractural by transfer of ownership without the consent of both the Ga Mantse and Bgese Mantse, and submitted that since the Kotey family had alienated the land in dispute to the defendant, they had forfeited their right to the land and the plaintiff therefore acquired a good title,. At least possessor title, through the made to his vendors by the Korle Priest alone.

The first answer to that submission is contained in a passage appearing in a judgment which was tendered in this case delivered by Jackson J., the same judge who tried the Kokomlemle Consolidated Case (1), in an action instituted by one of the families to whom, also, according to his judgment in the said Kokomlemle consolidated Cases, an ancient grant had been made for passage reads as follows:

"These interests were discussed by me at length (i.e., in the Kokomlemle Cases) and having found that the land in question had originally been acquired by the family for farming purposes, .I found that they could not be dispossessed of those rights other than by their free consent so long as their conduct towards the Gbese Stool Confirmed with the good standard referred by native customary law. In this action the Gbses Stool is not party and makes no complaint. The land had thus acquired the character of family land and which the Head of the Family with land and which right included all the incidents of living whether by residence to land by members of the family or by leases of the land to strangers, i, e., so long as they do not alienate the land from the Stool of which are subjects.

Native custom does what is reasonable. Where a man, entitled to farm and occupy land, but unable for some reason or the other to farm it or build on it himself, permits a stranger to farm to build on it terms that he, the owner, also should enjoy part of the proceeds or manse profits, I.e., where a relationship similar to that of landlord and tenant is created, the grant of that interest of the land is not regarded by native custom as an alienation of the possession or usufructuary title in the land to the detriment of the of the stool. In this case there is no evidence of an alienation of the land in any shape or from by the Kotey family to render them liable to forfeit their ancient grant. All the head of Kotey family said is: "We agreed he should stay on that price of land." Secondly, forfeiture according to native custom is not an automatic consequence which must necessity attend a breach of a condition of grant. Native custom, quite apart from the principles of equity, which are applicable to this country, abhors greed and ill - gotten gain. Therefore, where with full knowledge for a breach of condition of a grant made in accordance with native custom, am grantor sit by and allow a third party to occupy the land openly in the belief that he has acquired good title, and to improve it, native custom will not look favorable upon a claim to forfeiture; it will refuse it.

This principle of estoppels in native customary law as a bar to a bar to a claim of ownership is often illustrated in certain proverbial or figurative claim of ownership is often illustrated in certain proverbial or figurative expressions in the various vernaculars, a question which in Ga folk lore the chief and his elder put to Mr. Squirrel make farms on the land, quickly jumped down as soon as the corps were ready for harvesting and claim ownership of the farms. The chief and the elders asked him:" Tsono asoo in anaa nmo? -Meaning literally: "Can a person just sit on a tree on a tree land and then become the owner of farms made by other on that land? " In other words: "you world farms are making a big mistake to think that in these circumstances you can become the owner of the farm".

As the learned trial judge out, the Korle Priest, through whom the plaintiff claims title to this land, was not prepared to contest the title of the Kotey family. I find that the real owners never objected to any alienation by the finding of the learned trial judge that there has been acquiescence on the part of the ultimate owner in the use of the landform building purposes is well founded.

The principle to be applied to forfeiture in native custom is the same as those governing a conveyance of stool or family land b the occupant of the stool other family without the necessary consent. Such conveyances are taken timorously to avoid; they may only be set aside when steppe are taken timorously to avoid; are taken timorously to avoid them. In the same way forfeiture wills not necessary follow a branch of a condition of the grant, it may only be enforced when sleeps are taken without delay.

The submission of learned counsel based upon the passage quoted from the judgment of Jackson J., approved of by the West African court of Appeal in the Kokomlemle Consolidated case, "that by native custom the Kokomlemle Consolidated Cases, the owner of the usufructuary title cannot transfer that title without the previous consent and concurrence of the absolute owner" requires qualification. What the native custom guards against is alienation to the prejudice of the absolute of the title of the absolute owner and of the customary services due to him. Every without actual permission. Such occupation or enjoyment of the usufruct imports recognition of the title of the stool as owner. Whether the subject obtained the construct in stool land by original occupation, or by gift, sales or other form of transfer form another subject or grantee to the stool, his titles will be good even through his original entry or the transfer to him was without previous consent and original entry or the transfer to him kofi the stool. It would be ridiculous to say that title from express permission of the stool but cannot obtain a good title from another who has also enters under similar conditions. How much more when the subject obtains the usufruct form another subject who entered with express prior consent of the stool.

It may be argued that when a subject obtains the express consent of the stool to occupy stool land, the stool can be a prohibition against such occurrence of the usufruvtuary title without the previous consent and concurrence of the stool. IN my opinion such a condition will be void and enforceable of the since it will be violation of the subject's inherent right to occupy stool land without any burden except the recognition for the title of the stool which carries with it certain customary services.

The occupation without express permission is deemed by native custom to be with implied permission. Therefore the occupation with express permission cannot carry with it a grater burden than that which native custom imposes upon occupation of stool land with prior expressed permission of the stool does not create a contractual relationship between the stool and the subject analogous to "abuse" or abunu" tenancy.

It is nothing more than apos9itve conferment upon him of his inherent customary right by native custom in the stool land. That express permission cannot therefore limited or curtail the rights or incident which by native custom are attached to the subject's occupation of the land.

Coussey J. as he then was, delivering the judgment, unreported, unreported, of the West African Court of Appeal in Civil Appeal No. 117/49 on January 15, 1952, stated the position as follows:

"In English law there is a clear division between property and possession, but a very usual from of native title is that of a usufructuary right which is a qualification of or burden on the final title of the owner of the land..... The plaintiff had made farms and had an interest in the land which was transferable so long as he recognized the title f the owner."

In my opinion the statement for the native custom is that a usufructuary title can be transferred without the consent of the real owner provided the transfer carries with it son obligation upon the transferee to recognize the of real owner and all the incidents Of the subject right of occupation including the performance of customary services to the real owner.

A judgment of van Lare J., as he then was cited to the trial judge in this case and a certified copy of it was tendered in evidence. That judgment was given in Adumua-Bossman V. Bannerman (3), and the subject-matter was a portion of the Kotey Family land. In that judgment the learned judge held that the plaintiff, who was a grantee of the Kotey family, was entitled to a declaration of his title to the usufruct in the land.

There is no doubt that the trial judge this case was influence by the said judgment. That judgment was subsequently set said by the West African Court of Appeal.

Learned counted submitted that since that judgment has been set aside, the judgment of the land court in the present cased based upon it should also be set aside. The ratio decided in the judgment of the West African court of Appeal in that case was the well- known principle that possession by a defendant will prevail against the whole world except the true owner. The same principle must be applied to this case. There is no evidence that the plaintiff has ever been in possession. In paragraph 3 of his statement of claim the plaintiff averred that the defendant is in possession. Thus no matter how defective the title of the defendant is, his possession is good against all but the true owner.

The plaintiff by his writ set a claim of ownership which should entitle him to immediate possession as against the defendant. He has not been able to establish that title; it appears he laboured hard till the last moment no court of law could have given judgment for him.

In the circumstances I would dismiss the appeal.

GRANVILLE SHARP J.A.I agree.

Smith J. I also agree.

4.4 Creation of the Usufruct

The beginning of *Budu II v. Caesar* is all about customary arbitration. Starting at the second paragraph of p. 422 of the case, Ollennu begins to discuss land rights.

4.4.1 Budu II v. Caesar & Ors.

[1959] GLR 410.

In the High Court (Lands Division), Accra

26 November, 1959

[413]
Cases cited:

(1) *Gyeniwa v. Mumah* (W.A.C.A. Cyclostyled judgments, Nov.–Dec. 1947; p. 49);
(2) *Kwasi & ors. v. Larbi* ([1953] A.C. 164);
(3) *Ankrah & ors. v. Dabra & anor.* (1 W.A.L.R. 89);
(4) *Twumasi v. Badu* (2 W.A.L.R. 204);
(5) *Yao v. Amobie & anor.* (Unreported);
(6) *Gibbs & anor. v. Flight & anor.* ((1853) 138 E.R. 1417);
(7) *Munday v. Norton* ([1892] 1 Q.B. 403);
(8) *Wyndham v. Jackson* ((1938) 2 A.E.R. 109);
(9) *in re An Arbitration between Green & Co. & Balfour, Williamson & Co;* ((1890) 63 L.T.325);
(10) *Ohimen v. Adjei* (2 W.A.L.R. 275);
(11) *Thompson v. Mensah* (unreported).[17]

OLLENNU J. :
(*His lordship set forth the history of the proceedings, and continued:*—)

I shall deal firstly with the issue whether or not there has been a valid arbitration upon the dispute between the plaintiff and the Caesar family so as to operate as an estoppel against the Caesar family.

It is not very material by what name the layman calls proceedings which in the eyes of the law amount to a binding arbitration—he may call it arbitration or settlement. Whether any particular proceedings constitute arbitration or negotiations for a settlement is a question of low, to be decided by the court upon the evidence before it. In the case of arbitration, the award is binding upon the parties to it whether or not they accept it, the parties cannot resile after the award has been published. In the case of proceedings in the nature of negotiation for settlement of a dispute, the decision becomes binding only after it has been accepted by the parties, and not other-wise (see *Gyeniwa v. Mumah* (W.A.C.A. Cylostyled Judgments, **[414]** November–December, 1947 page 49), *Kwasi & ors. v. Larbi*, ([1953] AC. 164); *Ankrah & ors. v.Dabra & anor*, (1 W.A.L.R. 89) ; Twumasi v. Badu (2 W.A.L.R. 204); Yao v. Amobie & anor., (Civil Appeal No. 77/57, Judgment of the Court of Appeal delivered on the 3rd of May, 1958).

[17]Ed. — It appears that this case was later published as *Thompson v. Mensah*, 3 W.A.L.R. 240 (1957).

In customary law there are three essential characteristics of an arbitration, as opposed to negotiations for a settlement. These are:

(a) a voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits;

(b) a prior agreement by both parties to accept the award of the arbitrators; and

(c) publication of the award.

As to what amounts to voluntary submission, the following observation were made by the Court of Appeal in *Yaw v. Amobie* cited above:

> "It is very rarely that two people who are quarreling would meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates upon the dispute. Whether or not a party had agreed to submit to the arbitration is a question of fact in each case, to be determined from the conduct of the parties and other circumstances."

I have now to apply these principles to this case.

The evidence of the alleged arbitration in this case was given by the plaintiff and two of his witnesses, and (in cross–examination) by one witness called on behalf of the Caesar family. The following is the account given by the plaintiff:

> "The case with Caesar was withdrawn form court, and dealt with at arbitration presided over by the late Omanhene Nana Akoto. That dispute was in respect of three portions of the land. The arbitrators awarded me the remaining two. Caesar paid £6 arbitration fee for inspection of the land."
>
> Cross–examined, the plaintiff said:
>
> "Yes, I have said that was the late Caesar who took the case to arbitration. I admit that Caesar was the one who instituted the action in the Native court, and that the suit was later transferred **[415]** to this court. But I deny that it was the Omanhene Nana Akoto who came to court and asked that he should be allowed to withdraw the case from the case from the court, to try and settle it. It is not true that the arbitration was not concluded, and that the case was continued in the Land court. It is not correct that the arbitration was protracted, and that in consequence the late Caesar wrote to the President that he was having the case heard in the court. I say the arbitration was concluded in three days. It is true that Caesar wrote to the arbitrators complaining that the arbitration had not been concluded, but this was about two years after the arbitration had been concluded."

It must be pointed out at this stage that, as will appear later on, the evidence of the plaintiff that it was Caesar and not the Omanhene who asked for settlement of the Case out of court, was contradicted by the plaintiffs 4th witness (Opanin Kofi Dede), who gave the following account of the alleged arbitration [**416**] in his evidence–in–chief:—

> "In 1947, on the 1st November (a Monday) the late Nana Asare Akoto, Omanhene of Akwamu, sent a message to Nana Kofi Bamforo, Ohene of Kotropel, to say that on Caesar had taken motion against Nana Kofi Budu in the High court, and that he (Nana Asare Akoto) had gone and withdrawn the case from the High court to try to settle it, and that he wanted Nana Kofi Bamforo and his elders to assist him in the attempt to settle the matter. I was with Nana Kofi Bamforo when the message was delivered to him. As a result of this request we went to Atimpoku the next day, Tuesday, the 2nd November, 1947 to assist in settling the matter."

Again, the evidence given by the plaintiff that it was about two years after the arbitration that the late Caesar wrote his letter of protest to the president of the alleged arbitration, is also contradicted by Caesar's letters (Exhibits "J1" and "J2"). These were tendered on behalf of the plaintiff, and his counsel submitted that they were conclusive proof of all the three essential for a settlement.

Exhibit "J1" is a letter dated the 15th September 1947 and speaks of "arbitration held on the 15th and 16th of August" of that same year. Exhibit "J2" is a letter dated the 18th October, 1947 ; it too, speaks of arbitration held "15th and 16th of last August this year," i.e. 1947. But the following passage appears in Exhibit "J1," the letter which Caesar addressed on the 15th September, 1947 to the President of the alleged arbitration:

> "With reference to the arbitration held at Atimpoku on the 15th and 16th August between Mr. Budu (defendant) and myself, which was presided over by yourself, I have written on two occasions 18/8/47 and 29/8/47 requesting you to forward a copy of the proceedings and your decision thereon, for my perusal, and signature, but up to the time of writing I have not heard from you.
>
> "In view of your failure to comply with my above request and certain utterances made by the said Nana Budu before Mr. Otinkorang and myself on the 9th September, 1947, at Senchi, I wish to notify you that I am sending the case back to the Court High for final settlement."

The words "for my perusal and signature" are significant, for they indicate that in the contemplation of the parties any decision arrived at in the proceedings which they called "arbitration" required the acceptance by the parties to make it binding. These facts, taken together with the positive evidence led by the witnesses for the plaintiff that the sums of £6 paid by each party were

special fees for the inspection of the land, not arbitration fees as such, lead to the assistance of other people, was nothing more than to attempt to negotiate a settlement of the dispute between the parties.

While on these letters (Exhibit "J1" and "J2"), I must refer to the submissions of learned Counsel for the plaintiff that these letters corroborate the evidence of P.W. 4 that the meetings for the alleged arbitration were held on two days; and that therefore the court should reject the evidence of the old man, Daniel Tei, who said that he attended only one meeting, that if a second meeting was held he was not aware of it, and that no money was paid at the one meeting which he attended. Daniel Tei, however, was cautious witness and of excellent demeanour; he was not prepared to swear to any fact of which he had no clear recollection. Each of these Exhibits "J1" and "J2" which, counsel submits, contain the whole truth and nothing but the truth, says that the two meetings in connection with what they styled "arbitration" were held on the 15th and 16th August, 1947. Those letters were written on the 15th September and the 18th October, 1947, barely one month and two months respectively after the meetings. P.W.4, whom counsel invites the court to accept as a truthful and an honest witness, went into details of days and dates. He deposed that he and his Divisional chief received the message of the Omanhene on Monday, 1st November, 1947, and that the arbitration was held on the following two days, Tuesday **[417]** and Wednesday, the 2nd and 3rd November, 1947. That evidence is flatly contradicted by each of the letters, Exhibits "J1" and "J2".

I am satisfied, even upon the evidence produced on behalf of the plaintiff himself, that there was no submission to arbitration, and no prior agreement by Caesar to be bound by any decision of the arbitrations, and that no award was published. I am further satisfied that the late Nana Akoto used his good offices in an attempt to effect a negotiated settlement of the dispute between the parties, in the hope that a decision arrived at by him and his assistants might be satisfactory to the parties, but he failed to achieve that. He did not reply to the letter Exhibit "J1" and contradict its contents. I am satisfied that no decision was in fact given, and none accepted by Caesar.

But there is something more fundamental in arbitration according to customary law than the principles set out above. The first distinctive characteristic of a valid arbitration according to customary law is that it must be "a voluntary submission of a dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits."

The words "on its merits" mean that arbitration according to customary law is not an arbitrary decision. It is exactly the same thing as arbitration under English law. It is the reference of a dispute or difference between not less than two parties, for determination after the hearing of both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction (Halsbury, 3rd Edition, volume 2, page 2, paragraph 1; *Gibbs v. Flight* (1853) 138 E.R. 1417); *Munday v. Norton* (1892) 1 Q.B. 403); *Wyndham v. Jackson* (1938) 2 A.E.R. 109).

The only difference between arbitration and a law–suit is that in arbitration the parties choose the person whom they wish to conduct the arbitration and to

decide their case; whereas a law–suit can be adjudicated upon only by a Court vested with jurisdiction by the law of the land, the trial may be by any Judge, Magistrate, or other judicial officer vested with jurisdiction in that behalf, and the case would in fact be tried, except in very special circumstances, by any such Judge, Magistrate, or other person before whom it is listed, whether or not the parties to the suit liked that particular person to try their case. It is of the utmost importance that there should be a judicial hearing of each party to arbitration, particularly as there is no right of appeal from an award. Grave injustice would be done if decisions of arbitrators were arbitrary.

[**418**] Now since in arbitration both sides must given a fair hearing in a judicial manner, the rules which prevail at the trial of an action in Court must be followed so far practicable. Each party must state his case fully, be available for cross–examination, and tender such documents (or other evidence) as he relies upon in support of his case (see Halsbury 3rd Edition, vol. 2, page 34, paragraph 78; and page 36 paragraph 82).

In arbitration by customary law the practice and procedure for the time being followed in the Native Court or Tribunal of the area must be followed as nearly as possible. Fry J., in the course of his judgment in *in re An Arbitration between Green & Co, and Balfour & Co.* ((1890) 63 L.T. 325 at p. 327) stated the principle as follows:—

> "The first and most important question in this case is, what was the subject in dispute between the parties when this arbitration was had recourse to? That is a subject upon which, according to all the authorities, parol testimony may be received and course must be received, because otherwise arbitrators might be taking upon themselves to determine matters which had never been in any way submitted to them"

And see also the following passage in Anon ((1814) 2 Chit. 44), which illustrates the principle:-

> "If an arbitrator, to whom an action for not repairing a house has been referred, makes his award on a view of the premises without calling the parties before him, the court will set aside the award; for though the premises may almost tell their own tales, yet there may be other facts which ought to be enquired into, such as payments by the party, or excuse for not repairing."

If it shown on the face of proceedings of arbitration according to customary law that the practice and procedure according to custom was not followed, or that no proper judicial hearing took place before an award was made, the proceeding would be null and void *ab initio*, and would not create any necessity to institute proceedings to have them set aside. It is a fundamental principle of customary law that no person shall be condemned either in respect of his person or his property without being given a fair hearing.

Bearing in mind the principle that the purpose of arbitration according to customary law is for the determination of a dispute after a fair hearing of both sides in a judicial manner, I shall now examine the evidence led by the plaintiff as to the conduct of the alleged arbitration. P.W. 1 (Emmanuel M. Akoto) was the first person who gave evidence of the proceedings at the alleged arbitration. He said:

> **[419]** "I knew the late Caesar, and I know that at one time an arbitration was held upon a dispute between you (the plaintiff) and the late Mr. Caesar. The late Nana Asare Akoto, then Omanhene of Akwamu, invited me to assist him in an arbitration on a dispute between the plaintiff and the late Caesar. We the arbitrators, asked Mr. Caesar to state his case, and he did so. He said he claimed three different plots of land, the first was situated at the Southern side of Atimpoku and the other two were situate North of Atimpoku. Yes, he told us how his said lands could be identified. He said they were lands bounded by Ntome trees, all the three plots. That fact was stated in his writ of summons. Nana Budu, on the other hand, said he could only remember that Mr. Caesar had only one plot of land. These were all the statements made by the parties.
>
> "After we had heard these statements of the two people we said we would first go and view the land. We did so. On the land we found Ntome trees on the land situate on the South. On the plots to the North he (Caesar) was not able to point out any Ntome trees. He did not point out any land marks to us. After the inspection we returned to town, we then asked each of the parties to pay £6 for the inspection and each paid pending the award."
>
> "After that we made an award. We said that because Nana Budu had agreed to Mr. Caesar's ownership of the Southern plots and because of the Ntome trees we found on the plot, Mr. Caesar had the right to that plot. We did not give Mr. Caesar any plot except the one upon which he was able to point out Ntome trees, and which Nana Budu agreed to."

In answer to the Court he said:

> "The account I gave of the arbitration we held is a full account of all that took place.
>
> *Q*Do you say that what you have described is a valid arbitration according to customary law?
>
> *A*Yes, the writ of summons mentioned Ntome trees, and we saw none on the other two plots, so what we did is right."

The next witness who spoke on the issue was Opanin Kofi Dade (P.W.4). He said:

> "After we had heard what each side had to say we said we would first of all inspect the land, and we asked each party to pay £6 for the inspection. Before we went to inspect the land, Mr. Caesar said he had three plots of land at Atimpoku with villages on them. [**420**] That is all the statement he made. He also said there were Ntome trees on the boundaries of these pieces of land, and he had coconut trees on the land. He did not say anything more. What I have said was all he said at the arbitration. Nana Budu, on the other hand, said that Mr. Caesar had only one piece of land, with a village thereon. He denied that Mr. Caesar owned three pieces of land. Nana Budu did not say anything more, except admitting only one of the claims made by Mr. Caesar, as I have said. On Wednesday, the 23rd November, 1947, we went and inspected the sites. After we had inspected the land we came to Senkyi to the house of one Mr. Asare. We settled the dispute by saying
>
> (1) That Mr. Caesar should have the first plot of land, as Nana Budu admitted that, that belongs to him, but
>
> (2) That as Mr. Caesar could not point any Ntome trees as he alleged, or any other sign on the other two pieces of land, Nana Budu should have those."

Those accounts show, in my opinion, that there was no hearing of both sides on the merits in a judicial manner. No evidence or statement was taken as to how Mr. Caesar got title to the lands, and no evidence or statement was taken from Nana Budu as to the grounds upon which he conceded one plot to Mr. Caesar and opposed his claim to the two plots. What appears to have happened was that the arbitrators wanted some preliminary idea of the nature of the lands in dispute before inspecting them and before hearing the case on the merits; but after the inspection of the land there was no hearing on the merits. I have found that the alleged decision of the arbitrators was never given; but if it had been, it would have been an arbitrary decision based upon no evidence at all. Therefore, even if there had been submission to arbitration, the proceedings thereat are shown by the plaintiff's own witnesses to have been null and void *ab initio*.

Next, I shall deal with the submission that the defendants are estopped by reason of their conduct in standing by, and allowing the plaintiff to declare the land to the Local council as stool land under section 73 of the Local Government Ordinance without protest.

In the first place, the plaintiff never produced a title of evidence that he has ever been required (under section 73 of the Local Government Ordinance) by the Local Council of the area where the land is situate to declare his stool lands. Nor is there an iota of evidence that he has in fact declared the lands in dispute as his stool land under section 73. the court can act only evidence, not conjecture.

[**421**] Again, section 73 of the Ordinance makes the Local Council the statutory manager of all stool land situate within the area of its authority; conse-

quently, the Local Council is made the statutory agent of a stool owning land within its area. In order that the Local Council, as such agent, may know the lands of the stools which are within its area and of which it is statutory caretaker, the Local Council is given power under section 73 to require stools within its area to declare their interest in land. An individual, therefore, need not take notice of any declaration which any stool may make, and no question of estoppel can arise to affect his title to his land by reason only of his failure to object to a declaration which a stool makes under section 73 and affecting land in which he claims an interest.

A Local Council, by agreement with an individual (such as the agreement Nana Kwafo Akoto said he was inducing Mr. Ocansey to enter into with the Mid Volta Local Council) may undertake for a consideration the collection of rents, tolls or tribute from land in private ownership; but there is no statutory power in a Local Council to assume the management and control of private lands. The submission of Counsel on the point is therefore misconceived.

The further submission of Counsel is that by failing to make declaration of ownership of the land as required in the resolution of the Akwamu State Council, passed at their meeting on the 20th April, 1951, the defendants are estopped from now asserting their title to the various portions of the land. This submission is also misconceived, for the resolution has no legal force. A State Council is, generally speaking, not a legislative body. Resolutions passed by it do not enjoy the force of law, except where the statute for the time being governing State Councils, gives any particular resolution the forces of law. In such a case the statute lays down the conditions on which the resolution can be law.

The statute in force in 1951 governing State Councils was the Native Authority (Colony) Ordinance. Section 30(2) of that Ordinance provided that a declaration of customary law made by a State Council could have legal effect only if the Governor in Council directed that it should come into force. Section 31(2) made similar provision in respect of resolutions of the State Council, which modified the existing customary laws. No order made by the Governor in Council has been produced directing the enforcement of the resolution of the 20th April, 1951, therefore non-compliance with any of its terms cannot affect the title of an owner of a portion of the Akwamu lands.

[**422**] Again, there is no evidence that that resolution was ever brought to the notice of the public and of the defendants; so that, even if the resolution had had the force of law, the public could not know of it or avail themselves of the opportunity to declare their ownership in lands affected by it.

I pass on now to the issue whether or not the land the subject matter of the suit is part of the plaintiff's stool lands. Judging from the pleadings, this issue as it framed is not an issue joined between the parties. No one denies that the land is within the geographical limits of the plaintiff's stool - the Benkumhene stool. In fact, the defendants rely upon the plaintiff's ownership of the land as their root of title; consequently, the time spent in leading exhaustive evidence of that fact was time wasted. What was put in issue was whether the land in dispute between the plaintiff and each of the three sets of defendants (or any

portion of it) is an unalienated portion of the stool land of the plaintiff.

The plaintiff admitted that portions of the land which he claims, edged green on the plan Exhibit "A", belong to other people. In such a case, the onus is upon him to prove to the satisfaction of the Court the exact areas, which had been alienated, and the exact area which still belongs to his stool. In fact, hardly any evidence was tendered on behalf of the plaintiff on this crucial issue in the case, so that, even if the defendants had led no evidence of their title, the court would not be in a position to give judgment for the plaintiff for declaration of title and possession in respect of an identifiable portion of the land, as land still in the ownership of the plaintiff.

Both the plaintiff and his Paramount Chief, Nana Kwafo Akoto (P.W.14), admitted that Caesar purchased a portion of the Atimpoku lands many years ago. They could have known this fact only as part of the tradition of their stools. That tradition is an admission by the two stools that Caesar acquired good title to a portion of the Akwamu Atimpoku lands. Who it was that conveyed good title to Caesar, and what was the extent of the area which was so lawfully alienated to Caesar and over which he has good title, their tradition did not relate. The only way in which the plaintiff attempted to challenge Caesar's title was to allege that none of the people from whom Caesar alleged he got the good title was an Atimpoku chief, or an Akwamu Chief. In addition to that the plaintiff led some sort of evidence that most of the areas claimed by Caesar had been occupied by his tenants, and that what remains of it had been alienated by Caesar to one Otinkorang.

[**423**] It is true that on the plan the stool has had some areas (marked 1 to 5) shown as land belonging to other people, but at the trial the plaintiff led no evidence to substantiate these allegations. The indication of those areas on the plan, therefore, has no evidential value; it is nothing more than fact pleaded, but remaining to be proved.

Oral evidence of custom was led on behalf of the plaintiff as to the tenure of Akwamu Stool lands; that oral evidence was supplemented by the resolution of the Akwamu State Council (Exhibit "G") to which I have already referred; also by the deed conveyance (Exhibit "2") of P.W. 17, Ofori Tawiah. From that evidence of the custom of Akwamu, I am satisfied that the customary law relating to tenure of stool lands in Akwamu is exactly the same as that of all other stool lands in Ghana.

It was submitted that if a purchaser of the freehold title in a portion of Akwamu stool land alienates the land without the stool's joining in it, the conveyance would be void. This submission is contrary to the evidence of custom led on behalf of the plaintiff, and contrary to natural justice and good conscience. That evidence of custom is that when a stool sells land, the *Guaha* is a custom is performed—a sheep is slaughtered; the vendor then invokes "the gods", and he declares to them that, from that moment, he has completely divested himself of all his title to the land, and that it has become vested in the purchaser. Cutting of *Guaha* is a custom which signifies complete severance of the land sold from the vendor, as a leaf or branch of a tree is completely cut off from the tree of which it was a part. After such an alienation by the stool, its concurrence in the

re-sale of the land (of which it has completely divested itself) is not essential to a valid alienation to a third party by the purchaser from the stool.

As P.W.19 (Okyeame Kofi Kwafo, the Linguist to the Omanhene) puts it, a third party who buys land from the purchaser from the stool may, for his own protection and as a further assurance of the title of his vendor, get the Chief and his elders of the place where the land is situate to witness the sale to him. In my opinion, that is the best that can be said; the failure to get such chief and his elders to concur in, or to witness, the conveyance to a third party by a purchaser from the stool does not–affect the validity of the title conveyed to the thirty party.

The plaintiff pointed out the area marked "5" on the plan as the only land owned by Caesar, and he alleged that the Caesars have disposed of that land to one Otinkorang. As already pointed out, **[424]** there is no evidence that, in relating the tradition of his stool to him, anyone ever pointed out to the plaintiff the extent of the land lawfully alienated to the Caesars. All he appears to have been told is that Caesar owned a portion of his stool land; his evidence that the area "5" is all the land the Caesars own in Atimpoku is, therefore, a mere conjecture.

Again, the allegation that the Caesar family had alienated any land they owned on Atimpoku land to Otinkorang was not proved either; Otinkorang was not called, nor was any witness to the alleged transaction called to give evidence of it. The plaintiff sought too tender a Deed of Conveyance date the 31 May, 1947, alleged to have been made between the late G. T. Caesar and the said M. B. Otinkorang. The document was not produced from proper custody, nor was its execution proved. Moreover, the 2nd defendant (a nephew of the late G. T. Caesar) through whom it was sought to tender that document and who is very familiar with the signature of his uncle, deposed that the signature of "G. T. Caesar" appearing on that document was not the signature of his late uncle of the name. He said, further, that the principal members of the Caesar family, whose consent and concurrence in dealing with the family land was requisite and necessary according to customary law, had never give their consent to the alienation of any portion of the family land by the late G. T. Caesar, or by any other person. In these circumstances that document could not be admitted. It was therefore marked Rejected "99"

The only admissible evidence left on the record regarding the alleged sale of land by G. T. Caesar to Otinkorang is that elicited from the 2nd defendant in cross–examination. That evidence was that the late G. T. Caesar made an abortive attempt to sell a small portion of the Caesar family land at Atimpoku to Otinkorang. It follows from that evidence that if the portion marked "5" on the plan is the area G. T. Caesar unsuccessfully attempted to sell, then that area is only a small portion and not the whole of the Caesar family lands in Atimpoku.

Again, Emmanuel M. Akoto (P.W.1) and Nana Kwafo Akoto (P.W.14), both said that part of Nana Budu's stool lands was lawfully sold to Ocansey (4th defendant) under a decree of the Tribunal of the Omanhene of Akwamu, a tribunal of competent jurisdiction. The plaintiff Nana Budu must know what

portion of his stool land was lawfully alienated to Ocansey. He know the area of land over which he made Awumu Dzei (P.W.6) his caretaker, which area Ocansey later claimed as by virtue of his said purchase, and the **[425]** tolls from which, collected by Dzei, Nana Budu had to refund to Ocansey. Nana Budu did not point out that land to the Surveyor to be shown on the plan nor did he identify it to the Court in his oral evidence.

There is also the evidence of Togbor Glover, (P.W.7) that the plaintiff's predecessor had alienated a portion of his stool land to his family, though the extent of that land was never shown.

As already stated, a plaintiff who seeks declaration of title to an area of land must identify to the Court the particular area of land in respect of which the declaration should be made in his favour. Where he claims damages for trespass, and/or injunction as in this case he must satisfy the Court of the exact area of land in his possession, which the trespassers have invaded, in order that a judgment given in his favour can be effectively enforced. Consequently, where a plaintiff claims an area, and the evidence shows that he does not own or was not in possession of the whole of that area he claims, and he is unable to show mush of that land he owns, or of how much he is in possession, no judgment can be given in his favour.

Thus although the whole of the area edged green, and covering two square miles, is admittedly within the territorial limits of the plaintiff's stool lands, yet upon the clear evidence of lawful alienation of portions of that area, and in the absence of immediate possession, none of the reliefs he claims can be granted.

I now turn to the evidence led by the plaintiff in an attempt to prove his exercise of rights of ownership over the land. Of all the host of witnesses whom he called on this issue, the only truthful person I find among them is Awuku Dzei (P.W.6). His evidence satisfies me that some time ago (probably in 1943, judging from the evidence of the 3rd defendant, Madam Nyako) the latter, and her uncle (the late Tea Solo), found the witness on the land, and they drove him away, this was done with the full knowledge of the plaintiff. The evidence of Awuku Dzei further satisfies me that at one time he was the plaintiff's caretaker of the land now claimant by Ocansey (4th defendant), and collected both riverside then took Ocansey came and asserted title to that area of land; the witness then took Ocansey to the plaintiff, and the plaintiff refunded to Ocansey all tolls which the witness Awuku Dzesi had collected and paid to the plaintiff over a certain period of time. From that day on, and up to the time that the Local Council took over the collection of the tolls, he (Awuku Dzei) **[426]** was the caretaker of the said lands for Ocansey. The conduct of the plaintiff in paying to the 4th defendant, Ocansey, all tolls which Awuku Dzei had collected and paid to him, is an admission by the plaintiff that as from a certain date, he had no further right, title and interest in the said land, and that he had ceased to be possession and occupation thereof.

The evidence led by some of the witnesses for the plaintiff on the question of his exercise of rights of ownership over the lands can only be described as ridiculous. By customary law, a subject of a stool is entitled, either by express or implied grant from the stool, to occupy any vacant portion of the stool land;

the occupant of such portion of the land becomes the owner of the possessory title in title in it: the land descends (upon his death intestate) to his family. A subject who so occupies stool land is not liable to pay any tolls or tribute of any kind to the stool; all that is due from him to the stool are the usual customary services (*Ohimen v. Adjei* (2 W.A.L.R. 275); *Thomson v. Mensah* (Court of Appeal, November, 1957). This right of the subject is inherit. It is based upon the well–known proverb which says, "In the fight to secure the land and save the stool no person's ancestor carried two swords, each carried one". In other words, the ancestors of all citizens (including those of the occupant of the stool) made equal sacrifices to win the land, and to preserve the stool. In spite of this well established principle of the customary law, this Court is asked to believe subjects of the Akwamu stool , and even subjects of the Atimpoku stool , when they say that for occupying Atimpoku stool lands they had to give to give annual tribute of 4/-, and farm products, to the stool. One of them said that Atimpoku stool lands, which his uncle an Atimpoku stool subject occupied during his lifetime, did not belong to the uncle, and so when he succeeded to his uncle he had to apply to Nana Budu for land to farm and to fell palm trees on; he said he paid tribute in cash and kind for his occupation. I cannot accept that evidence.

Having formed that opinion of the witnesses called by the plaintiff on the questions of possession, occupation and exercise of acts ownership of lands in dispute, I must hold that the plaintiff failed completely to prove his possession or occupation of, or the exercise by or his behalf of any acts of ownership of, the land in dispute, or any portion of it. This takes me to the case of the defendants.

The case of the first two defendants—the Caesar family—is that the three pieces of land they claim were lawfully acquired and occupied by their grandfather(the late Israel Henry Caesar, who died in 1990) and that the said lands have been occupied throughout by **[427]** members of the family since about 1880. The 2nd defendant, who is the present head of the family, gave the tradition as told him by his father as to the acquisition of all the three parcels of land they claim. The tradition he related is supported by two documents; one is an ancient document dated the 29th April, 1893, signed by I. H. Caesar, headed "Testamentary Declaration" (Exhibit "5" in the case); the other was a Photostat copy of another document, an Indenture of Conveyance dated the 3rd March, 1893 (Exhibit "10" in the case).

It was submitted on behalf of the plaintiff that Kwao Kwadjo Kwama Srebu and the others who are alleged to have been vendors of the land of the late I. H. Caesar, had never been occupants of the Atimpoku Stool , and therefore any sales they may have purported to make were null and void. It was further submitted that even if those alleged vendors had acquired good title to the land by purchase from the stools of Atimpoku and of the Omanhene of Akwamu, the sales which they made to the late Caesar would nevertheless be null and void, since no Akwamu Chief is shown to have witnessed the said sales.

I fail to appreciate the logic of those submissions, for the following reasons:

(1) Both the plaintiff (the Chief of Atimpoku) and Nana Kwafo Akoto(P.W.14,the

Omanhene) say that they do not know the person or persons who sold land at Atimpoku to the late Caesar got good title , i.e. the sale to him was valid;

(2) in law , customary or otherwise, a purchaser of the freehold interest in land is entitled to alienate the land he purchases without the necessary of his own vendor concurring in or even witnessing the sale, and such sale is valid.

Now the only evidence before the court as to who were the vendors to the late Caesar is the evidence given on behalf of the Caesar family. I am bound to accept that evidence, and since the plaintiff admits that there was a valid sale of land to the late Caesar, I must hold that he said vendor or vendors had good title which he or they conveyed. The plaintiff led no evidence to prove the extent of the land validly sold to Caesar, and his demarcation of the area marked "5" on the plan (Exhibit "A") was arbitrary and conjectural. The Court must look, therefore, to the whole of the evidence to ascertain the parcel or parcels reputed to have been in the possession **[428]** and occupation of the Caesar family, in order to determine what land or lands were sold to the late I. H. Caesar.

On that subject there is the evidence of the 2nd defendant (who is over 50 years of age) that ever since he was a small boy he has known his family to be in possession and occupation of all three pieces of land which his family claims, exercising full acts of ownership thereon. There is also the evidence of the blind old man P.W.2 (Daniel Tei) who struck me as an honest witness of excellent demeanour. His evidence is that since 1894, and up to about 12 years or so ago when he became blind, he has known the Caesar family to be in possession and occupation of the three pots of land. His own land, which he inherited from his father forms the northern boundary of Caesar's claims Nos. 1 and 2 together. He has personally taken part in the palm–oil industry which the Caesar carried on the land which is their claim No. 3.

There is the evidence of tei Quornoo (P.W.1) that this land, over which he litigated with the Asabu Stool (see the judgment in that case admitted in his case as Exhibit "5"), forms the boundary on the north of the land which is Caesar's 1st claim. That fact is also borne out by his title deeds, dated 1882 (Exhibit "11" in this case , and the document which formed the basis of his defence in the case in which Exhibit "6" is the judgment). There is also the evidence given by this witness as t the ownership possession and occupation by the Caesar's 3rd claim, forming a boundary on the south with land owned by him, a portion of which he sold to Ofori Tawiah (P.W.17). Here again , this witness's evidence is confirmed by his document Exhibit "7"; and it also finds some support in Ofori Tawiah's document (Exhibit "2"), the execution of which was witness by Nana Badu the plaintiff.

Learn Counsel for the plaintiff submitted that although in the body of the deed (Exhibit "2") the land conveyed to Ofori Tawiah is shown as forming a boundary on the north with land belonging to Caesar, yet since on the plan the land to the north is described as "land in dispute between G. T. Caesar and Nana Kofi Badu" it must be presume that, in joining to execute that document,

Nana Badus attention was centered on the description on the site plan attached to the deed, and not on that in the body of the deed. It might well be, as Counsel submitted, that Nana Badu accepted the description on the plan as stating the correct position of the land on the north at that date. If this is so, it means that Nana Badu was admitting in 1949 (the date of the deed) that the ownership of the land forming the northern boundary of the land conveyed by that deed was land which **[429]** in that year was in dispute between him and G. T. Caesar. That admission contradicts the plaintiff's case that his dispute with G.T. Caesar over that land was finally settled at an arbitration in 1947, and that he was declared owner of that land by the award of that arbitration. The plaintiff cannot blow hot and cold at the same time.

Again, it is the case of the plaintiff that the existence of Anya (otherwise known as *Buna* or *Ntome*) trees on the boundaries of a piece of land is conclusive evidence that the land along whose boundaries they exist is land which had been the subject matter of an absolute sale by the stool. Looking at the plan Exhibit "A", Anya trees are seen along all the boundaries of the land which is Caesar's 1st claim and along nearly the whole of the boundaries of the land marked Caesar's 3rd claim. The surveyor said that all the things he has indicated on the plan are things he saw with his own eyes; that evidence of his was not challenged. I accept it. It follows that those two pieces of land (Caesar's "1" and "3") are lands which have been the subject of absolute alienation, by sale and conveyance by the stool. The purchasers of such land can therefore themselves alienate them. Upon the evidence before the court the people who could be the purchasers of such lands are the Caesars. On their claim "2" also, the evidence of the Caesars that they planted the Orange and Mango trees on the north–eastern corner has not been contradicted.

I accept the evidence led by the Caesar family, and I hold that they are owners by right of purchase of each of the three pieces of land they claim in this suit.

The case of the 3rd defendant, and her mother the co–defendant, is that the land they claim was purchased by Paul Petty, father of the co–defendant, from the same Boso Kwadjo from whom old Caesar purchased a portion of his land.

The plaintiff says he has no knowledge of this, and that Boso Kwadjo had no authority to alienate Atimpoku stool lands. The question is, If Boso Kwadjo could make valid alienation of Atimpoku stool land to Caesar, why could he not alienate Paul Petty or to anyone else?

In view of the evidence of the significance of *Anya* trees from the existence of such trees(or their stumps—one described on the plan as "big *anya* stump") on the boundaries of the land which these defendants claim, I must come to the conclusion that that land is land which the Atimpoku stool must have validly alienated, I accept the evidence of occupation given by the co–defendant that her father **[430]** purchased that land. I also accept her evidence, and that of her daughter (the 3rd defendant) as to their family's occupation and possession of the land all these years. I believed that the fruit trees on that land were planted by members of their family, and not by any of the witnesses for the plaintiff. I also accept the evidence of P.W.6 (Awuku Dzei) that when he was

put on that land by the plaintiff, and the 3rd defendant and her uncle Tei Solor challenged his right to be on it, took Solor to the plaintiff, eventually he (Dzei) left the land.

I also note the admission made on behalf of the plaintiff through cross–examination that Clement Sackey, the only witness called by the 3rd defendant and co–defendant, felled palm tree on the land in 1946, and also farmed a portion of it upon licence granted to him by Tei Solor.

It was suggested by Counsel for the plaintiff that the plaintiff challenged the occupation of Sackey and a letter of complaint to his European Manager complaining of his trespass. There is no evidence that the plaintiff challenged the right of Sackey to work on the land. As to the content of the letters which sackey admits Nana Budu wrote to Sackey's employer, the only evidence of it is what counsel for the plaintiff elicited by cross–examination from the witness, namely, Nana budu reported Sackey to his employer for using the letter's time to do hies own private work, i.e. supervising his palm wine tapping, and making farms. I cannot see how it could be other wise. If Sackey had gone on the land upon instructions of his European Manager of the road works, the suggestion that the letter written by Nana Budu was in the protest of Sackey's trespass on his land would be reasonable; but not when the land, as the evidence shows, for his private purposes as a licensee of Tei Solor.

As started in the introductory part of the judgment, the only person Nana Budu sued in this case is the 1st defendant—all the other defendant were joined upon their own application. If Nana Budu bid not concede that the Pettey family (i.e. Tei Solo) own the land they now claim, why did he not sue Tei Solo when the latter in 1943 drove Nana Budu's agent Awuku Dzei from the land, and in 1946 permitted Sackey to fell palm trees on the land, and to farm. The only inference to be drawn from Nana Budu's conduct is that he was well aware of the Tei Solo's family's title to that land.

The 3rd defendant and her family have proved to my satisfaction that their family are the owners of the land which they claim in this suits, and that they have been in possession and occupation ever since it became their property.

[**431**] Finally, to the claim of 4th defendant Ocansey. His case is simple in the extreme, and it was proved for him conclusively by the plaintiff himself, his 1st witness (Emmanuel Akoto), his 6th witness (Awuku Dzei), and his 14th witness (Nana Kwafo Akoto). His case is that he purchased the whole of the right title and interest of Nana Budu in the land which he now claims, at a sale at Public Auction conducted in execution of a decree of the Tribunal of competent jurisdiction. P.W.1 said that the writ of *fieri facias* under which the sale was conducted is Exhibit "3". He admitted that the description on the writ of attachment under which a sale takes place should be reproduced on the Certificate of Purchase which is issued after the sale. He also admitted that after he had issued the Certificate of Purchase (Exhibit "4") the judgment-creditor, Quornoo, who had given the description of the land to be attached in execution, submitted to his Tribunal an affidavit (Exhibit "5"), pointing out that the land sold had been wrongly described on the Certificate of Purchase.

The 4th defendant said under cross–examination that at the auction–sale the judgment–creditor took him round, and showed him all the boundaries of the land sold. He said in his evidence–in–chief that the surveyor, and which is delineated on the plan Exhibit "A", and thereon edged yellow.

It was submitted by Counsel for the plaintiff that the 4th defendant is bound by the description on the Certificate of Purchase. That submission may be correct in normal circumstances, but be that as it may, the description of the land as shown on the Certificate of Purchase can be material only if there is a dispute as to the physical identity of the land attached and sold. For example, if the plaintiff has pointed out another piece of land as the one attached and sold, then and only then could a dispute arise as to description, and the Court could be concerned to enquire which of the two different pieces of land answered the description of the land attached and sold.

In this case the plaintiff has not pointed out any land as that sold. There is one piece of land (and one piece of land only) proved to the Court as the land attached and sold, and that is the land delineated on the plan Exhibit "A" and thereon edged yellow. There is the further evidence of Awuku Dzei, already referred to, that the plaintiff has admitted the 4th defendant's ownership of that area of land. What is there for the plaintiff to argue about? Is there any wonder that the plaintiff never sued the 4th defendant? The 4th defendant has conclusively proved his case.

[**432**] Among other reliefs, the 1st and 2nd defendant (i.e. the Caesars) have counterclaimed for damages for trespass to their land, so has the 4th defendant.

As regards the claim of the Caesar family for trespass, we have to go back to 1946-1947 when G. T. Caesar instituted an action against the plaintiff. P. W. 4 deposed that the reason which the late Caesar gave in 1947 for suing Nana Budu was that Nana Budu had trespassed on his land. That witness also that, when he and the other people who purported to hold an arbitration on the dispute inspected the three areas of land, they saw that palm trees had been felled on the claim No. 2 land, and cassava farms made on the claim No.3 land. He said further that Nana Budu admitted that it was he who had caused the palm tress to be felled, and the farms to be made.

As I have found that these two plots of land were in the possession and occupation of the Caesar family long before the year 1946, and that they have always continued to be so, it follows that Nana Budu's entry upon the two pieces of land was trespass.

As regards the claim of the 4th defendant (Ocansey) for trespass the evidence satisfied me that since the time that Nana Budu paid him (Ocansey) the tolls which Awuku Dzei had collect on his Nana Budu's behalf from Ocansey's land, Nana Budu has never trespassed upon that land again. As Ocansey himself said, the only reason why he applied and was joined as a defendant in this suit is that the area of land, measuring 2 square miles, which Nana Budu claims includes his land. Assertion of title to land, without entry upon the land, does not constitute trespass, and Ocansey's claim for damages for trespass must therefore fail.

In the result, the claim of the plaintiff against each of the defendants and the co–defendant is dismissed, and judgment entered on that claim for each

defendant

On the counterclaim of the 1st and 2nd defendant there will be judgment for the 1st and 2nd defendants (i.e. the Caesar family) for:—

(1) declaration of their title to each of the three pieces of land described in their counter–claim and delineated on the plan Exhibit "A", and thereon edged brown;

(2) an Order for recovery of possession of each of the said three piece of land;

(3) £100 damages for trespass to the 2nd and 3rd pieces of the said land, and **[433]**

(4) an injunction restraining the plaintiff, his agents, servants or any person claiming through him, from entering upon the said lands, or in anyway whatsoever interfering with the Caesar family in their ownership, possession and occupation of the said three pieces of land, or any of them.

On the counter–claim of the 3rd defendant and of the co–defendant (i.e the Paul Pettey family), there will be judgment for the 3rd defendant and the co–defendant for declaration of their title to the land as claimed by them in their counter–claim, and shown and delineated on the plan Exhibit "A", and thereon edged purple.

On the counter–claim of the 4th defendant (Ocansey) there will be judgment for the 4th defendant for:

(1) declaration of his title to the land described in his counter-claim, and shown and delineated on the plan Exhibit "A", and thereon edged in yellow, and

(2) injunction restraining the plaintiff (Nana Budu), his agents servants and licensees, from entering upon the 4th defendant's said land, or in any manner whatsoever interfering with the 4th defendant in his ownership, possession and occupation of the said land.

The defendants and the co–defendant will have their costs fixed as follows:—

For the 1st and 2nd defendant; Out–of–pockets and attendance, £146 5/-.

For the 3rd defendant and the co–defendant: Out–of–pockets, and attendance of themselves and their witnesses, £87 5/-.

For Counsel for the 1st three defendants and the co–defendant, 250 guineas.

For the 4th defendant: Out–of–pockets and attendance of himself and witness, £81 12/-.

For Counsel for the 4th defendant 175 guineas.

(Editorial Note:[18] As delivered, the above judgment contained certain observations on the conduct of counsel for the plaintiff, which observations it has not been thought necessary to reproduce for purpose of this report. On appeal, the appellate court allowed the appeal, though not on the merits, and ordered a re–trial.)

[18]This editorial note is reported in the GLR original

NOTES:

1.) On p. 423, Ollennu says that once a stool has sold land, its consent is not required for subsequent transfers by the new owner. Is this true today in all areas of Ghana? Benjamin Kunbuour, in an article for the *Journal of Dagaare Studies*, suggests that the law is otherwise in practice. *See* Benjamin Kubuour, *Customary Law of the Dagara of Northern Ghana: Indigenous Rules or a Social Construction?*, 2 J. DAGAARE STUD. 11 n.7 (2002) (available at http://www.hku.hk/linguist/JDS2002_Kunbuor.pdf (last visited Dec. 2, 2004)). Kunbuour claims that the Lands Commision requires the consent of the stool for re-alienation of land after a usufruct has been aquired by a subject, but that this requirement is contrary to customary law in the area.

2.) Ollennu also describes the *Guaha* ceremony required to transfer land (on p. 423). He seems to relate the ceremony to complete severance of the land from the stool. If this is not done (as, perhaps, when a stool subject settles with an implied rather than express grant), is there not a complete severance of the stool's interest? In such a case, does the stool retain the right to approve future transactions?

3.) Ollennu makes a clear statement on p. 426 that either an express or an implied grant from a stool may suffice to pass an interest to a subject.

4.4.2 Bruce v. Quarnor & Ors.

[1959] GLR 292.

In the High Court (Lands Division), Accra

10 September, 1959

[**293**]

OLLENNU J.:

(*His lordship referred to the pleadings and contained:—*)

The plaintiff's first witness (a daughter) under cross–examination by counsel for the defendant stated that her father the plaintiff had apportioned the land in dispute, and had made a gift of various portions of it to his children. She stated further that the area which the first defendant is alleged to have trespassed upon is within the portion granted to her (the witness) by the plaintiff. The plaintiff's second witness, his son, also said under cross-examination that the plaintiff had given portions of the land to his children, but had reserved a portion for himself. This witness said that the portions which the second and third defendants are alleged to have trespassed upon are within the area which the plaintiff had reserved for himself.

[**294**]Learned counsel for the first defendants submitted that in view of the evidence given by those two witnesses the plaintiff its shown to have no *locus*

standi particularly as regards his claim against the first defendant, because, having granted the whole of his right title and interest in the land to his children, there is nothing left for him in the land over which he could litigate. Counsel submitted that the plaintiff's claim should be dismissed on his ground.

This submission would have been very forceful were the law which I am called upon to administer in deciding this suit purely English law and nothing else. But all the parties to this suit are natives, and Section 87(1) of the Courts Ordinance expressly lays down that:

> "Native law and custom not being repugnant to natural justice, equity, and good conscience ... shall be deemed to be applicable in causes and matters where the parties thereto are natives and particularly but without derogating from their application in other cases, in causes and matters relating to the tenure and transfer of real and personal property ..."

By native custom, grant of land implies an undertaking by the grantor to ensure good title to the grantee. It is therefore the responsibility of the grantor, where the title of the grantee to the land is challenged, or where the grantee's possession is disturbed, to litigate his (the grantor's) title to the land; in other words, to prove that right, title or interest which he purported to grant was valid.

The Judgment of Petrides C.J., delivered on the 1st July 1941 in Suit No. 26/1940, entitled *Odonkor & anor. v. Allotey & anor.* (and two other suits consolidated), is in point. In the course of that judgment the learned Chief Justice said:

> "It has been contended that A. B. Nartey is not entitled to maintain an action for declaration in respect of land he sold before action was brought. I am satisfied after listening to the evidence of the Asere Mantse, he can do according to Native Law and Custom. There is evidence I accept that Nartey was asked by his purchasers to sue for a declaration of title, I hope that Nartey can, in the circumstances, sue in respect of the plots he sold before action ... In my view either the original owner of the property or the purchaser can maintain an action in respect of it."

In practice, the vendor and the purchaser sue jointly.

That declaration of the customary law on the point of procedure was not challenged when the case went on appeal to the West African Court of Appeal as shown in the judgment of that Court of (7 W.A.C.A. 160). The judgment of the West African Court of Appeal in *Fiscian v. Tetteh* (2 W.A.L.R. 192), where the point is **[295]** dealt with indirectly, should also be referred to; and see *Majolagbe v. Larbi & ors.* (p.190 of this volume).[19]

I hold therefore that the plaintiff is properly before the Court.

[19] That is, [1959] GLR 190.

Some confusion arose as to the identity of the land claimed by the plaintiff. This was created by the following factors:—

(a) there were slight differences between the dimensions of the land as described in the writ of summons, and those as delineated on the plan attached to the plaintiff's statement of claim;

(b) there was a difference in the position of the land in relation to "Grid Lines," as delineated on

  (i) the plan attached to the statement of claim;

  (ii) that attached to the plaintiff's Deed of Conveyance Exhibit "B", and

  (iii) that on a lay–out plan of the area, (Exhibit "3") produced by a witness for all the defendants, Nii Adama Asua II, an elder of the James Town Stool.

The Court therefore caused a survey to be made of the piece of land which each of the parties claims to have been granted to him or her, and a plan made in consequence of that survey. The plan produced in consequence of that survey was admitted in evidence, and marked Exhibit "X".

The location of the land as shown on the plan attached to Exhibit 'B' was superimposed on Exhibit "X", and the plan 'X' was also superimposed on the plan Exhibit "3". This operation made it obvious that the land claimed by the plaintiff, as pointed out at the locus, is in a different geographical position from that shown on the plan attached to his Deed (Exhibit "B"), and from that on the lay–out plan (Exhibit "3").

In view of these prima facie differences and confusion, learned counsel for the 1st defendants submitted that the plaintiff had failed to identify the land he claims with the certainty that the law requires of a plaintiff, and that his claim should therefore be dismissed. In support of that submission counsel cited the following cases;

(1) *Frimpong II v. Brempong II* (14 W.A.C.A. 13);

(2) *Emegwara v. Nwaimo* (14 W.A.C.A. 347) and

(3) *Amata v. Modekwe* (14 W.A.C.A. 580)

Two outstanding features of the case are

(1) that the land as shown on all the various plans has precisely the same shape, no matter the geographical region in which it **[296]** is placed on the plan, and no matter the difference in some f the dimensions; and

(2) as will appear again presently, the important witnesses called for the defendants admitted that plaintiff occupies, and has for a long time occupied piece of land in the locality.

In such circumstances it is the duty of the Court, if it is to do justice, not to dismiss the plaintiff's claim by reason of the *prima facie* confusion, but to ascertain from the evidence as a whole (both oral and documentary) whether the actual area of land in respect of which the plaintiff sued has been identified with certainty, and whether the pieces, or any of the pieces, of land which the defendants has entered upon fall within that land in the possession and occupation of the plaintiff. In other words, the Court must ascertain from the evidence whether there is land efficiently identified at the locus by the plaintiff as being in dispute between him and the other parties, and in respect of which a Court can give effective judgment.

I have carefully examined the evidence as a whole, and particularly that of the surveyor. He gave evidence pillars, the ages of which he was unable to tell. He spoke of the situation of the ruins of a swish building, pointed out to him by P.W.2.[20] and indicated by him on the Plan Exhibited "X". He gave evidence of the close similarity between the shape of the plaintiff's land as shown to him at the locus and delineated by him on Exhibit "X", and the shape of the plaintiff's land as shown on Exhibit "3" produced on behalf of the defendants. I have come to the definite conclusion that the land in respect of which the various plans were made is one and the same piece of land, and not different pieces of land. I am satisfied that the land which the plaintiff pointed out at the locus to the Surveyor delineated in blue on the plan Exhibit "X" and on the lay–out plan Exhibit "3", is the land in dispute.

Learned counsel for the first defendant submitted that if there is certainty about the identity of the land in dispute (which he says there is not) then since both the plaintiff and the first defendant rely upon the James Town Stool as their root of title, and since his client's deed is prior in time, it must take precedence over the deed of the plaintiff.

But in the first place the defendants document, though prior in time as regards execution, is unregistered, whilst that of the plaintiff, is registered; the first defendants deed cannot therefore have priority over the plaintiff's documents.

[297] But that is a minor point. The most important point is that both the plaintiff and the first defendant rely principally upon a grant made in accordance with customary law. They used the deeds only as documentary evidence of the grant already completed under customary law. Here I must say that I accept the evidence of the plaintiff that, when he notice that the original grant made to him in accordance with customary law had not been recited in the deed Exhibit "B", he requested Nii Kofi Akrashie II to have the correction made, and took steps in that behalf. Nii Kofi Akrashie, however, was destooled before he could do so.

Conveyance of land made in accordance with customary law is effective as from the moment it is made. A deed subsequently executed by the grantor for the grantee may add to, but it cannot take from, the effect of the grant. Thus, a stool can by deed convey to the person the absolute ownership in the land

[20] Plaintiff's Witness #2

which it originally granted to that person by customary law and thereby except the grantee from the performance of customary services which might normally have been due from the grantee to the stool; but such a deed cannot operate to revoke the grant made by custom.

The plaintiff, as proved by the witness for the defendants Nii Adama Asua II, is a member of the royal family of James Town, the stool family. He, as a subject of the said stool is entitled by customary law to occupy any vacant portion of the land of the said stool. This he can do either upon actual or implied grant.

Apart from the evidence led on behalf of the plaintiff that the stool granted the land to him over 30 years ago, there is evidence of first defendants grantor, James Quarshie Danso (D.W.1.), that the first went in the area in 1923, and found Amaatse (P.W.3) already farming the area. Amaatse then showed him the plaintiff's land, which form a boundary with the land Amaatse was farming. Amaatse said that the land now claimed by the first defendant is a portion of the land, which Amaatse had been farming, and which, Danso said was subsequently granted to him (Danso) by the stool.

Nii Adama Asua II, also deposed that in 1956, when the plaintiff approached Nii Kofi Akrashie II, and his elders for a document, the plaintiff sand that he wanted the document because he had been farming that land for a long time.

Thus, even if the plaintiff's possession and occupation of the land was not upon actual grant, his possession and occupation as a subject of the stool is good title, and it will take precedence over any grant which the stool may purport subsequently to make of any **[298]** portion of that land. By customary law a stool has no right to grant land which is in the occupation of a subject to any one–subject or stranger–without the consent and concurrence of the person in possession.

I am satisfied upon the evidence that the land in dispute as delineated in blue on the plans Exhibit "X" was granted to the plaintiff over 30 years ago by Nii Kojo Ababio IV, as stated by the plaintiff. I also accept the evidence by the plaintiff and by each of his witnesses (particularly P.W.3. Amaatse) together with the evidence of Danso (first witness for the first defendant) that the plaintiff has been in continuous possession and occupation of the of the land for over thirty year; when Danso first went to the land.

Danso gave evidence that at the time he was granting to his niece (the first defendant) the land formally occupied by Amaatse, he did not invite Qmaatse or the plaintiff, with whose lands his said land marched, to be present and agreed upon, the boundaries. This satisfies me the first defendant did not know, and could not know, the proper boundaries between her land and the plaintiff's.

Nii Adama Asua II, deposed that the area was laid out some time after grants had been made by the stool, and that, as a result of the lay–out, new plots of land were given to former grantees in exchange for land already granted to them. In consequently, he said, a new area consisting of 14 plots (as appearing on Exhibit "3") has been allotted to the plaintiff in exchange for his original land, though the plaintiff had not gone to the stool to be shown that new area. Counsel submitted, therefore, that if any trespass had been committed by any

of the defendants to the land granted by the stool to the plaintiff, the plaintiff cannot complain.

It is difficult to appreciate this argument. Once land has been granted to a person, it cannot be taken away from him and another piece given him in substitution without his consent. The grantor would be acting unlawfully if, without the consent of the grantee, he should grant the original land to another person, allocating another piece of land to the original grantee. And the party to whom a purported granted of such land is made would be guilty of trespass if he entered upon it without the permission of the original grantee.

The defence put up by the second and third defendants is simply that they occupied the land as grantees thereof from the James Town Stool. This defence avail them so long as that portion of the land is not vacant stool land, but land already granted to the plaintiff, and in his possession and occupation.

[**299**] I am satisfied upon the evidence

(1) that the land in dispute edged Blue on the plans (Exhibit "X" and Exhibit "3") is the property of the plaintiff.

(2) that the plaintiff has been in possession of it for over 30 years;

(3) that without the leave and licence of the plaintiff, and without any lawful authority, the first defendant entered upon that portion of it enclosed between the three yellow lines and portion of the blue line forming the southern boundaries of the land;

(4) that the second defendant entered upon that portion of it enclosed by the three pink lines and portion of the blue line forming the eastern boundary of the plaintiff's land;

(5) that the third defendant entered upon that portion of it at the south-western corner thereof as is enclosed between the three green lines and portions of the southern boundaries of the land; and

(6) that each such wrongful entry was made whilst plaintiff was in possession.

There will therefore judgment for the plaintiff for:

(i) declaration of title against each of the defendants to the land described in his writ of summons and as delineated on the plan Exhibit "X", and thereon edged in blue.

(ii) An order for recovery of possession against each defendant of the portion of the plaintiff's land wrongly occupied by her;

(iii) £10 general damages against each defendant separately or her trespass to the plaintiff's land, and

(iv) injunction against each of the defendants, their agents and servants, and each of their servants and agents, restraining portion of it, or in any manner whatsoever interfering with the plaintiff in his ownership, possession and occupation of the said land.

The plaintiff will have his cost against each of the defendants fixed as follows:

(1) 50 guineas inclusive against the first defendant;

(2) 40 guineas against the second defendant, and

(3) 40 guineas against the second defendant.

The assessor agrees with the judgment read.

NOTES:

1.) *Bruce v. Quarnor* makes an important point about the nature of a customary grant. Ollennu says:

> "Conveyance of land made in accordance with customary law is effective as from the moment it is made. A deed subsequently executed by the grantor for the grantee may add to, but it cannot take from, the effect of the grant."

This is in sharp contrast with English common-law, where the Statute of Frauds prevents oral grants from conveying any interest in land.

Ollennu also says that a deed cannot operate to revoke a grant made by custom. The Land Registry Act, 1962 (Act 122) requires registration of all *written* instruments which transfer interests in land. Without such registration, transfers are of no effect. *See* Act 122, § 24. If oral grants may create interests without the requirement of a writing, then even a search of documents registered under Act 122 may not reveal the true owner of a plot of land.

4.4.3 Amatei v. Hammond And Another

[1981] GLR 300.

High Court, Accra

February 26, 1979

[303]

Cases referred to:

(1) *Mensah v. Ghana Commercial Bank* (1958) W.A.L.R. 123.
(2) *Abakam Effiana Family v. Mbibado Effiana Family* [1959] G.L.R. 362, C.A.
(3) *Bruce v. Quarnor* [1959] G.L.R. 292.
(4) *Public Lands (Leasehold) Ordinance, In re; Osu Mantse (Claimants)* [1959] G.L.R. 163.
(5) *Summey v. Yohuno* [1962] 1 G.L.R. 160, S.C.

(6) *Okantey v. Kwaddey* [1959] G.L.R. 241, C.A.
(7) *Akwei v. Awuletey* [1960] G.L.R. 231, S.C.
(8) *Seraphim v. Amua-Sekyi* [1962] 1 G.L.R. 328.
(9) *Donkor v. Danso* [1959] G.L.R. 147.
(10) *Ashiemoa v. Bani* [1959] G.L.R. 130.

ACTION for a declaration of title to or right of occupation to a piece of land granted by the Osu Mankralo stool. The facts are fully set out in the judgment.

EDWARD WIREDU J. this the second trial of this case in this court. The first trial ended around the middle of 1963 and an appeal to the Court of appeal was allowed and re-trial *de novo* ordered.

The dispute is about a piece of building plot at Osu in the Osu Ashanti Blohum Quarter, the property of the Osu Mankralo stool. The plaintiff on the undisputed facts is a subject of the said tool. At land having constructed a building on it. This building on the **[304]** facts which I accept, was constructed at a time when the defendant's appeal again the first judgment of this court had been struck out for want of prosecution when he failed to turn up when the appeal was called for hearing. The facts further show that later the appeal was re-listed and the present trial is the result of the order of that appeal.

The defendant also claims to be a subject of the Osu Mankralo stool. Even though issue was joined on this claim by the defendant I have refrained form making and finding on its as the its determination one way or other will, in my view, not help in resolving the real controversy between the parties. The co–defendant on the facts which I accept, is the Osu Mankralo and will be treated as such in the course of this judgment.

Both the plaintiff and the defendant claim title or better still their right to occupation to the disputed land through the Osu Mankralo stool. But whilst the evidence brought by and on behalf of the plaintiff shows that his claim is through a grant made to him by his second witness, one Nii Nortey Yeboah as acting mankralo and some of the elders of the stool, the defendant's claim is through the mankralo himself (i.e the co–defendant) and some of his elders.

We shall therefore examine in detail the evidence brought in support of the parties to find out whose claim is to be upheld by the court. In resolving this issue I must not be taken to be unmindful of the burden which rests on a plaintiff for a declaration of title to rely on the strength of his own case and not on any weakness in the defendant's case.

The plaintiff's evidence, which was supported by his first witness, a Mr. Tagoe, who on the available facts owns lands abutting the disputed land, show that prior to obtaining the grant on which his claim is founded, he was faming a on a piece of land part of which is not in dispute and was in such occupation when the area was later carved out in building plots as a result of a lay-out carried out in the area. Mr. Tagoe himself testified that his own portion of the land on which he has built was part of the land the plaintiff was farming. The plaintiff testified that when the area was carve out into building plots, he obtained a grant of the disputed area from the Osu Mankralo stool, at the time

represented by Nii Nortey Yeboah as acting mankralo and the elders of the stool. This grant according to the plaintiff was a gift from the stool. He testified that after the grant he erected corner pillars at the four ends of the plot and tendered exhibit A, a deed of gift, as the conveyance from the stool to him. Nii Nortey Yeboah testified as the second witness for the plaintiff. He confirmed the grant to the plaintiff and the execution of exhibit A in his favour. His evidence **[305]** shows that the Gyasetse and the Gyse people installed him as acting Mankralo when the co–defendant was customarily destooled and has since that time been performing the customary functions of the Mankralo. He testified that in the capacity he has been granting stool lands to persons who come to see him and the elders of the stool. He claims to have the custody of the stool and has been performing all customary rites pertaining to the stool. Witness admitted that at the time he was acting, destoolment charges were then pending in the Ga State Council against the co–defendant. He admitted also that the charges were preferred by the Gyasetse but denied that the case has been determined against the Gyasetse. He also denied having supported the Gyasetse in the litigation and maintained that as acting mankralo his role was neutral. Mr. Tagoe, the fist witness for the plaintiff.

The events which seem to have sparked off the present action are that in the course of making preparations to build on the land by the plaintiff some time in 1961, the defendant, who was then accompanied by a policemen and who described himself as a minister of state met the plaintiff on the land and threatened to have him detained if he did not leave the land alone. The plaintiff therefore resolved to seek a redress in the law court for the relief's set out in his writ of summons.

The case for the defendant is that of the disputed land is part of two plots of land granted to him by the co–defendant and his elders customarily, some time in 1956. his testimony shows that the land granted him measured 150 feet by 100 feet and that is was originally meant for his father but the actual grant was made to him when his father asked him to go and see the co–defendant for a piece of land. He testified that he paid a customary fee of 32 shillings and two bottles schnapps as drink. He said he appointed one Walakata, an elder of the stool described as asafoatse. As his caretaker of the land because he did not at that time have an immediate intention to build on the land. He testified that apart from engaging Walakata as caretaker he did nothing on the land. He said Walakata lived near the disputed land at that time. He said some time between 1959 and 1960 he saw the plaintiff of told him the land belonged to him. He said he reported the plaintiff' presence on the land to Walakata. In 1961, continues the defendant, he saw that cement blocks were being made on the disputed land and suspecting the plaintiff to be responsible **[306]** he sent for his and warned him to leave the land alone and later reported this to the co–defendant. He denied having threatened the plaintiff with detention.

The defendant himself did not call any witness, as his obvious witness his grantor, had opted to join as the co–defendant. The co–defendant testified that the disputed land was granted to the defendant by him and his elders. He testified that the land was requested for by the defendant's father on behalf

of the defendant. He said the defendant's father paid a customary fee of 32 shillings and a bottle of whisky. He said after the grant the defendant's father paid an amount of £10.10s. for the land. He testified that he was among those who want and measured the land for the defendant. Next to testify was a Mr. Hammond, who can safely be described as a witness for the defendant and co–defendant. This witness is described as a private or personal secretary of the co–defendant. He said he was present when the defendant's father came to see the co–defendant and requested for a land for the defendant. He testified that he was present when the defendant's father paid an amount of 32 shillings and a bottle of whisky. Witness testified that he was among those who went and showed the land to the defendant who later paid an amount of £10.10s. for the land. The witness also said he was present when the defendant came to report the plaintiff's trespass to the disputed land.

The plaintiff's grant has been strongly criticised and rightly in my view by learned counsel for the defendant who argued that sine the land in dispute is on the undisputed facts the property of the Osu Mankralo stool, the co–defendant as the occupant of the stool being the only indispensable person competent to make grants of the Osu Mankralo stool lands with the elders of that stool, want of his participation in the grant to the plaintiff rendered farming rites or occupation by the plaintiff, assuming it was accepted, ceased in view of the subsequent assumption of control by the stool in caring out the area into building plots which change the nature of the use of the land. For authority learned counsel cited the case of *Mensah v. Ghana Commercial Bank* (1985) 3 W.A.L.R. 123 and *Abakam Effiana Family v. Mbibado Effiana Family* 1956 G.L.R. 362 at p. 363, C.A.

For the plaintiff, it was contended that the evidence of the alleged grant to the defendant was riddled with such serious material conflicts that the evidence brought in support of the should be rejected. Counsel argued that the facts proved in this case show that the was a rift between the co–defendant and the Gyasetse whereby the co–defendant was declared customarily destooled. **[307]** Continuing, counsel augured that the evidence shows that the administration of the Osu Ashanti blohum State continued with nii Nortey Yeboah as acting mankralo. He therefore argue that the plaintiff approached the stool in good faith for a grant and exhibit A and the evidence brought in support showed that a grant was actually made to him. He dismissed as untenable the argument that a subject in occupation of land could be deprived of his land by the stool without his consent. Learned counsel referred to the case of *Bruce v. Quarnor* (1956) G.L.R. 292 and *Osu Mantse (Claimants), In re Public Lands (Leasehold) Ordinance* [1959] G.L.R. 163.

Learned counsel finally sought refuge under the Land Development (Protection of Purchasers) Act, 1960 (Act 2) and submitted that the plaintiff's conduct in dealing with the disputed land had been in good faith and should be protected as such.

This case raised for consideration the following issues:

(a) whether it is competent for elders of a stool to appoint an acting chief

to deal with stool matters where the substantive chief has been declared customarily destooled; and

(b) whether the customary law principle that a subject of a stool has an inherent right to occupy any vacant stool land for farming (whether arable or husbandry) needs to be looked at the reflect changes in modern farming.

On issue (a) there is no dispute that the plaintiff's grant which (I accept was made to him) was by Nii Nortey Yeboah as acting Mankralo and the elders of Osu Mankralo stool named in exhibit A. it is also not disputed that the Gyasetse at the time of the grant had declared the co–defendant destooled. It is further not disputed that at that time or some time later after this declaration, destoolment charges preferred by the Gyasetse against the co-defendant were brought before the Ga State Council and were pending for determination. Had evidence been brought on behalf of the plaintiff supporting a proper customary destoolment of the co–defendant, that irrespective of the statutory provisions from destooling a chief, I would have felt inclined to uphold the plaintiffs grant since granting of land id purely one of the customary duties of a chief appointed to act in the place of the chief would be competent to alienate lands with the consent and concurrence of the elders of the stool just as the chief himself was competent to do.

The evidence brought to support Nii Nortey Yeboah's appointment as acting Osu Mankralo show nothing more than that the destoolment of the co–defendant was a mere declaration by the Gyasetse. I do not know the propriety of such as procedure but the one thing apparent form the evidence is that no charges were **[308]** formally preferred against the co–defendant whom destoolment was accepted without question and was championed by the Gyasetse. Preferment of such charges is a customary law requirement and I think the rules of natural justice are part of the general rules of the administration of justice, countenanced by customary law also and failure to comply with them should be held to annual any adjudication made in that regard. I therefore in my judgment hold that the declaration made by the Gyasetse destooling the co–defendant on the facts of this case offended the customary practice of removing a chief and is of no effect. It follows therefore that the subsequent appointment of Nii Nortey Yeboah as acting Mankralo is also void. I further find in my judgment that the grant made to the plaintiff without the participation of the co-defendant who was and is still the Osu mankralo is void: see *Mensah v. Ghana Commercial Bank* (supra).

This finding on th face of it may seem to conclude the case against the plaintiff but the plaintiff of the evidence is in physical and effective possession of the land in dispute. As against the whole world his possession is just as good title save against the true owner or someone claiming through him. It is in this light that I will proceed to consider the case brought on behalf of the defendant.

I have hesitation, whatsoever, in rejecting as untrue the evidence brought on behalf on the defendant that the Osu mankralo stool made a customary grant of the dispute area to the defendant in 1956 or at any other time. The evidence brought in this regard is , as was rightly pointed out by learned counsel for the

plaintiff, riddled with such material conflicts that is undeserving of any credit. Among the conflicts are: (a) The defendant's evidence that the disputed land was originally meant for his father as against the other available evidence that the co–defendant's father asked for the land on behalf of the defendant; (b) the defendant evidence that he paid a customary fee of 32 shillings and two bottles of schnapps as against the evidence that he paid a customary fee of 32 shillings and two bottles of schnapps as against the evidence by the co–defendant and Mr. Hammond that the amount was paid by the defendant's father and that the drink added was a bottle of whisky instead of two bottle of schnapps; (c) the absence of the subsequent payment of another amount of £10.10s. in the evidence of the defendant himself as against the co–defendant's evidence that £10.10 was paid on the defendant's behalf by his father and the evidence by Mr. Hammond that the defendant himself paid the £10.10; (d) the is also the conspicuous absence of the defendant's father in the evidence of the defendant at the time of the inspection of the land as against the evidence of the co–defendant and Mr. Hammond that the defendants father was **[309]** one of the parties that went to show the land; and (e) there is no mention by Mr. Hammond of the co–defendant having taken part in the inspection as against the co–defendant's evidence. I was not impressed with the evidence of Mr. Hammond who denied that the plaintiff has ever worked on the co–defendants land.

The preponderance of the evidence which I accept shows that the first time the the defendant ever want onto the disputed land was in 1961 when he was cement blacks being made on the disputed land and reject as untrue any visit by him between 1959 and 1960 which was introduced to lend credibility to this evidence of a grant in 1956. the defendant's evidence is further destroyed by his admission that Walakata owns no house near the disputed land.

Moreover, it is highly inconceivable that a person of the defendant's status, educated ant at that time a minister of state would obtain two building plots without a document and also do nothing physically on the land to indicate his grant, not even corner pillars. There is evidence that Walakata owned no hours near the disputed land and had never lived near the area. Counsel of the defendant informed the court that Walakata was dead and therefore could not be called as a witness. Walakata testified in the first trial of this case and was cross-examined. His evidence was admissible in this trial and counsel's attention was drawn to this. Counsel asked for an adjournment to enable his go and consider whether he deemed it useful to adopt his evidence. For some unexplained reason counsel returned to tell the court that he did not deemed it useful to adopt his evidence. the position therefore is that not only is the defendant's claim that he appointed Walakata as caretaker stands unsupported but it also stands destroyed by the fact that Walakata had never lived near the disputed area. The position therefore is that the evidence of the alleged grant by the co–defendant to the defendant is untrue and I reject same.

As between the plaintiff and the defendant none of them has a valid grant of the disputed land and they both therefore lack title. But the plaintiff on the facts of this case is in actual physical authorities of *Summey v. Yohuno* [1962] 1 G.L.R. 160 at p. 167, S.C and *Okantey v. Kwaddey* [1956] G.L.R 241 C.A,

the plaintiff's possession should be protected: see also *Abakam Effiana Family v. Mbibado Effiana Family* (supra).

The co–defendant on the facts of this case joined to support the grant to the defendant, his alleged grantee. The defendant having failed to prove his grant, he also fails: see *Bruce v. Quarnor* (supra).

[310] Even if my findings above are wrong, which I very much doubt, I have found the plaintiff to have acted in good faith in his dealing with the disputed land and deserves protection under Act 2 and the Land Development (Protection of Purchasers) (Accra Prescribed Area) Instrument, 1961 (L.I. 118). The evidence shoes that he did approach the Osu Stool and acknowledged title in that stool. He obtained a grant from the stool represented by Nii Nortey Yeboah as acting mankralo and the elders. The latter's capacity as such has not been challenged. Even though on my findings above Nii Nortey Yeboah lacked the capacity he assumed, it is this want of capacity which is cured by the combined effect of Act 2 and L.I. 118.

There remains the last issue raised. That is the scope and extent of the right enjoyed by a stool-subject in respect of vacant stool land. There is a common area of agreement among text writers and the case law that there exists an inherent right of a stool-subject to occupy any vacant stool land and that such occupation is deemed to be an implied grant by the stool and that whilst in such occupation the subject is entitled to alienate such interest as he acquires stool: see *Akwie v. Awuletey* [1960] G.L.R. 231 SC and *Seraphim v. Amua-Sekyi* [1962] 1 G.L.R. 328.

Whilst I accept as sound the customary law principle as enunciated above that although the absolute title in land is vested in the occupation of a subject is void, I am of the view some exceptions should be created in this area of our customary law practice to reflect present socio-economic and political changes in this area of our customary law.

Where a subject of a stool requires land for farming whether arable or for animal husbandry, and engages himself in a commercial mechanized farming he should be required to obtain an actual grant in the form of a lease. If such a person with the necessary resources and equipment is permitted to rely on this inherent right to clear miles and miles of stool land, it would not be long when other subjects of the same stool would be deprived of any share of the land. It is this same light that I consider that the authorities of *Donkor v. Danso* [1959] G.L.R. 147 and *Ashiemoa v. Bani* [1959] G.L.R. 130 should be looked at again. Where an outskirt land possession of a subject is required for general development of the community such as for building a school, lavatory, etc. or where as in this case, the area already in the occupation of the plaintiff had been carved into building plots for the use of general community and the complete lay-out of the area has changed, I am of the view that the subject's prior occupation should give way **[311]** subject, of course, to preference being given to him in the allocation of such plots if he requires one to build or in the alternative another suitable area given him in plane of the one lost and his consent should not be a prerequisite to the stool taking over control of such an outskirt land. Otherwise it would mean that his prior occupation could hamper

all future development of the area occupied by him.

I therefore hold in my judgment that the plaintiff lost his prior occupation right to the stool as a result of the new lay-out. The whole area including his portion was carved into building plots reject his contention that it was incompetent for the stool to make valid grants of any portion of the land he originally occupied for farming.

In the result the plaintiff succeeds as against the defendant and co–defendant and judgment is hereby entered in his favour for title. There will also be a perpetual injunction against the defendants, their servants and agents form any further interference with his quiet possession.

Judgment for the plaintiff.
D.F. L.

4.5 Alienation of the Usufruct

4.5.1 Kotei v. Asere Stool

[1961] GLR 493

Judicial Committee of the Privy Council

July 24th, 1961

Lord Denning, Lord Morris of Borth-y-Gest and the Rt. Hon. Mr. L. M. D. de Silva

Appeal (No. 31 of 1959) from a judgment of the West African Court of Appeal (Foster-Sutton, P., Coussey and Hearne, JJ.A.) delivered on the 4th March, 1955 (unreported) affirming the judgment of Jackson, J. delivered in the Land Court on the 22nd November, 1951, wherein he refused a declaration sought by the plaintiff that certain land was the ancestral property of his family. the facts, which are st out in the headnote are taken from the judgment of the Privy Council.

Lord Denning delivered the judgment of their Lordships. [*He reviewed the fact and earlier proceedings set out in the headnote, and continued:*] 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 or 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 seven–eights of the area of the land; but that in respect of the remaining one–eighth 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 seven–eighths 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 the evidence that the asere stool had placed headmen on the land; that these headmen permitted strangers to farm upon the 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 the 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 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 the seven–eighths to the Nikoi Olai family for their possessory right to the whole, and as to the one–eighth 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 seven–eighths 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 consider 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 family. Much of it has been used exclusively by members of that family (hence the seven–eighths area for which they obtained compensation for the wireless station). But some of it has been used by strangers by permission of the headmen and in respect of land so occupied by strangers, tolls have been paid to the Asere stool (hence the one–eighth 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 Abbetsewe 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 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 Kokomlemle lands. But their Lordships would point out that the findings in the Kokomlemle cases 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 occasions 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.

4.5.2 Robertson v. Nii Akramah II and Others (CONSOLIDATED)

[1973] 1 GLR 445.

Court of Appeal

22 February 1973

Appeal from a decision of Bannerman J. wherein he gave judgment for the defendants in an action for recovery of land and damages for trespass. The facts are fully set out in the judgment of Apaloo J. A.

Apaloo J.A. delivered the judgment of the court. About four miles north-east of the centre of Accra, is a fairly large tract of land said to be of poor agricultural value. It is situate on an eminence. With the rapid growth in the population of Accra and the consequent scramble for suburan building areas, it has become valuable building land. It is known as the Mukose lands. This land was the subject-matter of the litigation which culminated in this appeal. Rival claims to it were made by the Nikoi Olai family on one side and the Asere stool and its grantees on the other. This is not the first time that a dispute about its ownership has come before the courts, and we suspect, unhappily, that this is not likely to be the last.

The Nikoi Olai family belongs to the Asere Djorshie division of Accra. It has a stool named the Nikoi Olai stool. It was claimed that stool was properly the

Paramount stool of Asere. With that aspect of the matter, we are not concerned. What we feel bound to acknowledge, is that Nii Akramah II is the Paramount Chief of the Asere division. He occupies a stool other than the plaintiffs stool. It is called the Akotia Oworsika stool. Accordingly, the plaintiffs stool is subservient, at any rate, as at present, to that stool. It follows from this, that the plaintiff's family *qua* family, are subjects of the Asere Paramount stool.

The being the constitutional position as we see it, the present litigation can be regarded as a domestic difference between the Asere mantse and some of his subjects—an entirely Asere matter. These is evidence that in the past, part of the Mukose lands have been the subject of litigation between the Asere stool and some other stools or their subjects. The judgments given in those other cases or the position taken by either the Asere stool or the plaintiff's family have been said to be of some legal relevance in determining the rights of the parties in this case. To that aspect of the matter we will return.

As far as we are able to judge, the first time that there was any straight contest between the Asere stool and the plaintiff's family about the ownership of the Mukose lands, was in 1948, in *In re Public Lands Ordinance; Wireless Station Acquistion* (1948) D.C. (Land) '48-'51, 34. It was not the ordinary adversary suit with which one is familiar in these courts.The government had acquired, under the Public Lands ordinance, Cap. 113 (1951 Rev.), a piece of land situate at a place called Bubiashie for a wireless station. The latter became liable to pay compensation to such persons as "were in possession of such land as the owners thereof." The plaintiff's family asserted that it was entitled to compensation under the statutory criterion.The Asere stool made a similar assertion. The Supreme Court was thus faced with the task of determining as between the Asere stool and the plaintiff's family, who was the owner of the land and the person entitled to receive such compensation. Jackson J. who rendered a decision in that case, formulated the issue at p. 35 as follows: "Does the land belong to the Asere stool (4th claimant) or to the Djani Kofi family (5th claimant)?" The latter was of the plaintiff's family. Both sides were thus obliged to relate the origin of their titles. It would seem from the judgment giben in that case that the plaintiff's family claimed that the ancient village of Mukose was founded and settled upon by one of the descendants of Nikoi Olai and that thereafter the village and its surrounding lands were peopled by members of the plaintiff's family. It therefore claimed it to be its ancestral family land. The Asere stool's tradition seems to have been that land was founded and settled upon by hunters and other stool functionaries who were commissioned by the stool to farm in named areas including Mukose and after the final eviction of the Akwamus who had often fought them, the whole land between Accra and Ayawaso has been in the common use of all Asere subjects. The stool asserted that there was no such thing as family land in the Asere division. The learned judge was thus faced with the task of deciding which of the rival traditional stories was true. He found that it was the plaintiff's. He found against the Asere stool's claim that landed property cannot be owned by a family in the Asere division. He preferred the traditional story proffered on behalf of the plaintiff's family and said it was on firmer g round particularly when he recalled

the fact that the Mukose lands were not carved out of land belonging to the Asere Paramount Stool but were settled upon by the plaintiff's family with the consent of the aboriginal owners, "and from that day to the date of the notice of acquisition has been in the exclusive possession of the 5th claimant's [meaning the plaintiff's] family." (see p. 39 of the report). The position therefore was that when the evidence of the origin of the plaintiff's family's title was placed in juxtaposition to that of the Asere Paramount stool, the former's was preferred.

In the *Wireless Station Acquisition* enquiry (supra), the learned judge found that two person farmed on the east and west of that land having been placed there by unspecified headmen.These two paid tolls to the Asere stool was obviously going to lose these tolls by reason of the acquisition. The judge accordingly awarded one-eighth of the compensation to the stool. The rest was adjudged to be paid to the plaintiff's family. Whatever else this judgment decided, it established at least two things, that the Mukose lands were originally founded and settled upon by members of the plaintiff's family and secondly, that Bubiashie was part and parcel of Mukose. Indeed it is in this case that the original founding of Mukose was explored.

The next forensic contest that brought the plaintiff's family face to face with Asere stool was in 1951, in *Nikoi Olai v. Adams*, Land Court, 22 November 1951, unreported. A large portion of what the plaintiff's claimed to be Mukose lands was sold to a Lebanese called Captan. These sales were evidenced by two deeds executed in October and December 1947 respectively. The sales were made by one of the indigenous families of Asere called the Abbetsewe. They were endorsed by the Asere stool which received a handsome part of the consideration money. When the plaintiff's family got wind of it, it instituted pro ceedings in the native court seeking a declaration of title to that land, damages for trespass and a perpetual injunction. That action was taken against named members of the Abbetsewe family relied on a gift of the land rom the Asere stool, and as that stool was itself a concurring party to the sale, the learned judge thought that the stool should be joined to that action as co–defendant and he made an order to that effect on his own motion. The stool made no issue of this and indeed took opportunity in this later action to reassert its failed tradition about the original founding of Mukose. It is plain that the real object of the plaintiff's family in lunching this litigation was to set at nought the sale of the land to Captan or as one of its witnesses put it to "quash the sale."

The result of this case shows that it was successful in achieving that object. Although the sale was not formally set aside, the judge held that sale passed no interest in the land to the vendee. The learned judge came out heavily against the sale and was particularly outspoken in his condemnation of the Asere mantse for being a party to what the judge stigmatized as "a wicked and reckless disregard of the trusts imposed upon occupant of the stool." The judge also granted an injunction on certain conditions. The plaintiff's victory was a victory of a sort, because the judge proceeded to hold that the latter's family only "possess rights of farming in the area edged pink, subject only to such rights as may have been granted to strangers for farming by the Asere stool." That holding equates the plaintiff's family with any other subject of the

Asere stool who is entitled to enter and farm on stool land. The reason for this holding, in so far as it is possible to extract it from the judgment, appears from the following pronouncement of the learned judge:

> "Quite clearly, this land in issue was occupied very many years ago by some members of the plaintiff's family and who farmed it to some degree.
>
> It is equally clear that whatever villages they abandoned for very many years, the last one Mukose in 1926, and by the ordinary practice of customary law whatever character of the family land it may then have possessed disappeared with its abandonment, and the land was free for any subject of the Asere stool to farm upon and was equally open to strangers who had received the permission of the Manche or headmen to farm upon payment of an annual toll and so the evidence proves they did farm."

The plaintiff's family was understandably aggrieved at this considerable curtailing of its rights to the Mukose lands and it sought to have such limitation set aside by the West African Court of Appeal, in *Kotei v. Asere Stool*, West African Court of Appeal, 4 March 1955, unreported. It failed. It is perhaps indicative of the belief it had in the rightness of its cause that it is appealed this matter to then highest tribunal—the Privy Council: see *Kotei v. Asere Stool*, [1961] GLR 492, P.C. That court decided that in so far as Jackson J. held that the paramount title to the Mukose lands was vested in the Asere stool, that conclusion cannot be faulted but it refused to support that part of the judgment which held that plaintiff's family possessed only farming rights in the Mukose lands. It held that the family possessed in an area edged green on the supporting plan, the rights of a subject in possession of stool land. That court held it to be an estate and defined at great length the incidents and rights attached to that estate. In differing from Jackson J. on the question of the plaintiff's entitlement to a usufructuary title, the Privy Council dissented from the learned judge's view, that because the ancient village of Mukose was abandoned by the plaintiff's family, that resulted in the abandonment by it of the land as well. On the contrary, said the Privy Council at p. 495 "they have vigilantly upheld their rights."

In the suits which culminated in this appeal, the plaintiff's family founded itself squarely on that judgment. It again sought the coercive power of the courts to award damages against the Asere stool and certain named individuals because it claimed that the stool and these individuals encroached on the rights conferred on it by the Privy Council judgment. It in fact instituted four separate suits and as the three persons who were independently sued relied on the title of the Asere stool, all these four suits were consolidated and heard together. The first suit was taken against the Asere Mantse and his linguist called Boye because the plaintiff complains that since 1947, the two defendants have been granted away portions of the Mukose lands in the vicinity of the village of Abeka. It produced in evidence ten deeds executed by the Asere stool in vafour of various grantees

in the area edged green—that being the area where the plaintiff's family was adjudged to have a usufructuary title. All but one of these documents were executed in 1959. the plaintiff sought it declared that it was rightful entity to make alienations of that land and asked that the defendants be enjoined from making similar alienations in the future.

In the second suit, the plaintiff's complaint was that the defendant Dimson who held himself out as the land agent of the Asere stool, has not only himself built on portions of the land but has been granting various portions on the north west to strangers for the founding of a Zongo. In addition to damages, the plaintiff sought the court's aid to recover such portions and also an injunction against such future acts. A man called E. C. Otoo leased two plots of the land at Bubishie to a limited liability building company called E. Borio & Co. Ltd. The plaintiff says that was part of its Mukose lands and that Otoo had no right to grant such a lease. It therefore sought recovery of that land and damages. It is this that gave rise to the third suit. The fourth action was taken because a Madam Victoria Dede Otoo also granted a lease of an area measuring 300 feet by 200 feet to the eforesaid company. This land is also situate at Bubilashie. The plaintiff makes precisely the same complaint and sought recovery of the land and damages against both the grantor and the company jointly.

The defendants, Dimson and Mr. And Madam Otoo admitted the acts which the plaintiff alleged but contented that they were within their rights to do so and for their part, relied on the title of the Asere stool. They sheltered themselves behind the Asere mantse and swam or sank with him. The stool itself jointed all these three suits but its own answer somewhat ambivalent. Between 18 January 1962 and 7 January 1966, it filed no fewer than three statements of defence and three amended statements of defence in which it wavered from denying the plaintiff's claim in its entirely of the Privy Council judgment, to admitted its effect and confining it to the area edged green. In its last amended defence, it averred that "the judgment pleaded does not affect Abeka village and the lands around it." It also itself pleaded against the plaintiff's family a number of alleged admissions said to be by its predecessors and two judgments. The plaintiff answered that those judgments were between itself and strangers to this action and were *inter alios acta*. The plaintiff also averred that by reason of the Privy Council judgment, the Asere stool ought not to be admitted to say that it had no title to the Mukose lands and that it was estopped *per rem judicatam* from so averring. No new issue were settles as the defence vacillated, indeed the last statement of defence was filed some time after the plaintiff commenced giving evidence and was done without leave.

When the trial opened, the plaintiff's evidence was comparatively brief and was in the main confined to identifying the area of trespass as forming part of the Mukose lands and of acts of ownership performed on portions of Bubiashie land. The Asere stool took the opportunity in this action to reassert its complete ownership of the Mukose lands and produced a succession of witnesses to relate the tradition of the original founding and present ownership of villages which it claimed it owned. It also tendered no less than 29 exhibits, four of which are judgments. None of these judgments is particular helpful and

are all anterior in date to the Privy Council judgment relied on by the plaintiff. Notwithstanding the complication of the issues engendered by the Asere stool's never–ending amendments, the main issues on which the court's decision was invited were relatively clear, namely, first, whether the Asere stool and its privies were estopped by the Privy Council judgment from asserting that plaintiff's family had no usufructuary title to the Mukose lands, second, if it was so estopped, as between the plaintiff's family and the Asere stool, which entity was entitled, whether the proved alienations of that land made by the Asere mantse amounted to trespass and fourth, if it amounted to that wrong, whether the plaintiff's family was entitled to all and if not which of the remedies it sought.

The reception of evidence concluded on 24 June 1966 and the learned trial judge, Bannermn J. took time to reflect over this matter. His judgment was read on 12 November 1966. A substantial part of it was a précis of the evidence of the witness. Nowhere in his eleven–page judgment did he make any reasoned findings nor did he express any conclusions of his own on the many legal questions debated before him. The most vital of the remaining three depended for their success or failure on that suit. That case hinges to a large extent on the interpretation of the Privy Council judgment on which the plaintiff's family took its stand. The learned judge himself seemed to have appreciated as much and he himself said. "Dealing first with suit No. L232/1961, the claim is directly against Nii Akramah Asere mantse and it depends upon the construction and interpretation of the judgment of the Judicial Committee of the Privy Council" But the jduge did not even begin to "construe and interpret" it. The furtherest he went was to recite some of its holdings. In so far as he attempted any independent factual conclusion of his own, it is: "on the evidence as a whole the paramount title of the Asere stool over these lands stands undisputed as asserted in the Privy Council judgment." But there was no question of the Asere stool. That was the holding in the Privy Council judgment on which the plaintiff's family relied. The judgment concluded with the omnibus holding that: "On the evidence as a whole, the plaintiff cannot succeed in his claim against the defendants as per his writ of summons filed."

In the circumstances, it did not surprise us that the plaintiff's family should have appealed, against that judgment on not less than eleven grounds most of which were weighty. The Asere stool has not appealed, because abviously, it is quite happy with the judgment in its favour although many of the matters it argued in support of its case and its counterclaim were not pronounced upon nor was any order made on them. We remark this because at a certain stage of the argument, its counsel invited us to exercise our powers under rule 32 of the Supreme Court Rules, 1962 (L.I. 218) and enter judgment in its favour on the merits and on the counterclaim. This we declined to do and for the reasons which we will hereafter give.

As we said, the judgment appealed from was sought to be contested on eleven grounds. But two of these were abandoned, namely, grounds (6) and (8). These read as follows:

> "(6) The learned judge failed to make his own findings of fact on the

issue in the case.

(8) The learned judge made a tendious recital of the evidence-especially the evidence led for and on behalf of the Asere stool without himself making any evaluation whatsoever of the said evidence."

These complaints are perfectly valid and are apparent on the face of the judgment. But as accession to these grounds would not determine the main issues in this case, counsel's decision not to pursue them, was in our judgment, a wise one.

There were also two grounds which made complaints of a more or less formal nature. Argument on them was brief and to the point. While we consider the complaints well-merited, they do not actually impinge on the eventual result of this case. Accordingly, we do no more than mention them. They are grounds (5) and (7) and which were formulated as follows:

"(5) The learned judge confused the issue raised for trial before him and / or did not appreciate the issues.

(7) As the suits for trial were consolidated and each suit asked for specific reliefs the learned judge should have made specific findings in each suit."

Leading counsel for the Asere stool sought to answer these complaints but the argument by which he sought to do so was not at all attractive and in the end, the conceded to them.

That brings us to the more serious questions debated in the case. It was complained in ground (4) that, "The learned judge made no effort whatsoever to interpret the judgment of the Privy Council in transfer suit No. 31/1948 and to apply the interpretation and / or ratio thereof to the facts of this case." That the judgment was defective in this sense is plain beyond the possibility of controversy. Again this wholly unanswerable complaint was sought to be answered by the wholly untenable contention that the judge did make some attempt at interpretation. Whatever that can mean, we are satisfied that he did not in fact construe the Privy Council judgment nor did he attempt to discuss what rights and obligations in the Mukose lands the parties acquired by that judgment. We have been invited to make good the learned judge's omission by ourselves interpreting that judgment and thereafter using it to determine the rights of the parties. To that invitation, we readily respond. We cannot see how we can decide this case otherwise.

The Privy Council in *Kotei v. Asere Stool* [1961] G.L.R. 492 at p. 496. P.C held, differing on this point from Jackson J., that the "plaintiffs [are entitled to] 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." That court held that such rights are not mere farming rights as Jackson J. thought but 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. The Privy Council proceeded to spell out further the rights attached to a subject by that estate. It says at p 495:

> "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 descent 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."

In so stating the incidents, the Privy Council was not propounding any novel principles of law. Its holdings are merely an affirmation of what both the domestic courts of this country and textbook writes have always regarded as the true customary law on the matter. See on this *Thompson v. Mensah* (1957) 3 W.A.L.R. 240, C.A, *Ohimen v. Adjei* (1957) 2 W.A.L.R. 275, *Ashiemoa v. Bani* [1959] G.L.R. 130 and *Donkor v. Danso* [1959] G.L.R. 147. At p 57 of his *Customary Land Law in Ghana*, Ollennu states that position in almost the same language as the Privy Council. He says:

> "An outstanding incident of the determinable estate is that it is inheritable and alienable, either by transfer inter vivos or by testamentary disposition. This principle is not in conflict with the principle that the owner of the usufructuary title cannot transfer that title without previous consent and concurrence of the absolute owner *Golightly v. Ashrifie (Kokomlemle Consolidated cases.* (1955) 14 W.A.C.A. 676). The correct opinion is that the owner of the title can alienate his said title without the prior consent and concurrence of the absolute owner so long as the alienation carries with it an obligation upon the transferee to recognize the title of the absolute owner, and to perform all the customary services due from the subject to the stool, or to the community at large when called upon."

We think that as a pure legal question both the courts and textbook writers are *ad idem*. We must conclude from this that the plaintiff's family who has been adjudged to have the determinable or unsufructuary estate in the Mukose lands is the proper entity to alienate that land or portions of it. It is necessary to pose the question what is the resultant position if an alienation is made not by the owner of the determinable title but by the holder of paramount title. On this, Ollennu provides a self–evident answer. He says at p. 56 of his book.

> "Having regard to the very superior nature of the determinable title, customary law prohibits the absolute owner from alienating that land, or dealing with in any without the prior consent of the subject-owner. Any grant which the stool (or the head of family) purports to make, either to a subject or to a stranger, cannot affect the title of

> a subject in possession. The purchaser upon such alienation cannot obtain possession, and he and his grantors commit trespass if they enter upon the land for the purpose, or in pursuance, of the alleged grant."

He quotes a number of decided cases to support this.

We think that view accurately reflects the law. It is not in dispute that the Asere stool made grants of portions of Mukose lands. It is also equally clear that those grants were made without the prior consent of the plaintiff's family and indeed in the face of objection by it. It must follow that such grant were invalid.

As we said, it was also serious submitted to the court below that the Asere stool and all the defendants claiming through it were estopped by the Privy Council judgment from averring that the plaintiff's family has no title to the Mukose lands. We do not think it necessary for us to engage in a discussion of the policy reason behind the rule, that once a given fact has been put in issue and decided between the parties, it will preclude them and their privies from relitigating such fact in subsequent proceeding. It is sufficient to say that whatever its origin, it is firmly part of our law. The plaintiff invokes it and says, that the Asere stool and its grantees should be precluded from raising the question whether or not it has any title or estate to the Mukose lands. The parties to the Privy Council judgment are the same, the question which was decided between them, namely, the quality of their ownership of Mukose lands is the same. The subject-matter appears the same namely the Mukose lands. It was denied on behalf of the Asere stool that the plaintiff's family was entitled to have this plea invoked in its favour but the argument by which this contention is supported is anything but clear. In the end, it was said even if such doctrine could property be invoked in its favour, it must be limited to the area edged green—that being the area in respect of which the plaintiff's family obtained relief.

The answer to this submission can only be provided in considering the purely legal question whether the doctrine of estoppel can be limited in the manner contended for on behalf of Asere stool. The land which the plaintiff called Mukose and in respect of which he litigated in the Privy Council case was described in the evidence and its eastern boundary, at any rate was set out in the plan exhibit Q. The area of the immediate trespass was clearly smaller and is shown on the plan exhibit C and edged green. The judgment of the Privy Council proceeded on the clear basis that the land in dispute was much larger than the green area and that court considered the case not in fragments but on the whole of Mukose. It limited its relief to the green area because that happened to have been the portion sold to Captan which occasioned the litigation. In that sense, it is factually accurate to say that the judgment covered the smaller area edged green. One of the fundamental requirements for a successful plea of estoppel, is that the subject-matter in the former suit must be identical with the subject-matter in the instant suit.

The question therefore is: whether the green area can be said to be identical with the larger Mukose lands. We are glad to think that in determing this question, we have the assistance of respectable authority. This problem arose in an acute form in *Aperade Stool v. Achiase Stool* (1957) 3 W.A.L.R. 204, C.A. The former sued the latter stool for a piece of land and succeeded. On appeal to the West African Court of Appeal, the trial court's decision was reversed. The Aperade stool appealed to the Privy Council and lost. Subsequently a question of ownership arose between the same parties before the Reserve Settlement Commissioner involving a small portion of that land. The latter held that Aperade stool was estopped by the Privy Council judgment from asserting a claim to any portion of that land. On appeal to the Court of Appeal, the question was whether the lands were identical. Quite clearly, the one in the immediate dispute was smaller than the former one. In a split decision, the court held that the two lands were not identical.

Granville Sharp J.A. who read the leading judgment of the majority of the court could not agree that because a part was included in the whole the two were one and the same thing. He at p. 213 had recourse to dictionary to ascertain the meaning of the world identical, and felt himself unable "to condescend to the fallacy of asserting that the smaller part is the same as the greater whole, or the equal fallacy, elementary in each case ... that merely because the part is included within the whole the two are one and the same thing." That argument is flawless logic but it does not further the sound policy reason behind the principle that once an issue had been decided between the parties, the public interest requires that it should be laid to rest.

Ollennu J. (as he then was) did not feel himself inhibited by the constraint of logic from holding that a part was equal to the whole in the juridical sense. He argued that any other interpretation would be subversive of the principle on which the doctrine of res judicata was based. He demonstrated the absurd results which would ensure if the narrower interpration prevailed. That view in fact prevailed only to be disestablished by the Privy Council. When this case returned to that court, *sub nom. Frempong II v. Effah* [1961] G.L.R. 205, P.C. the view of Ollenu J. was held right. Legal problems like history have a habit of recurring. The problem which the submission of the Asere stool posed was posed and answered by this court in the recent case of *Robertson v. Reindorf* [1971] 2 G.L.R. 289, C.A. That case, by a strange coincidence also involved the plaintiff's family and it's Mukose lands. The plaintiff found itself in litigation with the Reindorf family on a quarry site. The plaintiff averred that the land was part of Mukose, its opponent claimed it was part of its ancestral land, Dome. Thus the extent of these two lands was put in issue and the plaintiff lost. But as the remedy sought was limited to the quarry site, the operative part of the judgment limited to relief to the area. In subsequent litigation between the parties, the plaintiff took opportunity to reopen the litigation in respect of the whole area. When met by a plea of *res judicata*, it answered that the plea should be limited only to the quarry site inasmuch as that was the area that gave rise to the litigation and in respect of which relief was granted. This content found favour with the learned judge of the High Court who held that the plaintiff's

family was estoppel only in relation to the quarry site. On appeal, this court in its judgment delivered as recently as 20 March 1971 held the judge wrong. It held that the plea ought not to be confined to the quarry site but extended to the whole land put in issue. See also *Re Kujani Bush Forest Reserve; Atakora v. Acheampong*, Court of Appeal, 17 July 1967, unreported; digested in (1968) C.C. 27.

That is the beaten track of the decisions and we will loyally follow it. In our judgment, the plea of estopped cannot properly be limited only to the green area. We hold that that area being part of the larger Mukose lands, is identical with it in the juridical sense. And as the whole of the Mukose lands was put in issue in the former case we must sustain the plea of the plaintiff's family that the Asere stool and all its grantees were estopped *per rem judicatam* from disputing that the plaintiff's family has a determinable estate in the whole of the Mukose lands.

Leading counsel for the Asere stool in what we regard as a last ditch attempt to avoid the interpretation and application of the Privy Council judgment, submitted that judgment was given in excess of jurisdiction and was void on that account. The reason proffered for this bold contention was that in the suit which culminated in that judgment, the plaintiff's family sued not *qua* family but as the "Mantse of Asere Djorshie for himself and represnting the stool and subjects of Asere Djorshie." It was said therefore that the Privy Council was in excess of jurisdiction in granting relief in favour of the plaintiff's family rather than the stool of Djorshie, But in point of fact, the plaintiff's family is at the same time a stool family. The evidence bears that out. And although the way in which it sued, suggests that it was seeking the relief on behalf of the stool, both the pleadings and evidence in that case showed that the action was intended for the benefit of the family. It is plain that the Asere stool so regarded it and the whole case was fought on that basis. Jackson J. who gave judgment as of first instance, thought it was a claim by a subordinate stool family against the paramount stool . It is not suggested that the Asere stool was prejudiced by it. We cannot see how it can have neen. This prolonged litigation traveled through the High Court right up to the Privy Council. No issue was made of the capacity in which the plaintiff's sued.

Had the Asere stool taken this point even as late as at the Privy Council, we think their lordships would, if they thought the point to be other than arid legalism, have granted leave to the plaintiff's family to amend the writ so that the real issues between the parties, as revealed by the evidence, could be pronounced upon. That plainly was the course which substantial justice demanded. The basic attitude of the Privy Council in this matter, is we think, exemplified by its 19 16 decision in the Accra land case of *Ababio v. Quartey* (1916) P.C. '74–'28, 40. There, the Privy Council held that if the plaintiff sued in a wrong capacity but that some capacity is disclosed which would have enabled him to maintain the suit, he should not be non-suited but that the court should allow all amendments necessary for the purpose of settling the real controversy between the parties . The same philosoghy informs the judgment of our domestic courts and this is evidenced by such cases as *Appiah v. Addai*

(1940) 6 W.A.C.A. 242, *Chief Gbogboulu v. Chief Hodo* (1941) 7 W.A.C.A. 164, *England v. Palmer* (1955) 14 W.A.C.A. 659 and *Wuta Ofei v. Dove*, Supreme Court, 18 April 1966, unreported; digested in (1966) C.C. 102.

Indeed in *Akyirefie v. Breman–Esiam Stool* (1951) 13 W.A.C.A. 331, the facts bear a close similarity to the instant case. There, the litigation was fought and defended in the right of the Breman–Esiam , stool and judgment was given in favour of the stool qua stool. It appeared on appeal that the title to the land was vested in the stool family not in the stool was such. The West African Court of Appeal, of its own motion amended the title of the suit by adding to the word "stool" in the plaintiff's description in the writ, the word "family." Its avowed object was to avoid multiplicity of suits and settle finally the matter in controversy between the parties. It thereafter to affirm the judgment.

In the instant suit, it was obvious that the plaintiff's family based its right to relief on that judgment. In not one of its multifarious defences did the Asere stool plead that judgment was other than perfectly valid. Indeed in paragraph (6) of its last amended defence, it impliedly acknowledged the validity and binding effect of that judgment but sought to escape from its *vinculum*. It pleaded:

> "In answer to paragraphs (4),(5) and (6) of the statement of claim, the first and second defendants say that the judgment pleaded in the paragraphs does not affect Abeka village and the lands around it."

We think the point a barren one and even if it can be said to have any semblance of merit, it would be unjust to allow the Asere stool to raise it at this eleventh hour. Accordingly, we hold that the Privy Council judgment pleaded by the plaintiff's family, is of full force and effectively estops the Asere stool and its grantees from disputing the plaintiff's title to the Mukose lands.

It was next submitted that even if that plea be good, it does not affect Abeka village and the lands around it. It was said this must be so because the plaintiff's evidence shows that the land in issue is near Abeka and it therefore must, as a matter of sound reasoning, exclude Abeka. We think this an insubstantial argument on words. Abeka village itself was said to be about 200 yards from the ancient village of Mukose. The land bearing that name is far in excess of 900 acres and it seems plain that the village of Abeka must have been founded on it. The evidence shows that Mukose and Abeka are sometimes used interchangeably. Three receipts bearing the signature of the defendant Boye acknowledging sums he received from grantees of a quarry on the land described the area as "Abeka Mokoseh" (see exhibit T1–T2, T3). We do not feel ourselves called upon to determine and declare the exact extent of the huge piece of land called Mukose. Whatever its extent, we are satisfied that the Asere stool cannot be heard to deny that the plaintiff's family is in possession of that land as stool subject with all the rights and obligations that concept entails. What we conceive ourselves called upon to do, is to consider whether the evidence, on balance, satisfies us that the Asere stool and its grantees committed trespass on the various areas described in the different suits.

In the first suit, namely, L232/61, the plaintiff's complaint was, that the Asere mantse and his linguist Boye entered the Mukose lands at Abeka and have been granting or selling portions thereof. The plaintiff procured a surveyor to show by reference to the deeds of grant the various plots granted. They all fell neatly in the area edged green in the plan exhibit. Q. That was the area adjudged in favour of the plaintiff's family in the Privy Council suit. The defendants did not deny the grants but set up averse title thereto. In our opinion, the plaintiff's family has made out its case in this suit and ought to get the reliefs it seeks.

In the second suit, that is L79/62, the plaintiff complained that the defendant Dimson purporting to be acting on the authority of the Asere mantse, has been making grants to strangers in north west Mukose for the purpose of founding a Zongo. The principal witness for the plaintiff identified the area as follows:

> "The land the subject of that suit falls within the area edged green in the plan exhibit C. A. very large portion of this land is within the green area. The portion which falls outside the green area on the west is part of the Mukose land."

The defendant did not dispute the area nor deny making the grants. He freely admitted them and gleefully boasted of even destroying the foundation of a building of the plaintiff on the land. He pinned his faith wholly on the success of the Asere mantse and said:

> "I am following my chief. I worked together with Taylor Woodrow for three years without any trouble. It was later that the Djorshie people laid claim, but I do believe them. We were on the land before, and later we heard the Djorshie people are claiming the area edged green. I cannot decide their ownership until the case has been decided by the court."

This defendant having tied his fortunes to those of the Asere mantse must suffer the same fate as the former. He is liable to damages to the plaintiff.

In the third suit, that is L605/62, the plaintiff's claims two well defined plots of land leased to E. Borio & Co, Ltd, by Mr. E.C.Otoo. Like the rest, the latter also shelters himself behind the Asere mantse. These plots are in Bubiashie. Admittedly, these plots do not lie in the area edged green. This is however immaterial if it can be shown that it is part of the Mukose lands. We have already observed that our interpretation of the judgment in the *Wireless Acquisition* case (*supra*) (exhibit F1) leads us to conclude that Bubiashie is part of Mukose. In that case, not only did the plaintiff's family give evidence about the founding of Mukose village but also of the origin of the word Bubiashie itself. The learned judge was impressed with that evidence. Furthermore, the composite plan exhibit 25 shows that the area adjudged to the plaintiff edged green is contiguous to the area acquired by government for the wireless site and indeed overlaps it. It cannot be disputed that the area acquired for the wireless station is Bubiashie. From our amatecuish attempt to collate the plans

by an examination and comparision of the grid lines in exhibit25and exhibit Q the two plots leased to the Borio company cannot be too great a distance from the wireless station. It would strain credence to be told that while the wireless station is at Bubiashie in Mukose, the two plots leased to Borio were not and have an entirely different origin and root of title.

In any case, the plaintiff family by its principal witness Ashalley Okoe led inherently credible evidence which identifies the plots leased to Borio not only as Bubiashie but as part of the larger Mukose land. It is in evidence that the Borio company fixed sign boards on one of the plots and erected a temporary structure on the other. Ashalley Okoe swore that these plots were in the occupation of the plaintiff's family before the last war but were taken over by the Army which built huts in the area. There were surrendered to the family at the conclusion of the war when the Army were about to quit the land. He produced in evidence a series of letters exchanged between the then head of the plaintiff's family Nii Amassah Nikoi Olai and the Army authorities. See exhibits H. J. K and L. Of these letters, three were dated at varying periods in 1943 and the last one from the commissioner of lands, bore the date 4 April 1944. this struck us as acts of ownership *ante litem motam* and is we think, weighty evidence in support of the plaintiff's family. We do not need to go into any further details. We believe we have said enough to indicate the process of reasoning which leads us to the firm conclusion that not only are the two plots leased to the Borio company by the defendant E.C Otoo part of Bubiashie but also part of Mukose lands. The alleged grant of those plots by the Asere mantse to Otoo passed on title to him. He in turn transmitted none to the Borio company. It follows that the plaintiff's family must succeed against both defendants in this suit.

In the fourth suit, namely, suit L.607/ 62, the plaintiff claims against Victoria Otoo and the Borio company a plot of land 300 feet by 200 feet said to be situate at Bubiashie. That plot is quite close to one of the two plots leased to that company by the defendant E. C Otoo. Victoria Otoo like her father E. C. Otoo, granted a 50–year lease of the land to that company and authorized them to enter into possession. When her right to make this lease was questioned, she relied on a deed of gift executed in her favour by the Akwashong mantse and later confirmed by the Asere mantse. We find that, that area is situate in Bubiashie and is within the Mukose lands. The observations we have made and the basis of our finding in the last suit apply with equal force to this case. She has rendered herself liable in damages to the plaintiff's family and she and the Borio company will have to give up that land to the true owners.

Before considering what reliefs the plaintiff's family is entitled to, it is necessary to answer a submission of law made on behalf of the Asere stool and also consider a belated request made on its behalf. In the last amended statement of defence submitted on behalf of the Asere stool, two judgments were pleaded as estopping the plaintiff's family from pursuing the present claim. The first of these was said to be *Robertson v. Reindorf*, High Court 31 March 1964, unreported and is supposed to relate to a part of Abeka. The second judgment pleaded is said to have been given in *Reindorf v. Amadu* [1962] G.L.R. 508, S.C. and is said to relate to the village of "Abeka and the lands around Abeka." The

plaintiff denies that it was estopped by any of these judgments.

It was not suggested that the Asere stool or any party deriving title from it was a party to this action. There was, in those actions, no conflict between the plaintiff's family and that stool which the court resolved. It seems entirely to have been litigation fought between the plaintiff's family and strangers to this action. It therefore completely passes our understanding how these judgments can be said in law to estop the plaintiff's family in this action. We think this plea wholly unmeritorious. In our opinion, neither the judgments pleaded as estoppel nor the others produced as evidencing prior litigation on Mukose lands contribute anything to the solution of the problems posed in the present case.

As we said, the Asere stool itself by its pleadings raised a number of issues which the learned judge omitted to pronounce upon including its counterclaim. This was obvious on a most cursory perusal of the judgment. If the Asere stool had desired to make any issue of this, rule 16 (1) of the Supreme Court Rules, 1962 (L. I. 218) provides a machinery by which it may ventilate its own grievances. It chose not to. At a last stage of the hearing of this appeal, its counsel pleaded with us to exercise the plenary discretionary powers conferred on us by rule 32 to vary the judgment by pronouncing in its favour. Though we thought this an undeserving plea, we have in fact given consideration to the matters sought to be pronounces upon, namely, the estoppels the stool raised. As we have held that the Asere stool was estopped from disputing the plaintiff's determinable title and which the trial judge omitted to pass upon, was largely irrelevant. In view of our finding for the plaintiff, the claim for forfeiture must go. It would indeed be strange if we were to hold that the plaintiff's family lost its title to the Mukose lands because it sought to do what the courts have held it entitled to do, namely, make alienations of portions of Mukose. We have listened to an exhaustive canvassing of this case for several days and on the evidence, we are certain of one thing, namely, that Asere stool's claim for forfeiture of the plaintiff's interest has no merit whatsoever. Although we were at one stage tempted to express our opinion as to when and under what circumstances the discretionary powers given to this court under rule 32 may properly be served in doing so. Such holding would be wholly unnecessary for our judgment and must await decision at an appropriate time.

In view of what we have said in the foregoing paragraphs of this long judgment, the plaintiff's family succeeds in each and every one of the four suits. In the first suit, it claims a declaration that as owner in possession of Mukose lands, it is entitle to make alienation of that land. Had the declaration sought been so worded, we would have acceded to the prayer but it is limited to Abeka village and the lands around it without furnishing an accurate description of it. That description made it somewhat uncertain for the enforcement of a perpetual injunction. For that reason and that reason only, we decline to make the Asere stool by its agents entered on that part of Mukose land edged green and made alienations of it. For this undoubted trespass, we award the plaintiff's family against the defendants in suit L. 232/61 jointed and severally ¢1,000.00 damages.

In suit L.605/62 the plaintiff described with precision the area in respect of which the order for possession is sought. We make such order in the terms sought. There is also a claim against both defendants jointly and severally, ¢500 damages. The plaintiff also claims against the first defendant company rental in respect of the use of the plots. As this is not a contractual tenancy, the question of rent does not arise. But the plaintiff is entitled to mesne profits for the use of the plots. The rent reserved in the lease between the company and the second defendant is £G277 per year. That seems a reasonable yardstick for computing the mesne profits. At £G277 per annum, this should aggregate £G831 or ¢1,662 in three years. The plaintiff is awarded that sum against the first defendant company being mesne profits for the period claimed.

In suit L607/62, the plaintiff described with particularity the area in respect of which he seeks an order for recovery of possession. We make such an order. We award against both defendants jointly and severally ¢200 damages for trespass. The rent reserved in the lease works out at £G110 per annum. Using that as a basis for mesne profits, the plaintiff should receive £G330 or ¢660 for the period claimed. We award that sum as damages against the first defendant company.

The plaintiff's family was entitled to its costs in the court below. We assess counsel's cost in that court at ¢1,000. Other costs in that court to be taxed. It is also entitled to costs in this court fixed at ¢1,500.00.

Application dismissed with costs.
S. E. K.

4.5.3 Buor v. Bekoe and Others

2 WALR 289, 1957

High Court, Eastern Judicial Division, Land Court

June 12, 1957

OLLENNU J. This is an appeal from a judgment of the Native Court "A" of Akyem Buakwa. The substance of the claim before the Native Court was for order for the redemption of a coca farm pledged by the plaintiffs predecessor to the first defendant, but at the request of the latter a note on the pledge was made in the name of the second defendant, a brother–in–law of the first Defendant.

The first defendants case in that the farm was offered to him on pledge to secure a loan of £46; he refused to accept it because it was too small, but the second defendant, who said he liked it, advanced the amount, and took the farm. Throughout the whole of his evidence-in-chief and under cross-examination he (the first defendant) created the impression that the transaction was one of loan and pledge, and that he was assisting the plaintiff to redeem the farm from the third defendant to whom the second defendant had transferred it without his

knowledge. But in answers to questions put to him by the court he alleged that the farm was sold and not pledged.

The third defendant sought to tender in evidence a document dated June 23, 1926, which he said was the note prepared on the occasion of the transaction, and shows a sale, not a pledge. The Native court rejected this document because the plaintiffs second witness, one I. E. Ofori, who was alleged to have prepared the document, denied that he wrote and signed it, and the third defendant was not able to prove that document otherwise.

The Native Court accepted the evidence of the plaintiff and his witnesses, one of whom, now the Odidro of the town, was Okyeame (linguist) to the then Odiro at the date of the transaction, and who deposed that the transaction he witnessed wan one of loan and pledge necessary and was not obtained, and no portion of the purchase price the transaction he witnessed was one of loan and pledge and not one of sale, and therefore the consent of the Odikro was not necessary and was not obtained, and no portion of the purchase price was claimed by or paid to the Odikro as would have been the case if the transaction were one of sale, the purchaser being a non–Akyem Abuakwa native.

By leave of the court the appellants (the first and third defendants) tendered the document of June 23, 1926 that was rejected by the Native Court together with three other documents which Ofori admitted were written and signed by him in 1924, for comparison with the document of June 23, 1926 to enable the court to determine whether the latter was written and signed by Ofori. Ofori also signed his name in court, in its different forms; this was also admitted.

Dr. Danquah, for the appellant, compared the document of June 23, 1926 with each of the other documents and, pointing to the similarities between the former and each of the others, submitted that it must have been written and signed by Ofori, and consequently that it is conclusive that the transaction was a sale and not a loan and pledge.

Mr. Opoku–Afari, on the other hand, submitted in the place that a comparison with the three others showed that the document of June 23, 1926 was not written by the same person who wrote those others. He submitted in the second place that even if the contents of the stool, and the stools one third share had non been paid. He cited Dr. Danquah's book entitled *Akan Laws and Customs*, 1928, p. 206 in support of that argument.

Dr. Danquah, in reply to the latter point, said that the stool had stood by all these thirty or more years during which the second defendant had occupied the land and subsequently sold the same to the third defendant, and therefore it is estopped from avoiding the sale.

As to the document of June 23, 1926 I must say that a careful comparison of it with the other documents reveals a close resemblance in certain aspects and characteristics. I think it is fair to say that it appears to have been written by the same person who wrote and singed the others.

And known to the native custom raised. I have to determine first of all whether a sale by a subject of this possessory rights in land to a non–subject of a stool without the knowledge and consent of the stool is void or violable. One this point the passage quoted form Dr. Danquahs book says that failure

to obtain the necessary consent and to pay to the stool its customary one–third share has often resulted in forfeiture of the land to the detriment of both the vendor and the purchaser. However, I do not see how I can accept that book as an authority properly cited before the court, Dr. Danquah being still alive. It can only have a persuasive force with the court, nothing more.

Upon consideration of the whole mater I have come to the conclusion that such a sale is comparable to a sale of family land by the head or any other member of the family, and is not comparable to the situation that arises under the provisions of the Administration (Togoland) Ordinance, c. 112, s. 4, when a vendor sells without first obtaining the consent of His Excellency the Governor–General in writing. I hold, therefore, that the sale, if any, is only avoidable and not void. Therefore if it is shown that the Odidro and the principal elders knew of it, but sat by and allowed the purchaser, in the belief that he has acquired good title, to incur expenses to improve it, the stool will be held to be estopped. The crucial question therefore is, does the evidence on record show that the elders of the stool were aware that there had been a alienation of the subject's possessory or usufructuary title to the land, and is there evidence to show that the second and third defendant have expended money to improve the farm over the year? In this respect the evidence of the plaintiff's first witness, the present Okikro who was linguist to the then Odikro, is important. That evidence shows that he understood the transaction to be one of loan and pledge pure and defendant after the transaction. There is nothing to show that he, or the Odikor or nay elder of the stool, was aware of a sale. The occupation of the farm by the second defendant for a number of years, and subsequently by the third defendant, are not enough to acquaint them with such knowledge for a pledge also would be entitled to occupy and to assign his pledge to another person.

Also as pointed out above, the evidence–in–chief and cross–examination of the first defendants supported the plaintiff's case that it was a loan and pledge transaction and not sale and conveyance. He said:

> "About thirty and a half years ago Kankam approached me for a loan of £46. At his request I inspected his cocoa farm at kokobana in company of Okyeame Gyais and many others. I refused to accept the cocoa farm as security because it was very small. Kwaku Danso told me he like it and so he would give him that amount. I assisted him to pay the money and to accept the farm. Having paid the money I told Kankam to bring a clerk to prepare him a document in connection with that transition. One Ofori was called to prepare it in the name of Danso who paid the amount of £46."

And in cross-examination he said, *inter alia*:

> "I told you Danso sold this farm to Afua without my knowledge. I am still in possession of your £32 in order to redeem this farm from the third defendant."

But strangely enough, in answer to the court he said, *inter alia*:

> "Kankam sold the farm to Kwaku Danso and not pledged ... it was Danso who purchased it."

How the transaction came to change from loan and pledge to sale and conveyance he never stated and it is nowhere shown on the record. Here I must remark that the second defendant did not give evidence. The only conclusion that a court can come to upon that evidence is that the stool by its linguist knew of a pledge and had no knowledge of a sale. In those circumstances even if the document was prepared as for a sale of the farm the stool cannot be held to be estopped. Besides the evidence shows that what the second defendant alleges he bought for £46 some thirty years ago he should for the sum of £47. That certainly does not show any expenditure on improvement of the farm. For that reason also estoppel cannot arise.

For the reasons stated above I hold, in spite of the opinion I have formed with regard to the document of June 23, 1926, that the transaction was one of loan and pledge and not one of sale and conveyance of the land and therefore that the judgment of the Native Court must stand. The appeal is dismissed with costs.

Appeal Dismissed
S.G.D.

4.6 The Extent of the Modern Usufruct

4.6.1 Yiboe v. Duedu

2 WALR 293, 1957

Supreme Court of Ghana, Eastern Judicial Division,
Land Court, Accra (Ollennu J.)

March 22, 1957

[**294**]
Cases referred to :
(1) *Djokoto v. Saba and Others*, Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court, Accra, June 28, 1950, unreported.
(2) *The Queen v. Inhabitants of Hartington (Middle Quarter)*(1855) 4 E. & B. 780.

Appeal from the decision of the Buem–Krachi Native Appeal Court on September 18, 1956, affirming the decision on May 22, 1956, of the Native Court "B," Nkenya giving judgment for the defendant stool on the claim and a declaration of title on the counterclaim, in an action brought by the plaintiff

family for a declaration of title to, and recovery of possession of, an area of land.

OLLENNU J. In this action, commenced in the Native Court "B" of Nkenya, the plaintiff claimed, for himself and on behalf of the Amandja Clan of Akloba, a declaration of title to and recovery of possession of, a piece or parcel of land know as "Bogloto–Sakada" situate at Akloba in the Nkenya area. The defendant was sued in his capacity as sub–chief of the said Nkenya Akloba. The defendant counterclaimed for a declaration that the "Bogloto00Sakada" land is communal land for all tribes inhabiting the town, and that it is under his control and administration as the overlord or chief of the said town of Akloba.

the history of the case is as follows: On or about January 8, 1941, the defendant's stool caused by–laws to be published directing citizens of Akloba who sold, pledged or let out portions of the land in dispute to report the transaction to the stool,a nd that any citizen who failed to comply with the order should suffer a fine of 26s. and a live sheep. The plaintiff wrote to the defendant refusing to comply with the by-laws, claiming the land to be his property. The defendant referred the matter to his head chief for settlement, but the plaintiff would not attend on an invitation by the head chief, whereupon the defendant took action against the plaintiff in the Magistrate's Court at Kpandu, claiming £50 damages for disregarding the lawful orders of the stool. [**295**] The Magistrate dismissed the claim, holding that disobedience to the lawful order of a stool is a criminal offence and does not give cause for an action for damages; and further that "ownership of land in Nkeyna Akloba is not confined to the Divisional Chief and his sub–chiefs but is vested in individuals as well." That judgment was confirmed on appeal to the Provincial Commissioner of the Eastern Province.

On July 17, 1944, the defendant instituted another action in the Magistrate's Court at Kpandu for £25 damages for trespass, alleging that the plaintiff had wrongfully entered upon the land, made a plan of it and fixed pillars thereon. In a judgment delivered on November 26, 1948, the Magistrate held as follows:

> "I can therefore only conclude that the land specified by the plaintiff in his claim is not Akloba Stool land but belongs to the defendant either in his personal capacity as head of his family or of the Amandja clan. I therefore find that the plaintiffs' claim for damages for trespass committed by the defendant fails."

The defendant appealed to the Land Court but his appeal was dismissed. He thereupon appealed to the West African Court of Appeal. That court by a judgment delivered on March 7, 1952, dismissed the appeal, but amended the judgment of the Magistrate by deleting therefrom the passage declaring the plaintiff the owner of the property on the grounds that no declaration could be made in his favour where he had not counterclaimed.

On January 10, 1956, the plaintiff instituted the present suit. In support of his case he gave short oral evidence and tendered in evidence the writ of summons in the former case, the proceedings and judgments in it up to the

Land Court, and the judgment of the West African Court of Appeal. He led no other evidence in proof of his title and refused to answer any questions by the defendant or the Native Court relating to title, and called no witnesses. He also refused to attend the inspection of the land by the Native Court.

The defendant on the other hand led evidence and called witnesses to prove his counterclaim that the land was communal land, and, at the inspection of the land, showed the Native Court features on the land evidencing the use of it as communal land by all four clans of the Akloba.

The Native Court held that the plaintiff had failed to prove his claim, and that the defendant had established his counterclaim. They therefore dismissed the plaintiff's claim, and entered judgments for the defendant both on the claim and the counterclaim. The plaintiff appealed from that judgment to the Buem–Krachi Native Appeal Court, but lost . He has now appealed to this court.

M. Akufo–Addo for the plaintiff submitted that the Native Courts misdirected themselves when they held that the plaintiff failed to prove **[296]** his case, because (a) the matter was res judicata by reason of the judgment in the previous suit, and (b) the defendant was estopped by the finding of facts made in the previous suit both from disputing the claim of the plaintiff and from maintaining his counterclaim. He submitted that if the plaintiff had counterclaimed in the previous suit, he would upon the facts found by the Magistrate have been entitled to a declaration of title and the present suit would not have been necessary. He referred the court to a judgment delivered by Coussey J., as he then was, in *Djokoto v. Saba and Others* (1), which he said is on all fours with the present suit.

Mr. E. O. Asafu–Adjaye for the defendant argued that he matter was not res judicata because the issue in the former suit was one of trespass, while the issue in the present case was one of title, and that any decision which the Magistrate purported to give on title was orbiter. He submitted therefore that the plaintiff could not succeed in the present action, where title is specifically raised, without leading evidence in proof of his title but by relying solely on the proceedings and judgment sin the former suit. On the question of estoppel he submitted that the contentions of Mr. Akufo–Addo were not maintainable in the present case.

Mr. Akufo–Addo in reply submitted that when carefully studied the whole of the proceedings and judgments in the former case amply support his contention that the matter was res judicata, because title was put in issue and proved in the former case.

In a claim for trespass, a plea of ownership by the defendant usually puts the title of the plaintiff in issue especially where the defendant is in possession. I think, however, that that principle applies where the title of the defendant must conflict with that of the plaintiff, e.g., on a claim by one subject against another subject of the same stool in respect of stool land, a claim by one member of a family against another member of the same family in respect of family land, a claim by one family against another family or a claim by one stool against another stool. It is not the same in the case of a claim by a stool against a subject in respect of stool land, or by the head of a family against a member

of the stool family. In these latter cases the ownership of the defendant in possession could be only the usufruct while absolute title might be vested in the stool or the family. Therefore, a declaration of ownership in favor of the individual against the stool or the family may amount to nothing more than a declaration that the individual is entitled to the usufructuary or the possessory right in the land and that declaration may not affect the absolute title of the stool or family.

For that reason it is only in rare cases that a stool can succeed against a subject in an action for trespass, and for that matter a family against a member thereof.

[**297**] To operate as res judicata the judgment relied upon must

> " conclude not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the ground work of the decision itself, though not then directly the point at issue " :

see Coleridge J. in *The Queen v. Inhabitants of the Township of Hartingon Middle Quarter* (2). It is therefore necessary, as submitted by Mr. Akufo–Addo, to study the proceedings and judgments in the former suite to ascertain whether the issue in this case is the same as was decided in the former case, or the same as that which was actually decided as the ground for the decision in the former suit. If it is, that will be the end of the whole matter. I have consequently made such a study and found great assistance from the judgment of th West African Court of Appeal delivered on March 7, 1952. In the case of *Chief Tengey Djokoto IV, etc. v. Chief Saba III, etc.* (1) cited by Mr. Akufo–Addo, the Tovie tribe who were in possession of a portion of the Djita lands brought an action against the Bate tribe for declaration of their title to the said Djita lands. The Bate tribe set up a counterclaim for damages for trespass on the ground that the Tovei tribe had, without right, cut down a number of palm trees on the land. To succeed on their counterclaim against the Tovie tribe, who were in possession, it was necessary for the Bate tribe to prove a superior right to immediate occupation, namely, their title to the land. The claim and the counterclaim made the title of either tribe an issue in that case. The trial court dismissed the claim of the the Tovie tribe and entered judgment for the Bate tribe on the counterclaim, declared them owners of the land an awarded them damages for trespass. On appeal, the West African Court of Appeal upheld the judgment in trespass, but set aside the declaration of title made in their favour as they had not counterclaimed for declaration of title. Thereafter the Bate tribe, headed by Chief Tengey Djokoto IV, sued the Tovie tribe, headed by Chief Saba III, for a declaration of title. Coussey J., as he was then, held that the issue in the second case, namely the title of the Bate tribe to the Djita lands, was precisely what was fully litigated in the former trial for the determination of the issue of trespass raised by the counterclaim.

Now that was a claim by one tribe against another, therefore a plea of ownership to the counterclaim for damages for trespass must of necessity put

the title of the claimant in issue. It is no the case here. Before the West African court of Appeal, it was submitted on behalf of the defendant (who in that case was the plaintiff) that the

> " real issue between the parties was the question as to whether the defendant held the land under the stool, or whether it was just personal property in which the stool had no interest "

[**298**] and that

> " the plaintiff has at no time questioned the defendant's right to occupy and use the land in question, and that it is clear the Magistrate misdirected himself as to the real issue in the case, because he based his decision on the evidence relating to the defendant's occupation and user [sic] of the land over a period of years, in respect of which no complaint had been made by the plaintiff."

On behalf of the plaintiff it was submitted that

> "the plaintiff had sued for damages for trespass, not for a declaration of title of the stool "

and that

> "upon a careful analysis of the evidence it is clear that the plaintiff was endeavoring to establish, on behalf of the stool, a right to possession of the land in question, which was inimical to the defendant's possession and user [sic] of such land. In other words that the evidence led on behalf of the plaintiff was designed to support his claim for trespass, not a claim to establish any overall right of the stool."

The court reviewed the evidence coupled with the wording of the claim and came to the conclusion that the issue before the Magistrate was as submitted by the defendant's counsel.

I have studied the record of the proceedings in the former case. One fact stands out pre–eminently in it, namely, that the contention by the defendant that the land belongs to his stool—that is to a community consisting of four clans including the plaintiff's clan—and that any member of the community has a right to occupy any portion of it with the customary permission of the stool or head of the community. In such a case all the plaintiff, a subject or member o the community, needed to prove to succeed, in the action for trespass by the stool or head of the community against him, was that he was in possession or occupation. I do not, therefore, see how the West African Court of Appeal could have come to any other conclusion than the one to which they did come.

This means that the questions as to the title of the defendant's stool or the Akloba community in the land, as well as the issue as to whether the land was

the plaintiff's absolute property in which the defendant's stool or the Akloba community had no interest, were not in issue, nor were they necessarily decided for the determination of the issue of trespass.

It my opinion the proceedings and judgments in the former suite, therefore, cannot operate as res judicata in the present suit. To succeed in his present claim to the ownership of the land by his clan to the exclusion of the other three clans in Akloba, the plaintiff must discharge the onus which lies upon any plaintiff in an action for a declaration [**299**] of title, and must prove his case to the satisfaction of the court. This he failed to do.

As regards estoppel, this seals a party's mouth to stop him from speaking, or prohibits him from alleging the contrary of what he had said on a previous occasion. Had the issue raised in the counterclaim been decided in the former suite I would have had no hesitation in holding that that decision, even if it did not operate as res judicata, would operate to seal the mouth of the defendant from raising it. And had the contention of the defendant in his counterclaim been the contrary of what he alleged in the previous case, I would have held that he is estopped from making his counterclaim. But that is not the case.

In my opinion both the Native Court "B" and the Native Appeal Court properly directed themselves ans were right in the decisions they gave. For these reasons I dismiss the appeal with costs.

The points raised in the appeal are of considerable importance and I think the plaintiff should be given an opportunity for further appeal if he should with do do so. I shall be prepared to grant special leave to appeal if application is made.

Appeal dismissed.
S.G.D.

4.6.2 Awuah v. Adututu and Another

[1987-88] 2 GLR 191.

Court of Appeal, Accra

28 July 1988

APPEAL by the first defendant from the decision of the High Court, Sunyani, reversing the judgment of the District Magistrate Grade I, Goaso given in favour of the plaintiff in an action for, inter alia, declaration of title to a piece of farming land. The facts are set out in the judgment of the court delivered by Abban JSC.

J M Lamptey for the plaintiff-appellant.
No appearance for or on behalf of the respondents.
ABBAN JSC. The appellant sued the respondent in the District Court Grade I, Goaso, in Brong–Ahafo for a declaration of title to land, damages for trespass and an order for perpetual injunction. Judgment was entered in the appellant's favour and the respondents appealed to the High Court, Sunyani.

On 15 July 1983 the High Court, Sunyani reversed the said decision of the district court, grade I and gave judgment for the respondents, demising the appellant's claim. It is against this judgment that the appeal was brought.

The fact in the case were simple: The appellant (hereinafter referred to as the plaintiff) obtained a grant of forest land from the first respondent for cultivation. The size of the forest land granted was described as 12×24 poles and the plaintiff paid £100 (¢220) to the first respondent for the grant. The first respondent for the grant. The first respondent (hereinafter called the first defendant) issued a receipt, exhibit B, to acknowledge the said payment. The plaintiff entered into possession and cultivated considerable portion of the land granted leaving a small area for future cultivation.

The plaintiff later gave that small area to a certain man to cultivate on "abunu" tenancy. After that person had cleared the forest, the first defendant entered it and appropriated considerable portion thereof and gave the same to one Kwame Boakye, the second defendant herein. The latter then went onto the land, and started farming activities thereon.

The plaintiff raised objection to the conduct of the first defendant who retorted by saying that that portion of land granted to the second defendant was not included in the plaintiff's grant; and that the plaintiff had gone beyond the limits of the land granted to him. Consequently, he, the first defendant, was entitled to retake the disputed portion and so his subsequent grant of that portion to the second defendant was in order.

Letters were exchanged between the parties in which each party tried to justify his stand. The matter seemed to have been brought before the officials of the Brong–Ahafo regional office. The parties were advised to agree on a common surveyor to make a plan of the disputed area. Thus, the plaintiff and the first defendant engaged a surveyor, Kwabena Botwe, the first plaintiff witness on the day appointed for the survey to be carried out, the first defendant said he had some urgent matters to attend to in Kumasi so he could not personally be present during the survey.

It may be noted that the grant of the land was made by the first defendant on behalf of his stool. But the physical demarcation of the land for the plaintiff was done by some emissaries deputed by the first defendant Consequently, since the first defendant himself could not attend the survey, he deputed certain persons to represent him. Those representatives included the very persons who had originally demarcated the land for the plaintiff.

The surveyor in the presence of the plaintiff took measurement of the disputed land as pointed out to him by the first defendant's representatives. The surveyor later prepared a plan which was tendered at the trial as exhibits C.

The first defendant on seeing the plan, contended that an old rope which had originally been used by his emissaries to demarcate the land for the plaintiff some sixteen years ago, should have been used by surveyor and since this was not done he would not accept the plan, exhibit C. So about a month' after the surveyor, the first defendant took the same surveyor back to the disputed land and had it resurveyed in the absence of the plaintiff. The plan prepared after the second survey later became later became exhibit 1 in the proceedings.

Despite various attempts to settle the matter, the parties could still not see eye with each other. Hence the plaintiff had to commence the present action in the District Court, Grade I, Goaso. The learned trial magistrate after reviewing the evidence adduced before him found as a fact that the plaintiff had "not exceeded the land originally granted to him." He therefore rejected the defence. He also accepted the plan, exhibit C, and rejected "the plan exhibit I as an afterthought."

The learned trial magistrate made further findings which for the sake of emphasis I hereby reproduce. They are as follows:

> "The first defendant has no dispute with the second plaintiff witness' [Opanyin Kwabena Sefa's] evidence that he, the second plaintiff witness, shares a common boundary with the plaintiff. *I therefore accept second the plaintiff witness's evidence that the second defendant has occupied a large portion of the plaintiff foodstuffs* farms as well as a portion of his farm with *cocoa, near their boundary with Yaw Boahene.* This constitutes trespass. The first defendant having granted that land to the plaintiff, he had no right to regrant any portion of it to the second defendant ... I accept the plan exhibit C in the circumstance, and reject the plan, exhibit I, as an afterthought. *I find that the first defendant has no vacant land left between the plaintiff, Sefa and Boahene which he could validly sell to the second defendant: he had already sold it to the plaintiff, therefore he has not right to resell it to the second defendant.*"

(The emphasis is mine)

Those positive and crucial findings of the learned trial magistrate were set aside on appeal by the High Court, Sunyani and the judgment founded thereon was reversed. The basis of the judgment of the High Court was seriously challenged in this appeal.

Leaned counsel for the appellant argued the only original ground of appeal filed, namely the judgment of the High Court was against the weight of evidence. Counsel contended that the plan, exhibit C, clearly showed the land granted to the plaintiff because it was the first defendant's own agents who pointed out to the surveyor the land which, according to them, they had originally demarcated for the plaintiff, and what agents showed to the surveyor was what the surveyor incorporated in exhibit C; and that boundary owners as given by the plaintiff in his evidence were the same as those on the plan, exhibit C. Counsel in the circumstances submitted that it was wrong for the learned High Court judge to reject exhibit C on the ground that "what the surveyor did, did not reflect the size of the forest land demarcated for the plaintiff."

It was again submitted that the rejection of the plan, exhibit C, on the further ground that the surveyor did not base his measurements on a rope kept by the first defendant for measuring lands in the area was wrong. For the plaintiff rightly refused to allow the use of that rope which could have been any rope and not necessarily the very rope that was used sixteen years ago.

There was no dispute that the land granted to the plaintiff was at Suntreso and it was portion of the stool land of Nana Akwaboahene. The first defendant was virtually the caretaker of that stool land and he was the person who had been authorized by the said Nana Akwaboahene to make grants of the said stool land to persons who needed land for farming purposes. It was also not dispute that in some cases, the first defendant himself did not go to the forest to demarcate the land. He sent agents or emissaries to go to the forest to do the physical demarcation and allocation; and in the case of the plaintiff's grant, those sent by the first defendant were three—Osei Kofi, Yaw Asenso and Subaah.

So that when the dispute arose and it became necessary to engaged the services of a surveyor the land, it was understandable that those very emissaries. Osei Kofi, Yaw Asenso and Subaah, were deputed by the first defendant to go along with the plaintiff and the surveyor. It was clear from the evidence that the surveyor took measurements of the disputed land as point out to him by those emissaries and it was that very area that the surveyor incorporated in the plan, exhibit C.

It is important to bear in mind that the first defendant was not present when his emissaries—Osei Kofi, Yaw Asenso and Subaah originally demarcated the forest land for the plaintiff. He was also not present during the first survey when those emissaries in the presence of the plaintiff showed the surveyor the area which, according to them, they demarcated for the plaintiff in 1962. thus the evidence of the first defendant to the effect that the plaintiff had exceeded the limits of the forest land granted to him was nothing but hearsay and therefore inadmissible. It could not therefore be relied upon.

In fact, the first defendant admitted lack of personal knowledge of the exact portion of land that was demarcated for the plaintiff when he said: "I was informed by Osei Kofi that the plaintiff had exceeded the limits of land we gave him." Then under cross–examination by the plaintiff the first defendant continued: "*I was not present when the land was measured for you but I am informed that you have exceeded the boundary.*" (The emphasis is mine).

It was therefore obvious that the only admissible and relevant evidence which the defendants produced to support their contention that the plaintiff exceeded the limits of the land granted to him was that of his emissary, Osei Kofi, who happened to be the only witness called by the defendant. Osei Kofi, the first defendant witness, stated as follows:

> "I was accompanied by Yaw Asenso and Subaah. We took the plaintiff to the forest. We had already demarcated the limits of the land and we showed it to him. The plaintiff told us that he wanted a mile square piece of land; we measured the land. This measured 12 × 24 of the rope–measure we used. This was equivalent to a farmer's mile."

Osei Kofi took part in the first survey conducted by the surveyor in the presence of the plaintiff. On this Osei Kofi said: "I agreed and accompanied the

plaintiff and the surveyor to the land and the plaintiff showed the land he alleges we gave to him." Assuming for the purpose of argument that it was true that it was the plaintiff and not Osei Kofi who showed the boundaries of the land to the surveyor. These was nothing on record indicating that Osei Kofi raised objection as to the correctness of those boundaries. According to Osei Kofi, he just looked on and he never disputed or complained about what the plaintiff showed to the surveyor. This could not be the behaviour or the conduct of a person who was all the time hotly challenging the plaintiff's right to the disputed area. Osei Kofi kept quiet and it was one month after the surveyor had completed his work and produced the plan about C. that he and the first defendant went and took the same surveyor back to the land; and in the absence of the plaintiff, conducted the surveyor along entirely different boundaries to make another plan, exhibit 1.

I think, exhibit 1 was not binding on the plaintiff. It was self-serving. Osei Kofi attempted to explain away his conduct by saying that he agreed with the first defendant that he would attend the first survey as an on-looker "and then later I was to make my own plan respecting the land which I actually gave to the plaintiff." This could not be true. If that was the agreement Osei Kofi had with the first defendant, why then should the first defendant agree to share equally with the plaintiff the expenses of the first survey and faithfully paid his share of the cost of the survey to the surveyor?

Again, if there was any such agreement why was it that the two separate surveys were not done on the same day in the presence of the plaintiff; and why was the plaintiff not called upon to foot part of the bill of the second survey? I think the learned trial magistrate was right when he rejected the evidence of Osei Kofi on that issue in the following manner:

> "In the circumstances therefore I reject the defence that when the plaintiff refused the use of that rope, he, the first defendant, suggested that two plans be produced, one representing that land which the plaintiff claimed was for him, as well as the land which the first defendant witness (Osei Kofi) actually gave to the plaintiff . . . I reject this contention."

With this finding nothing more was left in the evidence put forward by the defendant, namely that the plaintiff had exceeded the bounds of the land granted to him.

Be that as it may, Osei Kofi, as I have already held, was not only present at the first survey but also took active part and, in fact, pointed out to the surveyor an area which, according to him, was the area he and the other emissaries demarcated for the Plaintiff; and it was the area thus shown by Osei Kofi to the surveyor, when being cross-examined by the first defendant was asked:

> "Q The plaintiff mentioned that the land was demarcated to him by Yaw Asenso and Osei Kofi?

A Yes, and it was they who showed me the land they demarcated to the plaintiff and I measured it as shown in the first plan without objection ...

Q On the land at first surveying, Aseso and Osei Kofi told you that the land the plaintiff was showing to you was larger than they actually gave him.

A No; they rather led me along the boundary and I took the measurement along the line they showed me."

The learned trail magistrate accepted, as he was entitled to do, this piece of evidence and said:

"I saw the first plaintiff witness (the surveyor) in the box; I had no reason to impugn his credulity. I took him to be a witness of truth ... The first defendant did not strike me as a witness of truth. When the plaintiff wanted to tender the plan, exhibit C, the first defendant objected upon the ground that he plaintiff made the plan without his knowledge. But it turned out, as he himself later admitted, that the first plaintiff witness did so in the presence of the plaintiff and the first defendant's representatives including Kwabina Barimah."

The learned High Court judge rejected the plan, exhibit C, on two main grounds. First, because a certain rope was not used by the surveyor. Secondly, the surveyor under cross–examination had said that if the first defendant's agents during the first survey had objected or not to the boundaries showed by the plaintiff and had showed him the "correct" boundaries he (the surveyor) would not have minded them since there were cutlass marks already on the tress along the boundaries. The learned judge then made the following findings:

"By this I hold that the surveyor was not being fair to both parties ... In the result I say that what the first plaintiff witness (the surveyor) did. did not reflect the size of the forest land demarcated for the plaintiff."

In my view, the reasons for rejecting the plan, exhibit C, were not valid. In the first place, whatever the surveyor might have said in the statement was a mere conjecture as to what he might have done or might not have done if the agents had shown him a path where the trees were not having cutlass marks; and it did not represent what he in fact did or what exactly happened during the first survey. Thus the fact still remained that he only depended on the first defendant's agents and took measurements of the land which the agents of the first defendant showed him.

The rope which the defendants insisted on was not proved to be the exact rope which was used some sixteen years ago to measure the forest land for the plaintiff. The plaintiff was therefore right in not agreeing to the use of that rope.

The plaintiff in his evidence gave the names of his boundary owners. He said the forest land demarcated for him formed boundaries with Kwame Amofo, Malam (Kramo) Yaya, Kwarteng, Kwadjo Fordjour, Amandi, Yaw Boahene, Nyantakyiwa and Opanyin Sefa. Incidentally, all names of those eight boundary owners appeared on the plan, exhibit C. to me the plan, exhibit C, clearly showed the limits of the forest land which was demarcated for the plaintiff by the first defendant's own emissaries, and that the area edged in red on the said exhibit C showed the exact size and limits of land which those emissaries demarcated for the plaintiff in 1962.

I therefore hold that the grounds on which the learned High Court judge set aside the findings of the learned trial magistrate and then rejected the plan, exhibit C, were unreasonable as well as untenable.

The area of trespass was located around the plaintiff's boundary wit Opanyi Sefa and Yaw Boahene as indicated in the plaintiff's evidence. The plaintiff said:

> "The area which the second defendant had occupied is near my boundary with Sefa and Yaw Boahene . . . the second defendant . . . has unlawfully occupied a portion of the land which my labourer had already cleared and made into a farm."

This piece of evidence was confirmed by the plaintiff's boundary owner, Opanyi Sefa (the second plaintiff witness) as follows:

> "I know the portion which the second defendant had cleared. This is where my fallow land shares boundary with the plaintiff's fallow land. The second defendant has cleared a portion of my fallow land the, clearing the weeds around the cocoas trees and the foodstuffs which I have cultivated there. *The second defendant has cleared a large portion of the plaintiff's farm there and has continued across my boundary with the plaintiff into my fallow land and cleared a large portion of my fallow land . . .*"

(The emphasis is mine.)

The first defendant could not deny that Opanyi Sefa was truly a boundary owner of the land granted and demarcated for the plaintiff.

The first defendant accepting that Opanyi Sefa was the plaintiff's boundary owner put the following question to Opanyi Sefa when cross-examining the latter:

> "Q *I cannot challenge you when you say that you have boundary with the plaintiff, but those I sent to demarcate the boundary have said the plaintiff has exceeded the limits of the land given to him.*
>
> A I maintain that I know my boundary with the plaintiff. I know the trespass has taken place in the plaintiff's fallow land, and if you are now saying that you did not give that portion to him

> that is your own business: *You showed me that boundary as my boundary with the plaintiff.*"

(The emphasis is mine.)

By this question and answer, the first defendant was admitting that whatever was the size of the forest land that was granted and demarcated for the plaintiff, that forest land formed boundary with that of Opanyi Sefah. In other words, on the first defendant's own showing, the forest land granted to the plaintiff extended up to the land granted to Opanyi Sefah and formed a common boundary with it.

This was therefore a further prop that, contrary to the contention of the defendants, no vacant land was left between the plaintiff's land and that of Opanyi Sefah after the grants of land to those two persons. That being the case, the first defendant could not demarcate and grant any land around the common boundary of ht plaintiff and Opanyi Sefah to the second defendant.

What I see in this case is that the first defendant and his agents just took the second defendant to the land and carved for him considerable portions of land on both sides of the said common boundary; and when they were challenged by the plaintiff, and finding no excuse for their conduct, they sought to justify their behaviour by contending that the plaintiff had exceeded the limits of the forest land granted to him.

The learned trial magistrate was therefore right when on the evidence, he found that the defendants had committed trespass. The learned High Court judge, however, found otherwise, and held that the trial court was wrong in making that finding. But unfortunately, it was the other way round. It was rather the learned High Court judge who did not pay due attention to the evidence and so he failed to make proper assessment of the evidence on record. I therefore indorse the following finding of the learned trial magistrate when he said:

> "I find that the first defendant had not vacant land between the plaintiff, Sefa and Boahene which he could validly sell to the second defendant; he had already sold it to the plaintiff, therefore he [had] no right to resell it to the second defendant."

In my view, this finding was arrived at after proper appraisal and evaluation of the evidence, and it was clearly supported by the evidence.

Learned counsel for the appellant also contended that it was wrong for the learned High Court judge to declare the receipt, exhibit B, invalid on the ground that it was not registered under section 24 of the Land Registration Act, 1962 (Act 122). Counsel submitted that an ordinary receipt without particulars of the land stated in it did not fall under registrable documents as defined in sections 3 and 4 of the Act. Counsel finally submitted that the grounds on which the High Court set aside the judgment of the learned trial magistrate were all wrong and that the judgment of the High Court should not be allowed to stand.

It will be recalled that the second defendant issued a receipt, exhibit B, for the sum of £110 (¢220) paid by the plaintiff after the latter had been granted

the forest land. In the receipt, exhibit B, the forest land granted was indicated to be 12 × 12 poles which Osei Kofi, the first defendant witness, termed "the farmer's mile." The following was recorded in that receipt:

> "£110. I the under marked Kwaku Adututu [the first defendant] of Ayomso now at Kumasi have received from Yaw Awuah [the plaintiff] of Kumasi the cash sum of £110 (One hundred and ten pounds) being payment for a piece of forest land at Burutuase Ayomso measuring 12 X 24 poles given to him by me for farming. Dated at Kumasi this 20 day of November 1962.
>
> | | |
> |---|---|
> | Kwaku Adu Tutu | His |
> | Recipient & Owner | X |
> | Herein | Mark |
> | Thumbprint . . . " | |

The receipt was prepared by a letter writer of house No. 01/45/6, Mbrom Road, Kumasi. The first defendant fixed an adhesive stamp on it. He also made cancellation on the stamp before handling it over to the plaintiff. The learned trial magistrate accepted the receipt as showing that the land had been "sold" to the plaintiff. But the learned High Court judge held:

> "Exhibit B, the receipt, speaks of a grant. It is only the plaintiff who talks of sale. There is no corroboration of any sale . . . *There was no sale but only a grant; this is my finding going by the record of proceedings.* By section 24 of the Land Registry Act, 1962 (Act 122), since November 1962 all documents relating to the land must be registered in order to have any legal effect at all: see *Asare v. Brobbey* (1971) 2 GLR 331, CA. If such document is not registered it is invalid and so voidable. It becomes valid only when registered. *Thus exhibit B is* invalid and consequently voidable. . . "

(The emphasis is mine.)

The leaned High Court judge was, in my view, right when he held that exhibit B showed a grant and not a sale. He was also right when he found that the plaintiff was only granted the land. That is there was only customary grant. In consequence of these findings it should have occurred to the learned High Court judge that the receipt merely acknowledged payment of money; and that reference to the size of the land granted, without any particulars, could not change the character of that receipt into an instrument transferring title or an interest in land in the sense as is understood, in say, English conveyancing.

Exhibit B being a note showing that the plaintiff had paid money ad that the first defendant had received the said money, came within the definition of a receipt as provided in section 52 of the Stamps Ordinance, Cap 168 (1951 Rev) which was in operation in 1962 when it was issued. The Ordinance has since been repealed by the Stamp (Amendment) Act, 1960 (No 2). But the definition which was given to "receipt" in the Ordinance has, in substance, been repeated

in section 46 (1) of the Stamp Act, 1965 (Act 311), as further amended. Since exhibit B was denoted by an adhesive stamp which was "cancelled" by the first defendant before the "delivered it out of his hands" to the plaintiff as required by law, it was valid. It did not require registration for its validity.

In any case, the receipt could not be a registrable instrument. Section 4 of Act 122 provides:

> "4. No instrument, except a will or probate, shall be registered unless it contains a description (which may be by reference to plan which, in the opinion of the registrar, is sufficient to enable the location and boundaries of the land to which it relates to be identified or a sufficient reference to the date and particulars of registration of an instrument affecting the same land and already registered."

The receipt did not contain any boundaries and sufficient particulars from which the land could be clearly identified. In fact, it could be said to be a conveyance or an instrument transferring land.

It must be borne in mind that documents which are prepared after a grant according to custom, like the present, serve merely as documentary evidence of the grant and they do not alter the customary nature of the transaction: see *Sese v. Sese* (1984-86) 2 GLR 166, CA. So that assuming for the purpose of argument, that exhibit B was valid as held by the learned High Court judge, it did not mean that the plaintiff should lose his land in as much as the learned judge himself properly found that the first defendant made a valid customary grant of the forest land to the plaintiff.

It also seems to me that the learned High Court judge did not take kindly to the words, "sale" and "sold" used by the plaintiff in his evidence and by the learned trial magistrate in his judgment. But having found that it was a customary grant of forest land for farming purpose, the use of those words should not have bothered the learned High Court judge. Surprisingly, he made heavy weather of them. The fact that the plaintiff did not use the appropriate word "grant" but used "sale", etc was irrelevant to the main issue. The substance of the claim was rather more important. The action was fought in the trial court by the parties themselves. They were all illiterates and never had the benefit of the services of counsel in the trail court.

It could therefore be seen that those words were used, especially by understood in English conveyancing. After all the £110 (¢220) could not, even in 1962, be said to be a purchase price for the land which was more that 60 acres. The amount could only represent what is sometimes described as a "customary drink" to the stool and not a purchase price.

The plaintiff was relying on a customary grant for which he paid that amount in recognition thereof. Thus the learned High Court judge rejecting the plaintiff's claim. It may be remarked that even the word comprehend bargains and sales, gifts, leases, charges and the like; circumstances, when the plaintiff stated that the land was sold to him absolute ownership, had been transferred to him.

The learned High Court judge also picked a quarrel with the use of the words "owners" and "ownership" by the plaintiff in his writ of summons and in his

evidence. The learned judge took an unreasonably restricted view of the word "owner" and that led him to hold that:

> "Learned counsel for the plaintiff canvassed the point of a customary grant. The law says that under customary grant the grantor or donor retrains the title of ownership in the land: see *Awisi v. Nyako* (1966) GLR 3 and *Adai v. Daku* (1905) Red[21] 231. *That being so I fail to see how the plaintiff can sue for declaration of title. Even if he did not so sue but asked for perpetual injunction then he must have put title in issue. Here too the plaintiff measuring 12 × 24 ropes . . . I do that there was no sale and so the plaintiff was not the owner of the land. The judgment is therefore bad.*"

To put it simply, here the learned High Court judge was saying that because the ownership of the disputed land was in the stool–grantor and not in the plaintiff, the claim for a declaration of title was not maintainable and the action was therefore misconceived; and so the judgment entered I favour of the plaintiff on such a claim was bad in law.

The learned High Court judge, with due respect, got it all wrong. As I have already pointed out elsewhere in this judgment, since the first defendant admitted that he granted the land to the plaintiff and on the finding of the learned High Court judge himself that, in fact, the first defendant made the said grant to the plaintiff, the learned High Court judge should not have dismissed the plaintiff's claim. He should rather have gone further to consider the incidents of such a grant.

If he had exercised a little patience and given a little thought to that aspect of the matter he would have found that the plaintiff had an estate in that portion of the stool land and of which he tool effective possession, occupied and cultivated. That estate could variously be described as usufructuary, possessory or determinable title. The usufructuary title is a specie of ownership co–existent and simultaneous with the stool's absolute ownership. This has nicely been put by Dr. Asante in his book *Property Law and Social Goal in Ghana*. At 53, the learned author stated:.

> "The stool, in effect, no longer has dominion of the stool land but an interest in stool land conceptually superior to that of the subject. A concept of a split ownership is emerging allowing the existence of separate by simultaneous estates in respect of the same land."

The usufructuary is regarded as the owner of the area of land reduced into his possession; he can alienate voluntarily to a fellow subject or involuntarily to a judgment creditor without the prior consent of the stool. There is practically no limitation over his right to alienate that usufructuary title. So long as he recognized the absolute title of the stool, that usufructuary title could only be

[21] Ed.— The Court cites to Redwar. The case is also reported in Renner, (1905) Ren. 348, 417 (D.C. and F.C.).

determined on an express abandonment or failure of his heirs: see *Thompson v. Mensah* (1957) 3 WALR 240.

Neither can the stool divest the usufructuary of his title by alienating it to another without the consent and concurrence of the usufructuary: see *Ohimen v. Adjei* (1957) 2 WALR 275. It appears the plaintiff was not a subject of the stool of Akwaboa. The allodial owner of the land in dispute. In other words, the plaintiff was a stranger grantee of that stool in respect of a defined portion of the stool's forest land which he had cleared and cultivated. But it should be remembered that the usufructuary title which a stranger–grantee like the plaintiff acquires, places the stranger–grantee in the same position as the subject of the stool except that in the case of farming land, as well as in building land, the title of the stranger–grantee is limited to a well defined area demarcated and granted to him; whereas the subject of the stool is not *so rationed in the amount of the* forest land he may occupy.

It seems to me then that the learned High Court judge erred in law by holding that the plaintiff usufructuary owner, could not sue "for a declaration of title" and could not "ask for perpetual injunction." The courts have repeatedly held that a subject of the stool, or a stranger-grantee of the stool for that matter, can maintain an action against even the stool in defence of the usufructuary title and may impeach any disposition of such interest effected without his consent in favour of a third party: see *Baidoo v. Osei and Owusu* (1957) 3 WALR 298. In the *Baidoo* case (supra), the plaintiff, a stool–subject, sought a declaration of title of land and damages for trespass against the defendants. The land in question was a portion of stool land and the plaintiff claimed to have acquired usufructuary title by being the first to being it under cultivation from virgin forest. The second defendant was a also a stool subject and he granted the disputed land to the first defendant who was a stool-stranger without the consent of the plaintiff. The first defendant obtained a subsequent confirmatory lease from the stool. It was held that the plaintiff could maintain the action and judgment was entered in favour of the plaintiff. At 291–292 Ollenu J (as he then was) said:

> "The Native Court found that it was the predecessor of the plaintiff and not that of the co–defendant who cultivated the virgin forest on the land *and thereby became the owner of land according to native custom.* There is abundant evidence on the record, even from the witnesses of the co–defendant, which fully justify that finding.
>
> *The Stool is not entitled to grant any interest in stool land over which a subject has acquired a usufructuary title without the consent and concurrence of the owner of the usufruct.* Consequently, the lease of the land in dispute by the stool to the first defendant which prima facie was granted without the consent and concurrence *of the plaintiff's family, the owner of the usufruct, is of no effect and is irrelevant.*"

(The emphasis is mine.)

See also the case of *Oblee v. Armah and Affipong* (1958) 3 WALR 484. Here too there was a claim for declaration of title by the plaintiff, a subject of the stool, against the defendants, subjects of the same stool. The plaintiff based his claim on a grant made to him by the stool. The defendant relied on grants made in their favour by the stool subsequent in time to the grant to the plaintiff and which grants were made without the consent of the plaintiff. The plaintiff won on his claim for a declaration of title against the defendants. At 492–493, Ollenu J (as he then was) said:

> "Therefore whether the grant of the land to him was express or implied, *the plaintiff, by occupying and farming the land, became the owner of it according to custom, and every grant which the stool purport to make of any portion of it to the defendant or . . . To any else, without the prior consent and concurrence of the plaintiff, who holds the usufructuary title in it, is null and the void . . . There will be judgment for the plaintiff against the defendant and the co–defendant for declaration of his title to the land.*"

(The emphasis is mine.) The case of *Donkor v. Danso* 1959 GLR 147 is also on the same point.

It therefore clear from all these authorities that, contrary to the views of the learned High Court judge, the relief which the plaintiff sought in his writ of summons, namely a declaration of title, damages for trespass and perpetual injunction, were in order and that the action was maintainable. Consequently, the plaintiff having satisfactorily discharged the burden that lay on him, was entitled to granted all those reliefs.

In my view, not only did the learned High Court judge fail to make proper analysis of the evidence on record but also failed to have a fair and broad view of it. This led him to draw wrong conclusions, which ultimately led him to make wrong pronouncements on the legal issues involved in the case. In my opinion, he also erred when interfered with the findings of fact made by the learned trial magistrate when there was no basis for such interference.

In the circumstances, I would allow the appeal, set aside the judgment of the High Court, Sunyani and restore the judgment of the trial district court, grade 1.

OSEI-HWERE J.A. I agree

LAMPTEY J.A. I agree

Appeal allowed.
J N N O

NOTES:

1.) *Awuah v. Adututu* says that a subject can alienate without the prior consent of the stool. This seems to conflict with the rule stated in *Kotei v.*

Asere Stool, affirmed in *Robertson v. Nii Akramah II*, that the consent of the allodial owner is required for alienation.

Chapter 5

Family Property

5.1 The Usufruct in Family Land

5.1.1 Heyman v. Attipoe

(1957) 3 WALR 86.

High Court, Eastern Judicial Division, Land Court (Ollennu, J.)

6 September, 1957

Cases referred to :

(1) *Abude and Others v. Onano and Others* (1946) 12 W.A.C.A. 102.

Appeal from a decision of Anlo Native Court "A" on July 23, 1956, in favour of the defendant in an action for a declaration of title to land, for an order of possession and for an account.

Ollennu, J. The plaintiff and the defendant are both direct descendants of a comman ancestress, one Adanshigbo. the defendant is the grandson of Nyanya, oone of Adanshigbo's five children by her first husband, Chief Sokpui I; the plaintiff is a grandson of Hudzengor, one of Adanshigbo's two children by her second husband Kumorshie. It is common ground between the parties that the land in dispute belonged originally to Cheif Sokpui I, and that he made a gift of it to his wife Adanshigbo. But while the plaintiff claims taht Adanshigbo died intestate possessed of the said land, adn taht it has, by native custom, now become faimly property to be enjoyed in common by all the direct descendandts of Adanshigbo, the defendant contends that Adanshigbo disposed of the land during her lifetime to her daughter Nyanya alone, that Nyanya died intestate and possessed of if and that it has therefore become teh sole property of the direct de3scendeants of Nyanya, hsi grandmother, to hte exclusion of all other direct descendants of Adanshigbo.

The first finding of the Native corut contradicts the case put up by either party, which is that Chief Sokpui I made an absolute givt of the lland to Adanshigbo, such that Adanshigbo could deal with it in any way she liked. That decision, therefore, is not suppored by the evidence and so cannot stand.

The second finding amounts to a decision that Adanshigbo died possessed of the land. As already poitned out, that in fact is the only issue the Native Corut was called upon to determine. This finding is in favour of the plaintiff. Therefore the proeprt and indeed the only judgment which the Native Corut should have given is one for a declaration in favour of the plaintiff that the property is family property for all direct descendandts of Adanshigbo, including the plaintiff and defendant. But instead of giving judgment for the plaintiff the Native court built up a case for the defendant which was quite different from the oen he set up and tried to prove by the evidence he led. That new case is that Adanshigbo's only interes in the land was that of farming rights, which by native custom died with her, and thereupon the property descended by Anlo custom to her children by Chief Sokpui the donor exclusively.

Mr. Apaloo, learned counsel for the defendant, has propertly conceded that that decisoin cannot be defendend. A court is not entitled to make a case for any party. Its simple duty is to adjudicate upon the issues which are raised befor eit, adn any others that are incidental to those issues. The Native Court therefore erred in taking it upon themselves to make a new case for the defendant, and in entering judgment in his favour on that case.

Now in addition to his claim for a declaration that the land is the property of all the direct descendants of Adanshigbo, the plaintiff also claimed recovery of possession and accounts. Mr. Akufo–Addo, leanred counsel for the paintiff, conceded that the claim for an accoung against the defendant, the head of the family, is no maintanable according to native custom. As to teh claim for recovery of possession, he says that he would not presss for an order in that behalf: that was as far as he could go.

By native custom a member of a family cannot sue the head of the famly for accounts. The authorities are many on that point; one of them is *Abude and Others v. Onano and Others* (1). The plaintiff's claim for account must therefore fajil.

Again, by native custom the head of the family is the proper person to have charge of and control the family land for and on behalf of the family. A member of the family cannot maintain an action against him for recovery of general family land in the possession of the head. The only instance in which he can maintain an action for recovery of possession agasint teh head is when the head wrongfully takes possession of a portion of the family land which the individual member or a branch fo the famly has reduceed, by on of the customary methods, into his possession, *i.e.,* land over which the individual member or branch of the family has established a usufructuary title.

There is no evidence on the record that the area in dispute has ever been in the exclusive possession of the plaintiff, or of his small branch of the family, as their separate estate. In teh circumstances the claim for recovery of possession must also fail.

Thus, of the three claims the plaintiff made, only the principal one, namely, the one for a declaration that the land in dispute is property of the fmaily of all direct descendants of Adanshibgo, can succeed. For the reasons stated above I allow the appeal, set aside the jdugment of the Anlo Native Court "A" including the order as to costs, and substitute thereofre the following:

> "There will be judgment for the plaintiff against the defendant for a declaration that the land in dispute si the property of the Adanshigbo family, consisting of all direct descendants of the said Adanshigbo, including the plaintiff and tlal those he represent, and the defendant and all descendants of Nyanya."

The plaintiff's claim for recovelry of possession and for account are dismissed.

NOTES:

1.) *Heyman v. Attipoe* says that a family member who settles on family land aquires a usufruct in that land. Like a stool subject who has settled on stool land, a family member has the exclusive right to possession and may exercise those rights even against the head of the family.

5.1.2 Larbi v. Cato and Another

[1960] GLR 146.

In the Court of Appeal

6 June, 1960

APPEAL from a judgment of Ollennu, J. in the High Court, Accra in favour of the defendants in an action claiming, *inter alia*, a declaration othat certain premises were family property. The case is reported in [1959] G.L.R. 35. The facts appear fully from the judgment of the Court of Appeal.

Danquah for appellant.
Bentsi–Enchill for respondants.
GRANVILLE SHARP , J.A. delivered the judgment of the court: The plaintiff in this action has appealed to this court against tht ejudgment of Ollennu, J. datated the 28th January, 1959, by which the learned judge dismissed the plaintiff's claim to a declaration that a certain property, *viz.* House No. C276/1 (otherwise known as Obuadabang Terrace, Fanofa, Adabraka, Accra) is family–property of the Obuadabang family of larteh, of which family the plaintiff is the head. Ancillary reliefe claimed, and also refused by the learned judge, was (a) delivery to the family of the title deeds of the property, (b) delivery of possession

of the house by the second defendant to the plaintiff, and (c) an account of all rents collected by the second defendant in respect of the premises.

The basic claim that the ouse was family property was grounded upon the following averment contained in paragraph 3 of the statement of claim:—

> "In or about the year 1937 the said Ansah Obuadabaing Larbi with the financial assistance of various members of the said Obuadabang family of Larteh built house No. C276/1 situate at accra–Nswawam Road, Fanofa, Adabraka, Accra."

The ansah Obuadabang Larbi referred to was dead, and the plaintiff was his eldest surviving brother. the firs trdefendant in teh suit is the brother–in–law of the deceased,and the second defendant is the lawful widow of the deceased.

The decceased during his lifetime, byt deed of gtivt dated 24th March, 1952, conveyed the property to his son Ansah Obuadabang Cato–Larbi for a consideration stated as follows:

> "In consideration of the natural love esteem and affection of the donor for his son the odnee and the sum of twenty–five founds (£25) paid to the donor by the donee on or befor the execution of these presents (the receipt wwhereof the donor hereby acknowledges) and for divers other good causes and considerations . . . "

By his last will, executed and dated on the 19th September, 1952, the deceased in clause 7 expresly confirmed this last mentoined deed of givt in relation to the house, and it will assist in an understanding of the case to set out this clausee *in extensio:*

> " 7. I have already in my lifetime executed a deed of givt in respect of my house No. C276/1, which was erected by me in 1937, including the out–houses and garage which were erected in 1950, in favour of my son Ansah Obuadabaing Cato–Larbi and his heirs. The main building and three Boys' rooms and the twwo kitchens which were erected in 1937, were built in the name of my son Ansah Obuadabaing Cato–Larbi, but the other outhouses and the garage erected in 1950 were erected in my name. The deed of givt includes all these buildings, 1937 and 1950. I did os because of the assistance which my father–in–law J. E.. Cato, late of Senchie and Saltpond, gave me, coupled with a further monetary assistance which my brother–in–law, J. E. Cato, Manager, Senchie ferry, gave me in 1938 when I was sued by Messr.s G. B. Ollivant Limited to enforce payment of building materials supplied me by G. B. Ollivant Ltd., the total amount being £408 17s. 6d. (four hundred and eight pounds seventeen shillings and sixpence), which amount is still unpaid by me. My title deeds relating to my sai dhouse were deposited by me with my father–in–law, the late J. E. Cato, to secur the repayment of the sum of nine hundred and eighty pounds (£980). Part of this amount

> was spent by my elder brother J. R. O. Larbi on my education when iwas in England ass a student, and the rest was squandered by my said brother J. R. O. Larbi upon his own pleasure.
>
> " I strongly direct my son Ansah Obuadabang Cato–Larbi to pay all debts due from me to the estate of J. E. Cato, late of Senchie and Saltpond, and to see also that the sum of Four Hundred and eight pounds seventeen shillings and sixpence (£408 17s. 6d.) due from me to his Uncle, J. E. Cato, manager, United Africa Co. Ltd., Senchie Ferry, is paid, and claim from him the title deeds relating to the House No. C276/1 Faofa, Adabraka, Nswam road, Accra, which I have gited to him."

As a result of these several instruments, the state of affairs relating to the proeprty at the date of the death of Ansah Obuadagbaing Larbi was that the ownershsip of the hosue resided (both as donee by valid deed of gift, and as devisee under teh will) in Snaah Obuadabang Cato–Larbi; and taht this ownership was subject to an equitable charge by deposit of title deeds which were at the date fo the proceedings in the control and custody of J. El. Cato, the first defendant, to whom they had passed on the death of his father (the J. E. Cator referred to as the testator'ss father–in–law in Clause 7 of the will, *supra*). The stecond defendant is iin possession of the house as the mother of Cato–Larbi, and with his leave and license.

At the hearing before the leanred trial judge no objection was raised against either the deed of gift or the will as such. The plaintiff's general complaint was taht the deceased (A. O. Larbi) was not entitled to dispose of the property in any way, becaus eit was a family property, to the disposition of which the family had not consented. It would not have been possible for hte family to resist probate of the will, beecause no recognised ground for doing so existed, but it is a matter of comment that no steps were taken to set aside the deed of gift on teh grounds that it was a ffraud on the family, and that hte donor had no title to convey the property. Noththing of raud was alleged at the trial, and it was not until the matter came befor uss that Dr. Danquah (in our opinion without any justification whatever) sought to throw suspicion on the deed on the basis that—as he stated, though without any supporting evidence —the monetary consideration referred to in it was ilusory and a decsption. the deed was in fact registered as No. 443/1952 in the deeds Registry, and there was therefore no concealment.

In reply to the defence that the property was the sole property of hte testator, A. O. Larbi, deceased., the plaintiff pleaded as follows:

> " the plaintiff ssays taht inasmuch as teh buildings known as Obuadabang Terracd were erected by the late Ansah Obuadabang Larbi wit hfamily money he cannot in law give it away under hiss will or by deed or otherwise."

Upon this it is to be noted that no issue was raiseed, or suggested, whether or not the buildings were reected on family land. Notwithstanding this, Dr.

Danqua in a further divfergence from the pleadings, from anything suggested at any stage of the trial, and from anything suggested by his grounds of appeal, thought it right to occupy his time–and the time of the court—with something stronger than a suggestion that the land[1] on which the buildings stand is family land. Teh first thing that needs to be said about this is that there is the clearest possible evidence in a deed, dated the 3rd April, 1939 and produced at the trial, that the land came to be the sole property of the deceased, A. O. Larbi upon a partition of a larger parcel, which up to the date of the deed and the deceased owned jointly (as ian inheritance) with one Isaac Frank Antwi. Secondly, it must be supposed that Dr. Danquah felt himself drien to make the unwarrantable suggestion to which we have referred in order to draww to a logical conclusion arguments as to customary law in relation to family property whic, to say no more about them, are in our opinion novel.

The case for the plaintiff was a simple one, ignoring for the moment certain digressions from what was material. It was that he had received a letter from the deceased ddated the 18th January, 1937, as follows:

> "In connection with my poposed building I write to ask you to give me out of our family porperty the sum of £50 (Fifty pounds) by way of contribution toards teh erection thereof, part payment to be effected early in February, 1937"

and that he had sent a sum of £30, and that thereafter he had sent other sumes, namely £10 in march, 1937, £20 in May, 1937, £150 in November, 1937 and £100 in Jannuary or February, 1938. He said that susm in repsect of which he was not given a receipt were entered by the deceased in a pass book. No evidence was given as to the whereabouts of any such pass book, nor did the plaintiff think it worthwhile to serve any notice to produce it at the trial. The plaintiff said that other members of the family made contreibutions, in various sums which he named. All but one fo these was known to be alive at the time fo the hearing, but none came forth to lend any support to what the plaitniff said. Two clerks, who were said to hsave made entires of all these contributions, wer called, bur wer not questioned either as to teh pas bookss or their entries. They gave evidence only as to the receipts.

In cross–examination by Mr. Bensi–Enchill the plaintff wa induced to give evidence upon which Dr. Danquah based arguments befor us which had not been advanced in the court below. That evidence it is therefore necessary to set out:

> "The farms in the family estate were my granfather's farms . . . According to Larteh custom, when a father leaves a property the head of the familyh takes care of it and manages it for the whole family . . . Out of the proceeds of the estate I educated my younger brothers namely the late A. O. Larbi, Koi O. Larib, B. Akwei, Juliana Lartebia and

[1] Here, the photocopy from which this was made has only the letters 'lan ' . . . it is hard to tell if the 'd' is mising in the original, or if it is just a bad photocopy.

> others ... No, those people educated do not owe the money spent on thei reducation as by the family ... Surely my brothers were also entitled to enjoy some fo the proceeds of the farms in the estate, and there will be no obligation on them to pay to the family what they enoy or is given to them out of the sestate, unless there is a special arrangment that they should pay ... In this case there was a special arranggement. That arrrangement was made in pursuance of the letter (Exhibit 'A') which my late brother wrote to me ... My late brother wrote letters similar to Ehibit 'A' to othe rmembers of the family ... No, I did not at any time make demands upon my late breother for repayment of the money, because it was agreed that he was building the house for the family ... Yes, I know that he built the house in his own name."

Before dealing with Dr. Danquah's submissions in the light of this evidence, we should say that htere was evidence in teh documents (both Exxhibit " A " and the receipts) that hte deceased always treated, and referred to, the property as " my new building ". There was evidence that, when action as brought by Mesrs. Ollivants which threatended the property, no member of the family appeared to take any interest in the matter.

Teh plaintff claimed that certain new buildings which were ereted in 1950 by the deceasd were also family property, because " I say he did it from rents collected from the main house, and therefore those proceeds are slao family property ". The deceased had in fact erected the buildings in thename of his son, and there was no evidence that any rents whatevver had been colleted from teh 1937 house in his own name. There was, furthermore, evidence that (without protest from any member of the amily) the deceassed had insisted upon a member who had been permitted to occupy a room in the house vacating that room in exchange for another, thus evincing a desire to use for his own convenience what was his own., yet without necessarily hurting one to whom he felt he owed some filial or avuncular obligation.

On this evidene hte learned juge, in our opinion, was fully entitled to find, and was right in finding, that the plaintiff had not proved his case. On our own reading of it, the evidence for the plaintff stands out as quite unreliable, and such inferences as are to be drawn from it cannot support the cliam put forward by the plaintiff. The leanerd judge had the additional davantage that he heard and saw the witnesses, whose demaenour no doubt assisted him in his assessment fo their reliability.

It was in these circumstances that Dr. Danquah felt himself to be judtified in presenting (not once, but with constant and quite unnecessary repetition) and arguemnt that because the deceased had, togehter with other members of the family, been given the advantage, with the support of family funds, of an education whicih had enabled deceased to pracice with distinction and consequent self–enrichment at the Bar and as a solicitor, therefore everythign he enjoyed as the resutl of his early education, and everythign that was purchased by him out of his own efforts and earnings, tok upon itself the character of profits earned by

the use of familiy funds, and that therefore House No. C276/1 in Adabraka, and (presumably) the substantial bank balance from time to time available to the deceased, belonged, not to the deceased but to the Obuadabang Larbi family of Larteh.

It is material to point out that the plaintiff himself said that sons of the amily, assisted by teh family in teh way in which the deceased was, were under no obligation to repay teh sums expended upon them. Thsi statement is in full accord with our understanding of custom in Ghana. Support so extended is by way of gift ofr the avancement fo the younger generation, and, while it places upon them certain recognissed moral obligations towards the family, it does not stamp with the mark fo the family everything that they afterwards aquire by their own efforts, whehter as lawyers, doctors, or merchants, or by activity in other fields. If the contrary wer eteh correct view there is hardly a person of distijnctoiin in the country who could claim to possess anything that he could call his won, and much of the body of customary law on the disposal and inheritance of self–acquired property would be case away, which is the *reductio ad absurdum* fo the whole argument.

According to Dr. Danqua, if a person were building a mud house for himself in a village, and a member of his family came near at a moment when the builder (overtaken with thirst and fatigue) begged and received from teh visitor refreshment to the value of a shilling, this would suffice to stamp the building with the mark fo the family. WWe do not doubt for aone mmoent thathtose fmaily membbes who make contributions to teh building of a house are entitled to share the enjoyment of the building, but this is (and must be) on the basis that, but accepting support and conribution from teh family, teh eubilder recognises the ahe is building a house for the family.l It is quite otherise when, as the leanred judge upon ample evidence here found, a person is building his own house and seeks assistance by way of loan, or as his personal share of a family fund, in order to complete his building. If the family as a whol is in fac assisting in the buildinf of the house it would not affecte the situation if the contribution of one member was greater than another's. In such circumstances the slightest assistance (which is to say conteributon) would give to the provider an interest in teh enjoyment of the house, but in our vifew, as in that of the trial judge, one single member of the family cannot by carrying one brick, or one board of wook, stamp the building with the mark of the family. Where, as in the present case, by special arrangement a loan or payment of money due out of a family fund is made to a person building his own house, and the sum involved is £30 (a small part of the cost of the building) it would, in our opinion, require evidence much stronger than was tendered befor ethe leanred trial judg eto justify a finding that the house is a family property.

Towards the concllusion of his judgment the trial judge said:

> "the building erected by the deceased on his land was worht no lesss than £2,500. The amount of £30 was, therefore, neglibigle compared with the value of the building. Applying a principle which I have already stated, even if tit was meant to be a contribution in teh

> technical sense, it would not (in these modern days) change teh character of the building from individual to vamily property."

We do not think that the learned judge intended by these ovservations to change the customary law, as Dr. Danquah would have it. It is not, in our opinion, necessary to decide this wone way or another, as the observations in question were in any event *obiter* to his decision on the facts.

Dr. Danquah cited to us a small volume of authority upon his contentions, to which it is therefore necesssary, in clnclusion, to refer. In doing so we are according to Dr. Danquah a degree fo consideration which he himself failed to extend to the court. First, however, we would refer to a case to which Dr. Danquah did not himself make reference. *African & Colonial Co. Ltd. v. Blemir Syndicate, G.C. Hutchful and Others* (Full Ct. 1923–25 p.40). In the present case there is ample evidence that Cato–Larbi's predecessor (through whose gift and devise he hodls the property), and Cato–Labri himselve, have throughout theld themselves out as owner in each c ase of the hosue. They have lived in it and controlled its use, and the family havenot noticeably interfered, save for the issue of one warning which was ignored with impunity and without further incident. In these circumstance,s according to the case cited above (in which teh judgment of hte Full Court was confirmed by the Privy Council), "very satisfactory evidence is required to prove that the land or house is nothis sole property," (at p.44) a proposition earlier laid down in the case of *Russell v. Martin* (1 *Ren. Rep.* 193). Next, it is not important to refer to Dr. Danqua's own learned work on *Akan Laws and Customs* which, though for a certainlively reason not authoritative, has not inconsiderable persuasive force. At pp.205–206 the leanred author says:

> " No person can have absolute control over property except he owns it *sui juris* ... [Property] may be held by a son as a gift f rom his father. It may be held by one member against all others as a gift received from another member of the family or from a member of a strange family. Lastly, it may be acquired by outright purchase, or by other business means out of income earned through one's own individual efforts."

It may be asked how Dr. Danquah would seek to reconcile these oberevations in his book with his general argument before us, and in particular with his contention that if a lawyer, whose profesion had been made possible for him by reason of support from the family, were given some property by a stranger ass a token of admiration fro his skil in advocacy and devotion to duty in the course of some litigation, that gift would belong, notto him, but to hte family to whose early support he oweed his perofesional qualification.

In the cited passate Dr. Danquah followed the view epxressed by Sarbah at p.77 of his *Fanti Customary Laws*, (1st. ed.) that;

> "Property is designated self–acquired or private, where it is acquired by a person by memans of his own personal exertions, without any unremumerated help or asssitance from any member of his family."

It should be made clar that it is the "excertionss" tha have to be assisted, and it maters not that these exertions were made in asphere or calling, access to which had been made possible to the person by the earlier asssistance of teh family or some member of it.

Simillarly Redwar at p.79 of his *Comments on Gold Coast Ordinances:*

> "According to Native Law there is a presumption in favour of all land being jointly held by a Family or other Commmunity, whihc presumption may, however, be rebutted by evidcene that it has been acquired by an individual through is own personal exertions in trade or otherwise, *without any assistance fro teh Comunity of whom he is a member*, or by gift to the individual apart from the rest of teh Communtiy ... It is also clear that he has an unfettered right to dispose of his Individual Property either during his life time or by Will.

While it is true that customary law requires that the presumtpion in favour of family property should be rebuttedby evidence, and taht the onus is upon the one who asserts sole ownership, that onus shifts once it is shown that that person has been dealing with the property as his own, or that it came to him by givt or by testamentary disposition from one who dealt with it as his own: see *Russell v. Martin* (1 *Ren. Rep.*) 193.

The case of *Codjoe & Others v. Kwatchey & Others* (2 W.A.C.A. at p.375), which was cited both in the court below and to us, contains passages that do not support the arguments presented in support of this appeal. Evidence that a member of the family had been allowed to put up a small shed or shelter for trading during a short period on the land was claimed by the plaintiffs to establish that the land was family property. The trial judge rejected this argument, and Webbber, C. J. agreed with him, citing with approval the following passage from his judgment,

> "Her adoptive borother would naturally let her to a little petty trading there if she wanted and erect a stall as I have indicated. The family system would account for that. It is not by 'scintillae' such as this that the ownership of land can be determined." Webber, C. J., also cited with approval this passage from *Okai v. Asare* (unreported.) "Self–acquired land is not turned into family land by the owner of the land being kind enough to allow some of his family to live on the land and enjoy the use of it" (*ibid.*)

The fact, therefore, that a nephew in the preent case was alloed to reside in the house is colourless, and inour opinion ineffectual to stapm the house with the character of a fmaily property. Also, although we agree that according to the best authority a real contributoin towards the building ofa family house need not be substantial in the accepted sense of that word, in our view (as in that of the learned trial judge) it must be a "real contributoin", and we cannont accede to the view that customary law is a stranger to the doctrine *de minimis non*

curat lex. We have considered the other cases cited by Dr. Danquah, but we find them irrelevant to the issues decided by the larned judge, and to the facts upon which such issues were decided.

We have considered thiss appeal in a full awareness of the warning of Lord Haldane, in the case of *Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. at p.402) when he said:

> "in interpreting the native title to land, not only in Soughter Nigeria, but in other parts of the British Empire, much cautiion is essential. there is a tendency, iperating at times unconsciously, to render that title conceptually interms which are appropriate only to ystems which have grown up under English law. But this tendency has to be held in check closesly ... there iss no such full division between property and possession as English lawyers are familiar with."

Perhaps we may permit ourselves to say that this court is not, nor has it been since its inception, unfamiliar with this cautionary passsage which was cited to us. Having given the most careful consideration to the matter we cannot (save, as we have alrady said, in that part of which it was *obiter*) find anything in hte judgment of the learned trial judge which is open to any criticism, and we therefore dismiss this appeal.

Appeal dismissed.

NOTES:

1.) What is the proper test for whether a family's contribution has "stamped [a] building with the mark of the family?" Whether contributions by the family have been sufficient to make a building "family property" will depend on the facts in each case. Does *Larbi v. Cato* give any guidance for determining *how much* assistance an individual can safely accept from his or her family, without concern that the family may later claim ownership?

Larbi v. Cato uses different language in different places. The trial judge found that the house was worth £2,500, and referred to the £30 contribution of the family as "negligible." From the facts stated by the Court of Appeal, however, it appears that more than £30 may have been given. The plaintiffs apparently contended that a total of £310 were given between March, 1937 and February, 1938. Is use of the word "negligible" appropriate to describe £310 in rela

Later in the opinion, the appellate court says that a contribution need not be "substantial" to imprint property with the "mark of the family," but that a contribution must be a "real contribution." In numeric terms, £30 is 1.2% of £2,500. Ollennu called this "negligible." The Court of Appeals does not discuss the numbers in detail. Is it possible to argue that, if the plaintiff is correct in

asserting that a total of £310 were donated, a "real contribution" was made to the cost of the house?

2.) Maybe the proper question not related to the amount of family money received in relation to the cost of the house. Instead, maybe the correct test is whether the amount received was more than the share of family money to which the person building the house was entitled as of right.

5.2 Alienation of Family Property

5.2.1 Allotey v. Abrahams Tamakloe v. Abrahams

(1957) 3 WALR 280.

High Court, Eastern Division, Land Court (Ollennu, J.)

10 December, 1957

[**282**]
Cases referred to:

(1) *Quarm v. Yankah and Another* (1930) 1 W.A.C.A. 80.
(2) *Agbloe and Others v. Sappor* (1947) 12 W.A.C.A. 187.
(3) *Abude v. Onano* (1946) 12 W.A.C.A. 102.

ACTIONS for recovery of possession of land, declarations of title thereto and damages for trespass. The actions were consolidated.

OLLENNU J. The plaintiff in the first of these two consolidated suits claims a declaration of his title to an area of land specifically described in his write of summons; he also claims damages for trespass to the land [**283**] and an injunction. He relies for his title upon a deed of conveyance dated April 30, 1946, executed in his favour by Nii Tetteh Kpeshie II, Mantse of Sempe, acting with the consent and concurrence of principal headmen, Asafoatsemei, elders, linguists and councilors. The deed is registered as No. 550/1946 in the deeds Registry of Ghana. He pleaded that the defendant had entered upon the land, wrongfully claiming it as his property.

The defence, as contained in an amended statement of defence filed on behalf of the defendant to this first suit is:

(1) a denial that the Sempe Mantse and his elders sold land to the plaintiff which includes the land in dispute,

(2) that any purported sale of Sempe Stool Land by the Sempe Mantse to the plaintiff was without the knowledge and consent of the principal elders of the stool including the defendant, who claims to be Stool Father of Sempe, and is therefore null and void,

(3) that by reason of a judgment of the Ga Native Court "B" delivered on September 11, 1948, restraining the Sempe Mantse from alienating Sempe Stool land without the consent of certain persons, the document relied upon by the plaintiff is null and void and of no effect, and

(4) a denial of the allegation that the defendant has entered upon the said land or claims ownership of it.

The claims made by the plaintiff in the second suit are exactly the same as those made by the plaintiff in the first case, but in respect of another piece of land, which land is also specifically described in his writ of summons. The plaintiff in the second case depends for his title upon two deeds of conveyance dated October 16, 1946, and November 29, 1946, respectively, registered as Nos. 803/1946 and 932/1946 in the Deeds Registry of Ghana.

The defence to the second suit is exactly the same as in the first suit.

In proof of his case the first plaintiff tendered the deed of conveyance dated April 30, 1946, and led oral evidence as to its execution; he also led evidence that upon the execution of the deed he was laced in possession of the land so conveyed to him, and except for portions he has alienated to the plaintiff in the second suit, has remained and was in such possession at the date when the cause of action arose by the defendant's invasion of his possession, which he did by entering upon and placing sand and stones thereon.

Similarly, the plaintiff in the second suit led evidence of the execution of the deeds of conveyance of each of them up to date when the defendant invaded the said possession by entering and commencing building operations thereon.

[284] Although the defendant averred in the statement of defence filed on his behalf in each of the consolidated suits that he had never entered upon the portions of land in dispute and never claimed ownership of any of them yet, in his evidence before the court, the defendant admitted that he entered upon the lands, placed sand and stones on one portion and caused building operations to be started on another portion. The defendant said he did so upon a claim of right, based on the grounds: (1) that he paid moneys to have the Sempe Stool released from attachment and thereby became individual owner of both the stool and all its lands, and (2) that he is Sempe Stool Father and as such the caretaker of Sempe Stool land, and by virtue of that position he is entitled to enter upon any portion of Sempe Stool lands, which include the portions of land in dispute. In fairness to the defendant, it must be pointed out that those two points were among the principal defences which he raised in the original statements of defence filed by himself.

It is common ground between the parties that the pieces of land in dispute in these consolidated suits form a portion of Sempe Stool lands.

Even if it had been proved that the defendant paid debts of the stool to release the stool from attachment in execution of a decree of a court, he cannot by native custom become the owner of the stool land or of any stool property.

Although suggestions were made in cross–examination of witnesses for the plaintiffs that the stool Father, Stool Mother and Queen Mother of Sempe are, by custom of the Sempe Stool, the first three among the principal elders of Sempe, the suggestion was denied. J. A. Quay, the chief linguist of the Sempe Stool went further to say, under cross–examination, that in dealings with Sempe lands it is not the custom of the stool that women, whatever their status, should take part. that evidence elicited in cross–examination was not refuted; the defendant had every opportunity of refuting it but did not do so. He is bound by it. I accept it as a correct statement of Sempe custom.

As far as the position of a Dsasetse of Sempe is concerned, a question put by counsel of the defendant to the chief linguist, J. A. Quaye, and the answer to it, satisfied me that there is a dispute of over twenty years' standing as to whether or not the post of Dsasetse is a recognised office attached to the Sempe Stool. Learned counsel asked: "Do you know "that there has been a dispute in the Sempe Division since 1935 over the recognition of the office of a Dsasetse?" The reply was "yes, that is so." That question and answer rule out anybody who claims to be Dsasetse of Sempe as a necessary consenting and concurring party to any dealings with Sempe Stool lands by the Sempe Mantse.

Suggestions to the chief linguist, J. A. Quaye, and the linguist, Thomos Nii Ofoli, that the defendant and one Nanaku Omarduru II were respectively the Stool Father and Queen Mother of Sempe, were denied by the witnesses. The chief linguist, J. A. Quaye, gave the names of the holders of those two posts. The defendant and his second **[285]** witness, one Kwabena Mankata, on the contrary deposed that he, the defendant, was Stool Father and Nanaku Omaduru the Queen Mother of Sempe. The defendant of course sated that he had had nothing to do with the present Sempe Mantse since he was enstooled sometime in 1940 or thereabout, and has taken no part whatsoever in the administration of the affairs of the Division all these years;and further that it is the Mantse and the elders who sit with him in council who have been dealing with matters of administration of the Division including dealings with stool lands. I cannot accept the evidence of the defendant and his second witness, both of whom impressed me very badly, against that of the chief linguist, J. A. Quaye, and the linguist, Thomas Ofoli, each of whom I accept as thoroughly reliable and responsible witnesses.

The administration of the affairs of a stool or family will not by native custom be allowed to be paralysed to satisfy the selfish or private motives of individuals or minorities. Therefore, if the holder of a traditional office connected with the stool or in the family declines or fails for reasons best known to himself to exercise the duties of that office, those who by custom are entitled to elect or appoint persons to that office are entitled either to remove such holder entirely and appoint or elect another person to the post, or to appoint someone to act in that post. That applies equally to the occupant of the stool or the head of family himself. Thus, I find that even if the defendant had, at some time, been

appointed Stool Father, of which there is no credible evidence, nevertheless, since upon his own showing he has refrained for such a long time from sitting with the Mantse in council, he cannot seriously be regarded as a person whose consent and concurrence in stool affairs, including dealings with stool land, is necessary.

It is not denied by the defendant that J. A. Quaye is linguist to the Sempe Stool. The defendant's second witness, Kwabena Mankata, went further and corroborated the evidenced on the part of the plaintiff that J. A. Quaye has been the chief linguist to the Sempe Stool since the enstoolment of the present Sempe Mantse.

The defendant's evidence is, that he and his brothers are the only persons in sempe who are entitled by custom to deal with Sempe Stool land. He contends that the Sempe Mantse and the principal elders of Sempe have no right to deal with stool lands and are not entitled even to be consulted in dealings with Sempe Stool lands. This proposition of native custom is so preposterous that it cannot bear examination. I reject it.

Upon the evidence before me I find that J. A. Quaye is the chief linguist of the Sempe Stool and was so in 1946; that W. S. Allotey, the present Mankralo of Sempe, held the same office in 1946; that Nii Moi Hammnond, Abose Allotey, Nii Akweifio, and the late A. B. Moi were some of the principal elders of the Sempe Stool in 1946; and that the late J. W.. Boye was the Stool Secretary of Sempe in 1946. I also find that **[286]** whatever office the defendant might have held in Sempe before the enstoolment of the present Sempe Mantse, he has not been Stool Father of Sempe since the enstoolment of the present Mantse, and has not been exercising any office as a principal elder of Sempe; consequently that his consent and concurrence in dealings with Sempe Stool land is unnecessary.

According to native custom it is only the occupant of the stool or the head of the family who is entitled, with the consent and concurrence of the principal elders of the stool or family, to alienate stool or family land. There can be no valid disposal of stool or family land without the participation of the occupant of the stool or the head of the family; but there can be a valid alienation of stool or family land if the alienation was made by the occupant of the stool or the head of the family with the consent and concurrence of some, but not necessarily all, of the principal elders of the stool or family. The occupant of the stool or the head of the family is an indispensable figure in dealing with stool or family land.

Therefore the law is that a deed of conveyance of stool or family land executed by the occupant of the stool or the head of the family and a linguist and/or other principal elders of the stool or family, purporting to be with the necessary consent, is valid until it is proved that such consent and concurrence were not in fact obtained. In other words, such a conveyance is voidable, not void, and can only be set aside at the instance of a stool or family if the principal members of the stool or family act timeously. See the case of *Quarm v. Yankah and Another* (1).

On the other hand, a deed of conveyance of stool or family land which on the face of it is executed only by the principal elders of the stool or family,

no matter how large their numbers, is prima facie void *ab initio*, since on the face of it the indispensable person—the occupant of the stool or the head of the family—is not a party to it. See the case of *Agblo and Others v. Sappor* (2). In such a case, however, it is open to the principal elders to prove tat the occupant of the stool or the head of the family consented and concurred in the transaction and had authorised the deed to be executed in the form in which it appears.

The document dated April 30, 1946, relied upon by the plaintiff in the first case, contains the following recital: "Between Nii Tetteh Kpeshi II, Sempe Mantse of Accra on behalf of the Stool of Sempe with the consent and concurrence of the principal Headmen, Asafoatsemei, Elders, Linguists and Councilors of the Stool of Sempe whose knowledge, consent and concurrence is requisite or necessary according to native customary law for the valid sale alienation or disposition of Sempe Stool lands and which knowledge consent and concurrence is evidenced by some of such persons subscribing their names or marks to these presents as witnesses." That document is executed by Nii Tetteh Kpeshie II, Mantse of Sempe, and bears the signatures or marks of J. A. Quaye, the Chief Linguist of Sempe, W. S. Allotey, Mankralo **[287]** of Sempe, Nii Moi Hammond, Abose Allotey, Nii Akweifio and A. B.. Moi, who, as I have found, were principal elders of the stool of Sempe in 1946. The recital in the document that it was executed with the knowledge, consent and concurrence of the principal elders of the Sempe Stool, but that it is only some of such elders and the linguist who signed and marked the document to evidence such knowledge, consent and concurrence of all the principal elders, has not been refuted. On the contrary, that recital is confirmed by the evidence of the linguist, Nii Ofoli, who deposed that although he, a linguist, and other elders were present at the execution, and consented and concurred in it, yet they did not sign the document.

A judgment delivered on September 11, 1948, by the Ga Native Court "B," Division 1, in a suit entitled *Muffat and Others v. Kpeshie Quaye*, was tendered in evidence and relied upon by the defence. It contained an order: (1) prohibiting Nii Tetteh Kpeshie and J. A. Quaye from selling the plaintiff's stool land without the knowledge, consent and concurrence of the plaintiffs in the said case; (2) a perpetual injunction restraining Nii Tetteh Kpeshie and the said J. A. quaye from alienating Sempe Stool lands; and (3) for Nii Teteh Kpeshie to account to the said plaintiffs for proceeds of all Sempe Stool lands alienated by him and J. A. Quaye since his, Nii Tetteh Kpeshie's, enstoolment.

Counsel for the defendant in this suit contended that the plaintiff's deed of conveyance in the first suit is null and void because it was executed in contravention of the judgment aforementioned. There is no substance in that submission. First, the writ was instituted in 1947, as shown by its number, 67/47, a year after the execution of the deed, and the judgment was delivered on September 11, 1948, more than two years after the execution of the deed. The orders of ran injunction contained therein cannot therefore affect the plaintiff's deed. Secondly, the order for a perpetual injunction is *ultra vires* the Native Court and is therefore void *ab initio*; no contempt will be committed in ignoring it, and the validity of a document executed in violation is not necessarily void. Thirdly, the

order that the occupant of the stool should account to subjects of the stool, although it is against every principle of native custom, and is also void for want of jurisdiction—see the case of *Abude v. Onano* (3)—pre–supposes that all alienations of stool lands made prior to the judgment were valid, and the moneys realised from such sales are lawful stool moneys for which the recipient is liable to account. The plaintiff's deed of conveyance executed on April 30, 1946, is a deed which effected one of those alienations; consequently the alienation made by it must, upon the said judgment, also be presumed to be valid.

I am satisfied both upon the law and the facts that the deed dated April 30, 1946, relied upon by the plaintiff, A. A. Allotey, is [JAD: Note: I cannot read the remainder of this paragraph, pp, 287, 3 WALR. Need to get another copy.]

[288]

A. A. Allotey carved the land in dispute in the second suit out of the land conveyed by the deed of April 30, 1946, to Benjamin Kpoku Tamaklose, conferred upon the latter, the plaintiff in the said suit, a good title in the said land.

The plaintiff put in evidence two judgments of this court, one delivered by van Lare J., as he then was, and another delivered by Quashie–Idun J. In each of those two cases one Charles Okoe Aryee was the plaintiff and the present defendant was the defendant. The land in dispute in each of those cases was a portion of Sempe Stool land conveyed to the said Charles Okoe Aryee by Nii Tetteh Kpeshie II acting with the consent of his Chief Linguist, the said J. A. Quaye, and other elders, as happened in the conveyance of A. A. Allotey, the plaintiff in the first of these consolidated case. The lands the subject–matters of those judgments are situate in the neighborhood of the land in disputed in these consolidated cases. Each of the two judgments was against the defendant Modua Abrahams for a declaration of title, damages for trespass and an injunction. The plaintiff also tendered in evidence an order made by van Lare J. on November 14, 1955, committing the defendant for breach of the order for injunction in the first of the said judgments.

The acts of the defendant which constituted the cause of action in the present suits were committed subsequent to the two judgments referred to as also to his commitment for contempt. Those acts, the defence put forward, and the attitude of the defendant during the proceedings in the present consolidated suits, manifest a determination by the defendant to molest all persons to whom the sempe Stool has made grants of Sempe Stool lands, no matter what the courts may decide. To allow the defendant to have his way is to encourage lawlessness in the country.

The nature of the trespass committed, taken together with the defendant's knowledge of two decisions of this court on similar conveyances of Sempe Stool land made by the Mantse and his elders, create a situation which makes it imperative that the trespass be visited with substantial damages.

There will be judgment for the plaintiff, A. A. Allotey: (*a*) a declaration of title to the land claimed in his write of summons, (*b*) £100 damages for trespass, and (*c*) an injunction restraining the defendant, his servants and agents, **[289]** from entering upon the said land or in any way whatsoever interfering with the

plaintiff in his ownership, possession and occupation of the same. There will also be judgment for the plaint [JAD note: again, the corner is torn off here. Judgment is for plaintiffs. Need to find a copy where pp. 288 is intact.]

Judgments for the plaintiffs.
S. G. D.

NOTES:

1.) The general rule for alienation of *both stool and family property* is that a valid alienation is one made by the occupant of the stool, or the head of the family, with the consent of the principal councilors. *See Allotey v. Abrahams*, 3 W.A.L.R. 280, 286 (1957).

2.) Ollennu says that alienation without the participation of the head is impossible: the head (or stool occupant) is an indispensible party. *Id.*

5.2.2 Quasie Bayaidee v. Quamina Mensah (1878) Sar. F.C.L. 171.

Full Court Report (todo: What court??)

March 27, 1878

[171]

The plaintiff here seeks to recover from the defendant a piece of land called "Odoomassie," the possession of which, he says, the defendant has unlawfully deprived him. The judgment of the Court below was, that the plaintiff should recover the land, against which judgment the present appeal is brought.

It appears from the evidence that *Bayaidee* purchased the land from Kofi Aigin for the price of $1\frac{1}{2}$ preguans; that Kofi Aigin was the owner of the land; that his purchase took place fourteen years ago, as plaintiff states, and in any case, a very considerable number of years ago; that upon purchase *Bayaidee* entered into possession of the land and cultivated it, and that his possession was not disturbed until seven months before he brought the suit in September last.

The ground on which the appeal was maintained was that **[172]** the land was family land; that Kofi Aigin, although the occupant of the stool, could not make a valid sale of the land alone, and that one of the members of the family, Eccua Assabill, protested against the sale at the time it was being effected. Now, although it may be, and we believe it is the law, that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened

up a the instance of the family, provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale.

This is obviously not the case, whereas here the purchaser has possessed for a series of years an undisputed ownership—has cultivated and improved the land, and has established a home upon it.

We are of opinion that whatever right of impeaching the sale the family possessed is barred by their acquiescence and the plaintiff's continued course of undisturbed possession.

And we order that the judgment of the Court that he should recover his land be affirmed, with costs of this appeal.

NOTES:

1.) Where the head of the family acts alone to alienate property, the alienation os voidable, but *not* void *ab initio*. *See Bayaidee v. Mensah*, Sar. F.C.L., 171, 172 (1878).

5.2.3 Quamina Awortchie v. Cudjoe Eshon (1872) Sar. F.C.L. 170

Before CHALMERS, Judicial Assessor.

March 17, 1872

[170]

Chiefs: When a man is head of the family and he has to sell land in case of debt having arisen in the family, is it necessary that he inform the members of the family and get their concurrence before the land could be sold?

If the purchaser know [sic] that the land he had to purchase was a family land and the man from whom he was purchasing it was the head of that family, he would not make the purchase from the head without requesting him to get the concurrence of his family. And if he paid his money to the head of the family without this, his money was considered lost, in respect he was fully aware that the land was family land.

If he did not know it, it would be that he was a stranger, and he would get back his money from the head of the family.

Interrogated: Whether any limit of time within which family must interpose if they desire to set aside a sale?

There is no limitation of time—even after lapse of time.

Interrogated: How consent should be signified?

[**171**] It would be necessary for all the members of the family to meet and discuss, and if there were land to be sold, all the members would meet and get strangers to be witnesses, and family would concur for payment of the debt: as many members as could be got should represent the family. When such a meeting and discussion has once been had, it remains good; it would be proved by the stranger who were witnesses.

JUDGMENT

Sale set aside, and Quamin Tawiah, who sold the land, ordered to restore to *Quamina Awortchie* 5 ozs., the amount he had received.

NOTES:

1.) In order to obtain the consents required to alienate family land, a meeting of the principle members should be held.

5.3 Capacity / Standing to Sue

Kwan v. Nyieni gives the general rules about capacity to sue in a family. They are discussed below:

5.3.1 Nyamekye v. Ansah

[1989-90] 2 GLR 152.

Court of Appeal, Accra

19 January 1989

APPEAL by the plaintiff from the decision of the High Court, Sekondi dismissing her action against the defendants for, inter alia, declaration of title to a piece of land in her branch of the royal family and allowing the second defendant's (the chief's) counterclaim for similar reliefs in the stool. The facts are suffiently set out in the judgment of Ampiah JA.

J B Short for the plaintiff–appellant.
A B Sam for the second defendant–respondent.
AMPIAH JA. The plaintiff in her action clamed against the defendant a declaration of title to a piece of land at Kejebil and an order of perpetual injunction to restrain the defendants, their agents, workmen and assignees from interfering with her family's rights over and in the disputed land. The defendants denied the plaintiff's claim and counterclaimed for a declaration of title to almost the same land. The learned trialjudge at the High Court, Sekondi on 2 August

1983,dismissed the plaintiff's claim and gave judgment for the defendants on their counterclaim. Against this judgment the plaintiff has appealed to this court.

The plaintiff has attacked the judgment on many grounds, one of which is that the judgment was against the weight of the evidence. The issues which the parties set down for determination were:

"(a) Whether the land in dispute belongs to the whole royal Ekissi family of Kejebil or to the T S Apia's branch of the said family.

(b) Whether the new cemetery was sold to the oman or whether the oman were licensees.

(c) Whether it is the plaintiff's family or the second defendant who has been collecting proceeds from the felling of palm trees at the cemetery.

(d) Whether or not the plaintiff or the second defendant is entitled to their respective claims."

I think the main issue was to the ownership of the land; the other issues being overt acts to establish ownership. Since both parties claimed title to the land, the onus fell equally on both not only to establish the root of their title but also the identity of the land they respectively claimed.

The plaintiff contended that since the first defendant did not give evidence, judgment should have been entered him. I do not agree. A party to an action need not give evidence himself. Provided he can adduce evidence of some sort from other sources, the court would have to look at that evidence in considering the totality of the evidence before it. And, in a case where the first defendant can be described as a nominal defendant who derived his claim through the second defendant adduces evidence sufficient to establish his title to the land. The first defendant would succeed or fail with the second defendant. What was necessary in the instance case was whether or not the second defendant had been able to establish his claim to the land.

It is not disputed that both the plaintiff and the second defendant belong to the royal Ekissi family, the owners of the Kajebil stool. The evidence however showed that there were three sections of this family originated by three woman and that succession to the stool was by rotation. The plaintiff and the second defendant belong to different sections of the royal family.

There was overwhelming evidence that individual members of the stool family occupied various portions of the land and that such portions transferred to members of their immediate family upon their death. Despite this, the second defendant persisted in his claim that these portions of the land belongs to the stool and that it was only the occupant of the stool who had authority over the land and who could deal with it. The plaintiff denied that claim and asserted that the portion of the land had been acquired and cultivated upon by her ancestor, T B Apia, and that upon his death that piece of land had gone to J D Fynn as successor and head of her immediate family. She claimed that she

had succeeded to that portion of the land after J D Fynn. It is not disputed that the plaintiff is a sister of Fynn and that she, Fynn and Apia belongs to the same section of the royal Ekssi family. Even through the plaintiff described her family's interest in the land as allodial it would occur to all who read the evidence that her family could only claim a determinable or usufrutuary title in the land. What the plaintiff really claimed as per her pleading and evidence was her right to occupation of a land first occupied by her ancestor, T S Apia, and an order to restrain the defendants from interfering with her rights over the land. The customary law position is that even through individuals and families may first cultivate on land, it is the stool which first settles on the land that has the allodial title to the land.

The occupation of land by individuals or families, quarters and sub-divisions of a community is a sine qua non to acquisition of land by a stool. Without original occupation by subjects there can be no stool land: see Ollennu, *Principles of Customary Land Law in Ghana* (1962 ed.) at p. 30. Even though the second defendant tried to show that the land claimed by the plaintiff was originally settled on by Nana Darko, the preponderant evidence showed that it was T S Apia, the ancestor of the plaintiff, who first cultivated crops on the land in 1919 or thereabout and that upon his death, J D Fynn took over control of the farm and the land as successor for his immediate family. It is this first cultivation which has given the plaintiff the false claim to allodial ownership. It must however be obvious to the plaintiff that before 1919 her stool family had settled on the land. It is instructive here to refer to Casely Hayford in his book *Gold Coast Native Institutions* at pp 45-46 where the principle is stated thus:

> "In the early stages of the Native System, upon the acquisition of lands by conquest or settlement by members of a given community, the lands so acquired or settled upon would be appointed among those worthy of them in the order of merit. Upon that basis, the Chief Military Commander, who subsequently becomes the King, would have his requisite share, and so would every member of the community down to the lowest ranks of the fighting men. Thus each man's land would be his own special property and that of his family, though the King, as overlord of all, would undoubtedly exercise sovereignty over the whole land, every inch of which however would have an individual family owning it."

The position of the individuals families, etc who occupy the land vis–à–vis the stool is that any portion of unoccupied or vacate the land which individual members of that community or tribe are able by their labour to reduce into their possession, becomes the individual's property and land so occupied would belong to their families after the individual's death. Since the evidence showed that it is the royal Ekissi family which constitutes the stool family of Kajebil and since all the claimants are of this royal Ekissi family, though of different branches, it was not difficult to resolve that the land belonged to the whole royal Ekissi family with the allodial title vested in the Kajebil stool but the family

which has immediate enjoyment and control of the land will be the individual or family which is in occupation: see *Wiapa v Solomon* (1905) Ren 410 and also *Concession Enquiry No 242 (Axim) 1780 and 1781* (CC) (1903) Ren 281.

The plaintiff was required therefore to show that her family had but first occupation reduced that portion to its use. The second defendant, for the stool, was also required, since he counterclaimed for the area comprising the cemetery, to prove that the area has specifically been reserved for a cemetery. On this issue counsel for the plaintiff contended that the judgment was against the weight of the evidence.

The plaintiff described her land defendant from the second defendant's. The second defendant admitted the boundaries pleaded by the plaintiff (see paragraph 3 of the statement of defence). The plaintiff however went further to call some of her boundary owners. Since Ahima, an adjoining boundary owner had identified himself with the defendants, it was not necessary that the plaintiff should call him. The plan (exhibit A) showed only two cemeteries on the land. The evidence showed that the old cemetery was at the outskirts of the town and that Krah's land was acquired for the old cemetery. After the acquisition, Krah lost all his interest in the land adjoining the plaintiff's. The plaintiff on the preponderance of the evidence was able to identify the land she claimed for her family.

Since the second defendant claimed that it was the land of Krah which was acquired for the cemetery which land her referred to as the cemetery land, it was incumbent on him to identify this land, if he was to succeed on his counterclaim. On this the learned trial judge said.

> "As I have already said the second defendant is disputing the title of the plaintiff to the land and claiming it on behalf of the stool and the royal family. Therefore it is not necessary for him to give the boundaries. All he is saying is that the land, the boundaries of which had been given by the plaintiff, is actually stool property and so I should declare it to be so ... There will be judgment for the second defendant on the counterclaim."

With respect to the learned trial judge he misunderstood the claim before him. If the second defendant had simply asked for a declaration that the whole land stool land there would have been no quarrel with the conclusion he came to on the second defendant's counterclaim. The second defendant's case was that the land had been taken away from Krah and used as a cemetery by the oman and that Krah had been given a new land. It was therefore necessary to identify Krah's land which was taken away. If indeed Krah acquired a determinable or unsfructuary interest in the land which made it necessary for his consent to be obtained before the taking over, then the plaintiff's assertion that T S Apia also acquire a portion of the land becomes plausible. This conclusion is further supported by the evidence that Nana Darko, Quayson, Ahima and others were said to have acquired specific interests in portions of the land and that upon their death these portions had vested in their respective branches of the royal

Ekissi family. Exhibit 1 confirmed this fact. Far from creating an estoppel on the plaintiff's family, exhibit 1 rather confirmed the customary law position that where an individual had reduced a portion of the stool or family land into his possession, the stool or family could not dispossess that person without his consent and concurrence. It was the stool's acceptance of this customary position which made it necessary to replace the land which it took away from Krah. Nana Angama Tsia III's (J D Fynn's) evidence in exhibit 1 only went to show that the land was taken from Krah by the stool and that the land the subject matter of the dispute then was duly given him in replacement. The plaintiff did not accept that the whole land belonged to Krah. It became necessary therefore for the second defendant to identify the land which was taken away from Krah. He did not call any witness. It was clear from the evidence that many of the matters the second defendant spoke of, had occurred when he was not a chief. He also did not have personal knowledge of most of these matters. There were elders of the stool who had more personal knowledge about these matters, yet none was called to testify; not even the successors of Krah. Thus, while at the close of the case the land claimed by the plaintiff was more identifiable, that claimed by the second defendant remained vague. The learned trial judge was therefore wrong in cursorily dismissing the duty on the second defendant to establish the boundaries of the land he claimed and given him judgment on his counterclaim.

With regard to the exercise of overt acts of ownership over this land, there was abundance of evidence from the plaintiff's side. In fact, the cross–examination of the plaintiff by defence counsel showed that the plaintiff had been collecting the proceeds from the land for some sixteen years. Counsel claimed that such collection was illegal. The second defendant admitted that T.S Apia cultivated crops on the land. He further admitted that it was D. J. Fynn to whom the drink (£4) for the acquisition of the land for the cemetery was given. The second plaintiff witness whom the learned trial judge described as a lair, could not have been telling lies. The second plaintiff witness whom was one I.B. Eshun whose evidence was about the collection of tolls from the various sections of the royal Ekissi family. The third plaintiff witness, another witness called Eshun, spoke about his working on the plaintiff's portion of the land through his father. The only witness who was said to have taken part in the acquisition of the land for the new cemetery was Thomas Kweku Ankama, the third plaintiff witness .there was an obvious mistake in numbering the witnesses, but the substance of Ankama's evidence was that land had been granted to the oman by the plaintiff's family for the cemetery . The second defendant agreed to this but said J. D Fynn had received the money for the stool. It was then suggested to the second defendant that:

" Q When something is taken from the stool and there is any thanks to be given, it is given either to the linguist or the occupant of the stool himself.

A That is not true. The chief orders the clerk to go and show the land, if anything is to be given it is to the clerk for the chief and not direct to the chief. A linguist is not a member of the family."

But when he was challenged that Fynn never received the "drink" as stool clerk , he led no evidence to rebut it. The plaintiff collected proceeds from the land for a period of about sixteen years without any objection. This included a period when Fynn (then incapacitated) was in charge of the land and about six years when she became the successor and head of her immediate family. There was thus plenty of evidence from the plaintiff's side as to the exercise of acts of ownership over this land.

As to whether the new cemetery was sold to the oman or that the oman were more licensees on the land, the answer was clear: Even though in their pleading the defendants had insisted that the land had been sold absolutely to the oman (see paragraph 5 of the statement of defence), they changed their story in their evidence. This was clearly inconsistent with their pleading. The second defendant's evidence that the stool was the one who was entitled to collect the proceeds from the cemetery cuts across his claim that the land, having been sold absolutely to the oman, the principle in *Attah v Esson* [1976] 1 GLR 128, CA is that where agricultural land has been given to a tenant in perpetuity, customary law would not permit a landlord to enter and gather the fruits of economic trees planted on it by the tenant. The court held further that the customary law rule that except by special arrangement the landlord was entitled to enjoy the fruits of economic trees such as palm and cola trees which already existed on the land had not today been shown to be unreasonable and must therefore be accepted as still governing the relationship of customary landlord and tenant. The evidence that the land was only given to the oman for the burial of the dead and that the grantor reserved to himself the right to collect the proceeds from the economic trees already on the land, was amply supported by the conduct of the plaintiff and her family who continued to collect the proceeds from the economic trees which the evidence showed were cultivated by Apia on the land before the release of the land to the oman. The evidence showed overwhelmingly that the land for the cemetery was not sold and that it was the plaintiff's family which has been collecting proceeds from the felling of palm trees at the cemetery. This was also an overt act of ownership over the land.

The fact that the whole land belonged to the royal Ekissi family and for that matter the stool as allodial owner could not deprive the plaintiff's family which has been shown to have exercised ownership right s over the land, and continued the exercise of those rights, of their title to the land. Under customary law, the plaintiff's family holds a determinable or usufructuary estate in land. And, as against the allodial title, the determinable estate is just a qualification or burden on the absolute or final title: see *Tijani v The Secretary to the Government of Southern Nigeria* [1921] 2 AC 399, PC. The plaintiff's family's determinable estate has co-existence with the absolute ownership. Its existence is concurrent with the existence of the absolute ownership which latter is generally dependent upon the occupation or possession by the subject or family. So long as the subject or family acknowledges his loyalty to the stool or tribe his determinable title to the portion of the stool land he occupies prevails against the whole world, even against the stool, community or tribe. The subject's occupation of the land and his acquisition of title is not by contract:

see Ollennu, *Principles of Customary Land Law* (1962 ed.) at 54-57. There is a long string of case on this point: see *Quarm v Yankah II* [1930] 1 WACA 80; *Golightly v Ashrifi* [1955] 14 WACA 676 and *Kakrah v Ampofoah* (1957) 2 WALR 303. The stool has no right to grant land in the occupation of a subject to anyone—subject or stranger—without the prior consent and concurrence of the subject in possession. Further, that the subject can successfully maintain an action in defence of the determinable estate in the land against the world at large, including the grantor–stool. What the plaintiff's family acquired in the land had the character of a family land which the head of the family with the concurrence of its members is entitled to occupy as family land and which right includes all the incidents of living, whether by residence on the land by members of the family or by lease of the land to strangers, ie so long as they do not alienate the land from the stool of which they are subjects: see *Annan v Ankrah (Consolidated)*, Land Court, Accra, 27 October 1952, unreported. The family's estate is inheritable and alienable.

The learned trial judge also held that the plaintiff had no capacity to sue and that whether the land was stool land or land for the whole of the royal Ekissi family, the plaintiff, not being the occupant of the stool or head of the royal Ekissi family, could not bring action in respect of the land. In fact the judge's conclusion was that even able to establish that she had been duly appointed as head or successor by the family, she could not sue.

As a general rule the head of a family as representative of the family is the proper person to institute suits for the recovery of family land: see *Kwan v Nyieni* [1959] GLR 62 at 72. And, where the authority of a person to sue in a respective capacity is challenged, the onus is upon him to prove that he has been duly authorized. He cannot succeed on the merits without first satisfying the court on that important preliminary issue: see *Chapman v Ocloo* [1957] 3 WALR 84.

In the instant case, the plaintiff sued as the head of her immediate family who are natives of Kajebil. Her evidence was that the land had originally been cultivated by T S Apia of her branch of the Ekissi family. J D Fynn also a member of her family had succeeded Apia on his death and after Fynn had died she had become customary successor and head of the immediate family of Apia. Her evidence of having succeeded to these positions, was amply supported through how she had been put into these offices was never shown. The evidence however showed indisputably that before and after the death of J D Fynn, the plaintiff had been exercising control over the land without protest from any corner. Before the death of Fynn, the plaintiff had controlled the land because even through Fynn was the successor of Apia and head of the family, he was incapacitated. And, she had done so because she had become the successor and head of the immediate family. She exercised such control over the land for about sixteen years before this action. The second defendant's assertion that one Kofitia Tutu had succeeded J D Fynn was never substantiated. It was a lame attempt to challenge the plaintiff's assertion.

The customary law position is that a successor when appointed is ipso facto the head of the immediate family. The head of family need not be formally

appointed. It is sufficient for such appointment if he is popularly acclaimed or acknowledged as the head. In the absence of appointment or acclamation the eldest male member of the family failing him, the eldest family member of the family, is automatically the head of the family: see Sarbah, *Fanti Customary Laws* (1897 ed) at 35; also *Mills v Addy* (1958) 3 WALR 357. Any person whom the family permits to deal with the family property for and on behalf of the family, or to exercise the functions of the head of the family, is in law, deemed to be the head of the family until the contrary is proved. In *Amah v Koifio* [1959] GLR 23, it was held, inter alia, that although the plaintiff had not been formally appointed head of his family, since the evidence showed that he had the family's authority to take care of the family property, he was by implication head of the family entitled to litigate the family's title to the property. See also *Mills v Addy* (supra). The preponderance of the evidence in this case supported the plaintiff's assertion that she had succeeded Fynn and that as the unchallenged elder female of the Apia family, which the evidence also indisputably established, she become the head of the immediate family. The judge's finding that the plaintiff has not established her capacity was therefore unsupported. In the case of *Kwakye v Tuba* [1961] GLR (Pt II) 535, the successor to a deceased person sued some people in respect of self-acquired property of which the person he succeeded died possessed; the head of the ancestral family applied to join on the ground that as between him, the head of the whole family, and the successor to the deceased, he as head of the whole family was the person entitled by customary law to litigate over the property left by the deceased. In the course of its ruling the court said at 537-538:

> "... learned counsel failed to appreciate that the term 'head of family' and 'successor' are terms which mean one and the same thing, and are interchangeable and that the only time that they are used together as having separate denotations is where it is necessary to distinguish *the head of an immediate family of a deceased from the head of wider family* of which the immediate family of the deceased is a branch. It is a distinction without a difference. This distinction in the use of the terms is illustrated in the judgment of the Land Court, Accra, in the case of *Serwah v Kesse* [Oll CLL 20; affirmed [1960] GLR 227, SC]
>
> ...
>
> What that means is that, upon the death of a person interstate, although his self–acquired property becomes the property of the whole of his family, the immediate and extended together, the right to immediate enjoyment of the beneficial interest in it, and to the control of it, vests in the immediate or branch family, and the person appointed successor to the deceased is, in law, the head of that immediate or branch family. *As such head he is the proper person to sue and he sued in respect of that particular family property.*"

(The emphasis is mine.) Thus, the plaintiff as the head of the immediate family was the proper person to sue when the defendants tried to interfere with the rights of her immediate family.

An appellate court has no right to disturb findings of fact made by trial court except where the findings are not supported by the evidence or are based on wrong principles of law. As I have tried to show, the findings by the learned trial judge on the main issues were wholly wrong and manifestly contrary to the evidence and principles of customary law; they cannot be supported.

In the circumstances, I would allow the appeal and set aside the judgment. I would enter judgment for the plaintiff on her claim and dismiss the second defendant's counterclaim.

OSEI–HWERE JA. I agree.

LAMPTEY JA. I also agree.

Appeal allowed.

D R K S

Chapter 6

Misc. (not yet organized) cases

6.0.2 Yeboah and Others v Kwakye [1987-88] 2 GLR 50.

Court of Appeal, Accra

5 June 1986

Appeal by the defendants against the decision of the High Court that the disputed landed properties belonged to the plaintiff's family in an action for declaration of title to land. The facts are sufficiently set out in the judgment.
Osei–Hwere JA delivered the judgment of the court. The properties in dispute may conveniently be lined up in two groups. In one group in the plot of land at Nsukwao Koforidua which is partly developed into swish and cement–block buildings. In the other are the three cocoa farm at Suhien Aboye a sugar cane farm at Nsukwao, Koforidua Old Estate Road and a food crop farm near the cemetery, Koforidua. The cement–blocks buildings comprise one storey structure (the main building) and two outbuildings commonly called "boys' quarters" Because all these buildings stand in close proximity they have been registered at the Koforidua Municipal Council as one unit with the registration number T 29. the registered owner is given as Afua Pokua/J Y Donkor.

Afua Pokua (now deceased) was the mother of J.Y Donkor, described as Yaw Donkor at the trial. Afua Pokua had two sisters and two brothers, namely Abenaa Mframa. Amma Tanoa Kwame Adjabeng and Tuffour. It does appear that Amma Tanoa predeceased Afua Pokua. On the death of Afua Pokua her sister Abenna Mframa was by-passes as her successor because she had voluntarily disclaimed her ties with her matrilineal family. Consequently her only surviving child. Yaw Donkor, was appointed successor. On the death of Yaw Donkor his family appointed Kwaku Kwakye, the son of Abenaa Mframa (the

plaintiff herein) to succeed. The plaintiff mounted this action now on appeal against the defendants because Yaw Donkor, by his will purported to dispose of the disputed properties to his wife and children.

The plaintiff made the following averments in paragraph (3) of his statement of claim:

> "(3) The house situate at Nsukwao, Koforidua and known as house No T 29, the farms more particularly described in the writ of summons and the undeveloped plot were originally built, cultivated and acquired by Madam Afua Pokua."

In answer to the above, the first to fourth defendants (who contested the suit) pleaded in paragraph (3) of their defence that the plot on which house No. T 29 was built was bought by Yaw Donkor consisting of three mud rooms. The plaintiff challenged this in his reply by the following.

> "(3) ... The plaintiff says that the house was built by Madam Afua Pokua and roofed by Kwabena Anane the head of family. Okonfo Kwadwo father of Afua Pokua gifted the land on which house No. T 29 stands to Afua Pokua."

These averments by the plaintiff admit, in short, that Afua Pokua built house No T 29 and cultivated the farms and also that the plot on which she built was gifted to her by her father. Having made these admissions, which stood unamended, these was no room for the plaintiff and his witness to depart from these admissions and the court, indeed, ought not to accept a case countray to and inconsistent with that which the party has pleaded. The authorities referred to by the trial judge are in point namely. *Dan v Addo* [1962] 2 GLR 200, SC and *Allotey v Quarcoo* [1981] GLR 208 CA.

The plaintiff's admission that Afua Pokua built the houses and cultivated the farms did not preclude him from explaining how she came by these acquisitions. The admission did no more than to state the factual truth that she was the instrument that brought them about, it was far from admitting that the block houses and the farms were her "self–acquired" properties in the legal connotation familiar to as all, i.e they were not acquired as family properties. It was the case for the plaintiff that Afua Pokua succeeded to other family properties notably those of her mother Kyaama (wrongly spelt in the record) and of her brothers Adjabeng and Tuffour. One of these family farms was hewn down during the cocoa rehabilitation and out of the compensation paid she put up the main building of the block–house . Yaw Donkor was put in charge of this building, and as the eldest male of the plaintiff's family his name was permitted to be used on the plans. The family subsequently authorized Yaw Donkor to take out a bank loan to complete the boys' quarters. Afua Pokua could not pay up the bank loan before she died. The loan was still outstanding when Yaw Donkor succeeded his mother and as the bank put up notices to sell the house the family authorized the sale of family land to redeem the mortgage. The family's claim to the properties as broadly stated did not seen inherently incredible.

Although the plaintiff's head of family, the first plaintiff's witness tried to impress on the court below that the farms in dispute came to Pokua by succession yet the second plaintiff witness contradicted him and came out with the truth, or at least something very close to it according to her, Adjabeng tilled a virgin forest which he left for the whole family. Afua Pokua succeeded to this property and cultivated the cocoa farms. The only witness for the defendants. Nana Oko Yaw Acheampong (who, although not related to the plaintiff's fame in the strict sense, is closely associated with it), gave evidence on the cultivation of the farms by Afua Pokua which was substantially the same as that of the second plaintiff witness. The slight twist to his evidence was that Adjabeng acquired a virgin forest and asked his sisters to cultivate it to the best of their capacity and upon that open invitation Pokua cultivated the cocoa farms.

The evidence of both the second plaintiff witness and the first defendant witness is consistent with the acquisition of the virgin forest by Adjabeng as family land. There was no evidence of a gift of the land to his sisters by Adjabeng. That being so the customary law made its full impact. That law is that where a family member made a farm on vacant family land even by his own private resources and unaided by the family, whether with or without the prior permission of the family, he acquired only a unsufructuary life interest therein. Although the life interest is fully alienable (eg it can be given as security for a loan) it is not open to the life tenant, unless he acts with the concurrence of the head and principal members of the family, to alienate any greater interest than his life estate. On his death, the interest in the property vests in the family. It follows that any disposition by the life tenant purporting to have any other effect, such as a devise under his will, shall be ineffective: see *Amoabimaa v Okyir* [1965] GLR 59, SC: *Biney v Biney* [1974] 1 GLR 318, CA and *Osei Yaw v Domfeh* [1965] GLR 418, SC.

The defendants resisted the plaintiff's claim that the disputed properties are his family properties which have descended on him by succession. Their defence was that Yaw Donkor bought the plot together with the swish house and that he obtained a bank loan to erect the cement–blocks buildings. They also contended that Afua Pokua made a gift of the farms in dispute to Yaw Donkor for which he paid "aseda" to his mother in the presence of Oko Yaw Agyeman, Tuffour, Afua Ntum and other members of family.

The first defendant is the widow of Yaw Donkor. From her evidence she got married to Yaw Donkor in 1966, some eight years (so say the defendants) after the cement–blocks buildings had been put up and some 28 years after the alleged gift of the farms to her husband.

It was contented on behalf of the plaintiff that the block buildings (at least the main building) started to spring up between 1947 and 1949. She obviously had no first–hand knowledge on how these properties were acquired except for what she alleged was passed on to her by her husband and mother–in–law. The eight plaintiff dwitness was married to Yaw Donkor from 1937 to 1949. She denied that her mother–in–law gifted any farms to her husband whilst their marriage subsisted. The effect of her evidence was that in the labour market he was "a rolling stone that gathered no moss." She said that when lived in

the swish house with her husband the first defendant witness was a young boy attending school and that he did not live in the house with them. The evidence from the plaintiff's side was that Tuffour could not have witnessed any gift in 1933.

It is this same first defendant witness who was forward to prop the defence. He said that he witnessed the gift of the farms in 1938 although he admitted he was in standard three in the elementary school in those days. He conveniently smothered the telling effect of this admission saying that he was then sixteen years old. He told unlikely story that although the land on which the swish house stands belongs to Afua Pokua yet her son Yaw Donkor bought this land together with the mud house from his mother's husband. The alleged reason for this strange sale was that Afua Pokua had decided to end the marriage and he was therefore bent on disposing of the house.

The claim by the defendant that Yaw Donkor purchased the plot with the mud–house flew in the face of Yaw Donkor's own declaration against interest. For in the purported devise of one of the three rooms of the swish house to the plaintiff, he declared that his mother built that house which he inherited from her after her death. In the result, the evidence of the first defendant witness, the defendants' mainstay, turned out to be mere humbug.

The learned trail judge, who saw and heard the parties and their witnesses came to the following conclusion:

> "On the preponderance of the evidence, I am satisfied that of the two versions the case of the plaintiff is more likely to be true. I accept it and reject that of the defence. I hold that the piece or parcel of land on which house No T 29 stands, the building and plot as well as the farms which form the subject matter of the action are family properties of the plaintiff and that they were not sel–acquired properties of the Yaw Donkor to be devised by this will"

In regard to the conduct of Yaw Donkor the trial judge ventilated his opinion sharply and scathingly as follows:

> "There is no doubt that the bad habit which (he) had formed over the years in selling family lands without the knowledge and consent of the family was firmly made out. The plaintiff established a prima facie case."

This opinion was inspired by the testimony of the queenmother of New Juaben, the fifth plaintiff witness, who informed the court that a complaint was once lodged before her by the members of family of Yaw Donkor that he had been selling family lands. According to her Yaw Donkor owned up with the explanation that he utilized ¢400 of it to Madam Mframa. She said that Yaw Donkor was reprimanded and they took a bottle of schnapps from him obviously as pacification. The fifth plaintiff witness was cross–examined to show that the complaint before her was really that Yaw Donkor had sold family plots to build for his wife, the first defendant. The first defendant herself admitted under

cross–examination that she once heard the head of family's announcement that all those who had bought land from Yaw Donkor should come and see the family. The thrust of the evidence of the fifth plaintiff witness and the suggestion to her in cross–examination together with the admission of the first defendant is to demonstrate and confirm that Afua Pokua succeeded to other family properties (apart from the farms she cultivated) and that these properties were transmitted toYaw Donkor as successor.

It may be pertinent to throw some light on the nature of primary facts whereof a trial judge is oblidged to make a finding. I can do no better than borrow the observations of Abban JA who read the judgment of this court in *Domfe v Adu* [1984-86] 1 GLR 653 at 660, CA. He stated:

> "I have to state that the primary facts which a trial judge may find as having been proved to his satisfaction are those necessary to establish the claim of a party or in some cases the defence and which have been alleged on one side and controverted on the other. It must also be borne in mind that the trial judge is not required to make findings of fact in respect of irrelevant matters on which the parties have led evidence when such findinds would not assist in the determination of the issues involved in the case."

The principal issue which the trial judge posed for his determination was whether the disputed properties are family properties of the plaintiff or the self–acquired properties of the late yaw Donkor. He concluded the issue in favour of the plaintiff. The defendants are aggrieved by this conclusion, wherefore their appeal to this court.

In *Kyiafi v Wono* [1967] GLR 463, CA it was held, as stated in the head note:

> "(1) the principles which regulate the right of an appellate court to interfere with findings of fact made by a trial court were as follows: where the appellate court was satisfied that the reasons given by the trial court in support of its findings were not satisfactory, or where it irresistibly appeared to the appellate court that the trial court had not taken proper advantage of having seen and heard the witnesses, then in any such case the matter would become at large for the appellate court, in which case the appellate was under a duty to give such decision as the justice of the case required, and, if need be, reverse the decision of the trial court should not interfere with findings of fact made by a trial court."

It does truly appear from the issue posed by the trial judge, that the issue of the gift of the farms pleaded by the defendants eluded him. This no doubt, did spring from the evidence of the first defendant, which suggested that Afua Pokua and her son Yaw Donkor made the farms together. Although the trial judge left this issue of the alleged gift of the farms at large this court is entitled to make up its own mind on it. Having regard to the evidence that the first

defendant witness was too young to have witnessed any such gift of the farms and also that Tuffouor had died in 1933 we are unable to accept his testimony on that score. Besides, the evidence of the first plaintiff witness that Yaw Donkor never announced any gift of the farms to him on his succession commends itself for acceptance.

The finding by the trial judge that all the properties in dispute are family properties is borne out by the evidence. A look at the mortgage deed, which was capitalized upon, disclosed that when that document was executed in 1958 the "one storey structure and outbuildings" were already standing and that these and the plot of land were used as security for the loan. The mortgage itself was to enable Yaw Donkor obtain "banking accommodation or facility on loan account and/or current account and/or any other account sanctioned by the bank." No stated amount was stipulated in the mortgage. This may well explain why the plaintiff and his witness could not inform the court about the amount obtained as loan. The mortgage deed also exposes as false the evidence implied by the first defendant and the second defendant witness that Yaw Donkor initially raised a loan from the Ghana Commercial Bank to put up house No T 29 and that was never built by Afua Pokua.

The defendants could not take any advantage of the fact that Yaw Donkor took a lease of the plot in his name from Nana Agyeman Akrasi II, Omanhene of New Juaben, or that he executed the mortgage deed in his name. The said Omamhene testified as the seventh plaintiff witness to the effect that during the tenure of his office Yaw Donkor came to him with a prepared leases witnessed by his mother and asked him to sign. According to him Yaw Donkor told him he wanted to take it to the bank for a loan to develop his mother's house. This lease was executed only four months before the mortgage deed. From the record the evidence of the seventh plaintiff witness was not effectively shaken. We have no doubt that the trial judge admitted this piece of evidence as one of those factors, which preponderated the evidence in favour of the plaintiff.

The argument that the lease and the mortgage deed operated as estoppel against the plaintiff was in our view, misconceived because Yaw Donkor knew the true purpose why those documents were made in his name. The purpose was made articulate by his declarations to the fifth plaintiff witness and the seventh plaintiff witness. The acceptance of the plaintiff's case necessarily implied the acceptance of the evidence that Afua Pokua stated the block buildings with the proceeds from rehabilitation the family's cocoa farm. On the merits of the case we hold that the general conclusion of the court below cannot be faulted.

Ground (4) of the supplementary grounds of appeal states that he the action was incompetent because the defendants were not the proper persons to be sued, since probate of the will of the late Yaw Donkor had not been granted and the defendants were not in possession as devisees. This ground reiterated the same submission which did not find favour with the trial court. The learned judge reasoned that the family should not stay and look on, supposing the executors did not take probate, whilst the beneficiaries of the will enjoyed the properties. He found that the defendants were sued because they live in the house and they are laying claim to it. As the action sues for a declaration of title we hold that

it is well grounded, the absence of probate notwithstanding.

Although section 61 of the Administration of Estate Act, 1961 (Act 63), for instance, provides that the grant of probate is necessary to entitle an executor to administer the property of the testator yet it states at the same time that before probate the executor may for the benefit of the estate exercise the functions which pertain to his office, but he shall not be entitled to make a disposition of any property. In *Catheline v Akufo–Addo* in [1984-86] 1 GLR 57, CA, this court followed the dicta of Lord Parker of Waddington in *Meyappa Chetty v Supramanian Chetty* [1916] AC 603 at 608, as well as some of the English authorities on the point, and held that as an executor derives his title and authority from the will of the testator and not from any grant of action vests in him upon the testator's death and the consequence is that he can institute an action in the character of executor before he proves the will, although he cannot make any dispositions before then. His right to sue is, of course, reciprocated by his liability to be sued. In the same token a beneficiary who meddles with the estate before probate can be sued to challenge his title.

Unfortunately the decision in *Amponsah v Kwatia* [1976] 2 GLR 189, CA demolishes something the last gallant effort of counsel for the defendants to save something of the appeal. His complaint was that the trial judge erred in decreeing perpetual injunction against the defendants, ie the widow and children of Yaw Donkor. He argued that as a widow the first defendant was entitled to live in the house until she is customarily divorced and also that the children are entitled to live there subject to good behaviour. He said that the effect of the injunction is to deny them those rights. The truth is that defendants have no such inherent rights. The court below found that house No T 29 is not the self–acquired property of Yaw Donkor but family property to which he succeeded. The wife and children of Yaw Donkor not being members of the plaintiff's family. There is no evidence that the plaintiff's family has revoked the licence.

It follows that the perpetual injunction cannot stand so long as the licence of the defendants has not been revoked. Subject to this we have formed the opinion that the appeal ought to be dismissed.

Appeal dismissed.
M C N – N

NOTES:

1.) The case above indicates that by customary law, at least in Akan areas, the right of the children of a deceased man to reside in their father's house is subject to good behavior. That is, chilren may be expelled from their father's house after his death, and the estate goes to the father's maternal family. The Intestate Succession Law (PNDCL 111), changes this rule.

6.1 Aquiescence and Adverse Possession

In the following case a license or tenancy (the terms seem to be used interchangably in this case, although they are significantly different) is at issue, rather than a usufructuary interest. What are the differences between the rights of a usufructuary and the rights of a licensee? How does the court determine that the appellant is a licensee rather than the holder of a usufruct?

6.1.1 Mensah v. Blow

[1967] G.L.R. 424

Court of Appeal

12 June 1967

Appeal from a decision of the Court, Cape Coast, given in its appellate jurisdiction on 26 February 1964, unreported, setting aside a judgment dated 30 December 1960 that was given in favour of the appellant by the magistrate of the Local Court, Komenda, upholding the appellant's claim to ownership and possession of a piece of farm land. The facts are sufficiently stated in the judgment of Lassey J.A.

Lassey J.A. This is an appeal from a decision of the High Court, Cape Coast, given in its appellate jurisdiction, dated 26 February 1964, (unreported), setting aside a judgment dated 30 December 1960, given in favour of the plaintiff-appellant (hereafter called the appellant) by the magistrate of the lord Court of Lomenda, in which he upheld the claim of the appellant to ownership and possession of a small piece of farm land known as "Kotokum" situate at Bisease in the Central Region of Ghana, and directing that judgment called the respondent) Ekua Blow for possession of the said piece of farmstead.

The main question arising on this appeal is whether a licensee, who has been permitted according to custom to occupy and use a piece of another person's ancestral land and who in fact has enjoyed an unfettered occupation and use of portions of that land, could rely on such leave and license as a defence to a claim by the true owner or lesson or his descendants to exercise their natural rights of ownership or possession over portions of such an ancestral land not actually farmed upon or specifically reduced into effective use or occupation by the licensee at custom. In other words according to customary practice, can an owner of land over which he has permitted a licensee to live and farm exercise his undoubted right of ownership or use of portions of this land contemporaneously with the right of the license to live on and use those portions of such ancestral land which have not been specifically allocated to or appropriated to actual use by the tenant or licensee, or is the original grantor or his descendants' right to possession or to occupy and use this land exclude entirely because of the subsistence o the licensee?

At the date of the proceedings in the Local Court at Komenda, the appellant's claim being one of damages for trespass, and the defence being that the

land on which the disputed farmstead was cultivated was a portion of the respondent's ancestral land, ownership or title was thereby indirectly put in issue, and the court should be satisfied that the appellant had discharged the onus which lay on him of demonstrating beyond reasonable doubt that the title to the disputed land or farmstead was in him or his family.

What is in dispute between the appellant and the respondent was which of them is presently entitled to possession of that of the land on which lies the disputed farmstead. There was no dispute between the parties as to the identify of the farmstead being claimed by the appellant; equally it was not seriously disputed that the said farmstead is situate on a portion of land appurtenant to the land on which the respondent and her family have been living and are in occupation. The fact that the respondent's ancestors had occupies and used portion of land on which the disputed farmstead was made was admitted at the trial by the appellant; but he further explained that prior t the trespass complained of by him, the respondent or her ancestor did not enjoy exclusive possession of the whole of the area of which the farmstead in dispute formed part because their long occupation of a portion of the entire land which the appellant claimed to be his ancestral was with the permission of his ancestors.

At the trial the appellant's case in a skeleton form was that the land on which the disputed farm is situate was his family's title to the whole of the; land and also to show how the respondent came to be on the land. The trial, magistrate believed and accepted the evidence of the appellant's witness, Kwaima Esiampong, a farmer living at Bisease, who testified to the effect the over 50 yeas ago two elderly men in the respondent's line of descent accompanied by some women sought permission form the appellant's ancestor one Kwasi 'Kunto to live on the appellant's family land. The evidence showed that the respondent's ancestor hailed from the Wassaw area where they migrated from.

According to the appellant's third witness the respondent's ancestor's request to be permitted to stay with the appellant's ancestor's was favourable considered by the elders at a meeting convened for that purpose, and the respondent's elder Enimah and his people were allowed to settle on the appellant's land on which they founded a village. Later members of the two families intermarried and their descendants, including the parties to the present dispute, indiscriminately and appropriated to their respective uses unoccupied portions of the appellant's ancestral land without let or hindrance from either quarter.

This was the state of affairs prevailing before the present dispute over the appellant's right to own or possess the farmstead in question arose. The appellant went on further to claim that he first cleared the virgin forest over the particular area of his family land by his own industry unaided by the respondent with the internton of cultivating it into a farm for disputed farmed which the respondent had trespassed upon by permitting his agents, some "Fante man" to plough without his authority.

The respondent on her part admitted sending someone to clears the farm in dispute, which she maintained was on a portion of her ancestral land which members of her family had occupied for many years without any let or hindrance from the appellant or his ancestors. It would seems from the evidence

as a whole that during the period of occupation by the respondent or her ancestors no tribute or tolls were demanded from or paid by them as an act of acknowledgement of the appellant's ancestral title or ownership to the entire land of which the disputed farmstead formed part.

Before resolving the preliminary issue of title or ownership to the whole land inhabited, as it were, be members of both the appellant's and the respondent's families, the trial magistrate inspected the locus quo and found at his inspection that one kobina mensah a nephew to the appellant and also a son-in-law to the respondent, was in occupation of portion of the land by the permission of the appellant, his uncle. The court was not impressed by the respondent's evidence as to how her ancestors became possessed of the land of which the farm in dispute formed parts, and consequently dismissed her adverse claim in formed part, and consequently further held that the respondent's family's long use and occupation of the land has always been with the permission of the appellant's appellant was first cleared by himself.

In my opinion, the first question which logically the learned judge of the appellate high court had consider was which of the two parties to the dispute had exclusive right to own or possess the farmstead in question. In other words, in view o the evidence regarding the use and occupation of portions of this land by members of both families can the respondent, notwithstanding her family's permission, lay any valid claim to the disputed territory actually found to have been cleared by the appellant? Instead the learned judge applied wrong principles of customary law and erred in holding that the and continues stay and use of portions of the entire land by the respondent and member of her family, even though admitted to be with the permission of the appellant, ought to extinguish the title of the true owner as found on the evidence by the trial local magistrate, and prevent the appellant as the true owner from recovering possession, and rather permit the respondent as a licensee or stranger-tenant to retain absolute or exclusive use of the unoccupied portions of the said land. With respect, I think the learned appellate High Court judge erred in coming to this conclusion and dismissing the appellant's claim to the dispute farmstead.

The evidence given by the appellant's third withness in this case as to how by the appellant, which piece of evidence the trial court accepted as true, illustrates occupation and use of another's land was the relevant portion of this evidence as, in my view, it contributes much to emphasize the importance of the principle of customary law with which this appeal was concerned. Kwamina Esiampong, the appellant's third withness said among other things as follows;

> "I remember over 50 years ago two elderly persons one name Emmah and the other by name Essel Komfo, came with tow elderly women one by name Adjoa Blow but I have forgotten the name of the other, with two young person to the elder of plaintiff name Kwasi, with the plea that they were coming to stay with him and would never return to their place of desertion. This plea was put before elders (stool elders) of Bisease and their verdict to accept them. This land in question was given to Enimah defendant's elder by the plaintiff's

> elder for settlement. Enimah later died after they had the elderly woman too died. The village then had developed nicely."

This piece of evidence shows that the true owner of the land, Kwesi Kuntoh, the appellant's ancestor, had permitted or licensed Enimah, the respondent's ancestor, had permitted or licensed Enimah, the respondent's ancestor and his follower to stay on and occupy the land building on it or cultivating food or cashes on it and to enjoy it as improved. Customary food or cash crops on it and to enjoy it as improved. Customary law regard the stranger Enimah as a lice set or estate in the land to the licensee, is the result of a contract or an implied agreement. It has certain important characteristic features about it. Theses are : (1) The owner (or lesser as he is sometimes called) of the must be willing to allow occupation and user of land or portion thereof the whole of the land as the case may be provided the licensee does set up an adverse claim to his title right to possession. In other words, the user of the land must be of a nature not inconsistent with the rights of the true owner. If he does, the licensee is liable to forfeit his right to be on the lessor's land and this conduct may justify re-entry by the owner or ejectment of the licensee. (2) Sometimes the nature fo the grant of the occupational tenancy carries with it the obligation on the part of the licensee to pay tribute or tolls or provide some customary services as an act of acknowledgment of the lessor's paramount or superior title to the land. In some case where the products of the land on which tribute is levied are what may be called natural or food product, the question of the tribute is determined by agreement before the licensee goes on to the land; on the other hand, if it is production of case crops like cocoa or timber, it is the usual practice to determine the quantum of the tribute by agreement after permission to occupy the land has been granted; see *Asenso v. Nkyidwuo* (1956) 1 W.A.L.R. 243, W.A.C.A. (3) The circumstance of the long occupation by the licensee are such that it is difficult or determine whether the customary tribute has been provided or demanded. The evidence led in the present case showed than during the period of occupation by the respondent's ancestors no tribute of tolls were demanded or paid by them. It would seem members of both families, some of whom had intermarried, freely exercised their rights of user over unoccupied portions of the land without reference to any body. Such user of the appellant's ancestor land must have misled the respondent to believe the ancestor must have acquired an estate or interest in the land which ought to entitle her to oust the appellant from the particular piece of farmstead inn dispute. The respondent in this appeal seems to me to be in precisely the same situation in which the defendant in the old case of *Kuma v. Kuma* (1936) 5 W.A.C.A. 4, P.C. found himself when he attempted to sell portions of the licensor's farming land. In the said case the defendant and his ancestor had been occupation of the land in dispute in the action for or about six generations without let or hindrance by the plaintiff or about six generation s without let or land in dispute in the action for a about six, generations without let hindrance by the plan tiff or his ancestor; no tributes or tolls had been demanded or paid; it even was established that no drink had been given to owners of the land for permitting him and his people

to farm on the land. When later the land, an objection was strongly taken and that led to that to the action being instituted to determine the extend of the defendant's right over the plaintiff's ancestral land. Like the only appellant in the present appeal, the plaintiff in the case cited, was only following the present appeal, the plaintiff in the cases cited was only following the practices of his forebears in not exacting tribute or tolls form person occupying the land with the family's permission, and allowed them to remain on the land subject to good behaviour. (4) Like the respondent and her ancestors in the present appeal, it is also an incidence of this holding that the limited or extent of any proprietary rights of the licensee be strictly defined or understood. The licensee only has a right to use the land equally practices, that throughout the period of occupation the licensee at custom has a present right of possession and over portion of the grantor's land where the right of the grantor is not ousted. In other words, title and right enjoy the land of the latter remains unimpaired, and the granting of the licensee or permission to occupy the grantor's land without paying tribute or tolls is not be regarded as a surrender by the owner or lesser of all claims or rights in the land. IN this case, I think it was wrong for the respondent to look upon his ancestor's long and unimpaired occupation of the appellant's land surrender of the latter's rights of user of portions not specifically allocated t him or members of his family.

I think, therefore, that it was a false approach on the part of the learned applets High Court judge to bases legal conclusions on the assumption that where the respondent licensee has enjoyed of possession or permission to remain and work on the land becomes incapable of disturbance as time goes on to the extent that she can even oust the real owner or dispossess him in respect of portions of the land not specially granted to her or reduced into her effective occupation. The learned appellate judge did not consider the principle of customary law that defines a licensee's right to occupy and use another's land vis–a–vis the exercise of the present rights of ownership still remaining in the grantor or owner.

The basis of the concluding part of the learned appellate judge's decision reads follows:

> "I agree with the submission of counsel for the [respondent] that in view of the finding made by the local magistrate and having regard to the evidence adduced in the case, the local magistrate was wrong in ordering the [respondent] to release the farm to the [appellant]."

After this the learned judge for the appellate High Court proceeded to set aside the judgment of the local magistrate delivered in favour of the appellant.

The trail magistrate found the follow facts proved:

(i) That the land on which the respondent and her ancestors have long been in occupation was the ancestral property of the appellant.

(ii) That the respondent's ancestors' long and uninterrupted occupation had always been with the permission of the appellant's family.

(iii) That a portion of the said ancestral land of the appellant has been granted to members of the respondent's son-in-law by the appellant.

(iv) That it was the appellant who first cleared the virgin forest over the area in dispute."

On these findings it is wrong to hold that the respondent's right to remain and use portions of the appellant's land was superior or cannot be held to have overridden the right of the owner over the disputed area which, as the evidence showed, had already been reduced into the effective occupation by the appellant. It is true the respondent may have enjoyed long and uninterrupted occupation, and she is in possession of portions of the appellant's land her own right, so far as it is a right, but it is a right which is given by customary law and her to be the land accrues to her and members of her family because of the permission originally granted to her ancestors to be there. Therefore the respondent as a licensee at custom has as much protection t be on the land and use the portions of it is permitted to use, but she enjoys occupational rights conferred by her licensee only in respect of portions of the land specially allocated to her for exclusive use by herself and members of her family, or where the extent of the land on which she is permitted to stay and farm has not been determined or limited, she can exercise rights of occupation and possession on an area not specifically appropriated to use by the lessor or members of his family, or where the evidence clearly shows that although a particular area has at time been either cultivation or reduced into effective occupation by the owner or members of his family it has been abandoned. These are some of the important limitations to the licensee's right of enjoyment or occupation in respect the land upon which she is permitted to farm or occupy. Her permission to be on the grantor's land is not assurance whereby the owner conveys an estate t interest in the land to her.

The respondent's claim that she is entitled to dispossess the appellant of the disputed farmstead in this appeal because of the long uninterrupted occupation enjoyed by herself and her ancestors over the land of which the farmstead formed a part is a false one. She seeks to revive in these proceeding in an elegant from the reje ted[1] proposition that a licensee become in course of time an absolute owner of the land to the extent of depriving the real owner of the right of user over unoccupied portions of the same land.

In my opinion, it would be against custom to hold that the respondent, who is a licensee at custom, could during the subsistence of the license permission exclude the appellant who is lessor or members of his family from using portions of their own land. If she could, then it shows that as against her landlord, the appellant, she holds an estate granted which cannot e extinguished or forfeited for all purpose. But id she cannot, it can only e because her landlord or lessor enjoys a present right of possession or user over proportion not occupied by her. This in my opinion is the correct wives of the position of the respondent according to customary law. If therefore the appellant, who enjoys a present right of

[1]Error in original

user at the same time with the respondent over portions f land not specifically cleared or occupied by the respondent, claims possession of the specific area now in dispute, which it is admitted on the evidence he cleared before the respondent sent her agent to plough the said area, I do not see what defence could open to her according to customary law ad usage or practices.

On the facts the respondents could not defend the appellant's claim over the disputed farmstead because as a licensee she would not have a present and unbarred right to possession or user over this area in dispute; customary law and practice enjoins upon her to give way to the rightful owner's better claim to particular farmstead now in dispute because the evidence which was accepted showed that he first reduced that area into his occupation. That is the situation we have here. Had the respondent been able to establish y evidence that she first cultivated the area on which the disputed farmstead is located, or that the area on which the disputed farmstead is located, or that the circumstance were such that although it was the appellant who first cleared the virgin forest with the intention of farming there but had sufficiently abandoned it, then her point that she was entitled to claim t as against the appellant might well have had weight. I do think that, therefore, on the facts found by the local court magistrate, the respondent could succeed.

For my part, I am satisfied that the judgment delivered in favour o the respondent at the High Court, Cape Coast, appears to have been founded on wrong application of the principles of customary law. The appellant had made a case, which was sufficient and proved by evidence. In my opinion, therefore, the High Court judge was wrong in setting aside the judgment of the trial local court magistrate. The appeal must be allowed and the decision of the High Court, Cape Coast, set aside including the order as to costs.

The judgment of the Komenda Local Court delivered in favour of the appellant is accordingly restored. Cost awarded by the High Court, if paid, to be refunded. The appellant will have his cost of this appeal fixed at N¢140.41.
OLLENNU J.A. I agree.
APALOO J.A. I also agree.

Appeal allowed.
T.G.K.

6.2 Customary Rights and Concessions

6.2.1 Kwadwo v. Sono

[1984-86] GLR 7.

Court of Appeal, Accra

27 February 1984

APPEAL against the quantum of damages awarded by the High Court, Sunyani to the plaintiff for the destruction of, inter alia, his cocoa trees by the defendant, a concessionaire, on working his concession. The facts are sufficiently stated in the judgment.

MENSAH BOISON J. A. This is an appeal by the defendant at the court below against an award of ¢61,252 special damages for his destruction of cocoa trees and other crops on the plaintiff's farm. The damage occurred in 1977 in the course of the defendants timber and logging operations on Dormaa stool land, over which the defendant had concession rights. The trial took place at the High Court, Sunyani in March 1980 before Ampiah J who dismissed the additional claims for general damages for "capsid infestation, rehabilitation and other incidental damage as a results of the defendants acts". The plaintiff's claim for an order of perpetual injunction restraining the defendant from further felling on the plaintiff's farm was similarly dismissed. This part of the decision is not questioned. For on authority where a person enters upon the land of another by lawful authority or licence, acts done I pursuance of the authority or licence cannot be the subject for general damages in tresspass: see *Gliksten (West Africa) Ltd v Appiah* (1967) GLR 44, CA.

Different considerations, however, apply to the award of the compensation now appealed against Exhibit 1, the defendant's by virtue of the Concessions Act, 1962 (Act 124), hereinafter referred to as the Act. Both at the trial and in this court, the rights conferred on the defendant by exhibits I and the exceptions in favour of the local inhabitants were not disputed. customary rights and privileges of the local population to "hunt and snare game, to gather fire-wood for domestic purposes only, to collect snails ... and to till and cultivate farms and plantations on the demised land." It is also conceded that any farmer on the demised land suffer damage as a result of the timber operations of the concessionair is entitled to compensation. Indeed, when the plaintiff complained of damage of his crops, the defendant was ready to offer compensation but for lack of agreement of the figures. Consequently, upon the case coming before the court, a consent order requesting the Regional Lands Department to inspect and assess the extent of damage to the plaintiffs crops was made at the start of the procedings. The plaintiff by counsel filed inspection instructions, and the arties attended on the inspection team. In due the course the Lands Department submitted its report, exhibit A, to trial court, to be folowed by evidence from the senoir valuation officer, who lead the inspection team. What is here relevant is that the parties accepted and the trial court found that an area of 11.68 acres of the plaintiff's cocoa farm damage or destroyed involving a total of 5,067 trees at ¢7,51.70, a figure which have been approved by the Chief Lands Officer, Accra became a bone of contention. In judgment the learned trial judge rejected the compensation rate of ¢1.50 per cocoa tree fixed in 1974 by the Chief Lands Office and wich the witness had applied. The learned judge was of the opinion that was it was ridiculous low and that the rate did not reflect the economic realities of the times. There was evidence from the witness that it was the policy of the Chief Lands Officer to have compensation rates reviewed periodically and to bring them in line with economic trends in the country. That evidence was

contained in exhibit X, the relevant paragraph of which reads:

> "(2) In the past, compensation rates used in the department were restricted to lands acquisition cases where the gornment acquired land and crops. From the basis of calculation in arriving at the present (1974) rates it is clear that prominence has been given to the estimated useful life every crop in question and this will necessary imply a major change in the valuation assessments in land acquisition cases where crops are also encountered and compensation paid separately therefor."

Exhibit Exhibit X further adds in paragraphs (4) and (5):

> "(4) I shall be grateful if you give the matter your serious consideration and let me have your comments without prejudice to the operations of the new effect from March 1974 ...
>
> (5) A review of the crop compensation rates in respect of the under mentioned crops is still being undertaken and the finally agreed rates will be communicated to you in due course ..."

But even at the time of the trial in 1980 no such review had taken place, and the rate of ¢1.50 for a cocoa tree still prevailed.

The witness was unable to tel on what basis the rates in exhibit X were arrived at, and the learned judge was obliged to rely on the economic trends in the country to work out a reasonable rate when he delivered himself thus.

> "The price of cocoa has rocketed so high from ¢30 to almost ¢80 per load at the time of the incident. Looking at the age, and the annual yield of the destroyed cocoa, coupled with the economic conditions existing at the time, I think a price ¢12 per cocoa tree would not be unreasonable. I would therefore award the plaintiff ¢60,804 damages for the cocoa trees damaged."

Awards for other crops destroyed brought up the total amount to the ¢61,252 mentioned earlier; but it is as to the ¢60,804 for the cocoa trees that the appeal is directed.

Mr. Totoe, counsel for the defendant, has attached this award on the ground that; "Because clause 2 (1) of the concession agreement, exhibit 1, stipulates that compensation payable to farmers for damage crops should be assessed by the Administrator of the Stool Lands the court erred in disregarding the assessment by the administrator." The burden of learned counsel's argument was that compensation under the concession was limited to payment of the actual of the crops damaged, which is the rate as fixed and recommended by the administrator; that any consideration of age or yield of the trees affected was in the nature of prospective damages.

To this, Mr. Amofa's rely was that the proposition that the court was limited to the administrator's determination amounted to denying the citizen access to

the courts in seeking relief where he has suffered damage to his crops by the default of another, insofar as the court could not act according to its own lights and discretion. That, learned counsel for the plaintiff contended, was contrary to the Constitution, 1979 which gave the judicial power of the State to the courts.

Now clause 2 (1) of exhibit 1 relied on By Mr. Totoe enjoins the defendant:

> "To compensate the owner of any fruit–bearing trees or cocoa trees growing thereon for any damage done by the lessee or his agents or contracts. Provided always that the amount of compensation payable shall be that determined by the Administrator of Stool Lands."

Mr. Totoe also refers to the provisions of the Concessions Act, 1962 (Act 124), s 16 (4) and (5) as the source of competency of the administrator. Those provisions recited that:

> "(4) All rights with respect to timber or trees on any land other than land specified in the preceding subsections of this section are vested in the President in trust for [the] stools concerned.
>
> (5) It shall be lawful for the president to execute nay deed or do any act as a trustee in respect of lands or rights referred to in this section."

What Mr. Totoe says is that by force of the above subsections of the Act, a demise to the defendant of the specified land overrides and extinguishes the rights and interests of the local farmers save as to what are preserved or of compensation payable therefore. This position, he' submitted, was brought about because the concession agreemnt, exhibit 1, was binding on all persons on the demised land. Consequently he added that since 1962 the assessment of compensation had been to or determined by the administrator. Mr. Totoe found support in a passage in the judgment in the case of *Gliksten (WA) Ltd v Appiah* (supra) when at 449, the court said:

> "Thus even if the holder of customary rights is on the land before the grant of the certificate of the court validating the concession, the title of the concessionaire takes precedence over the holder of customary rights. And only such rights as are preserved by the law or in the concessions agreement will continue as against the concessionaire."

Besides having the land vested in him, I think the provisions of sections 16 (4) and (5) of Act 124 do no more than empowered the President to grant leases for timber rights only. Such a demise affects a person like the plaintiff only insofar as the concessionaire's rights extend as well to timber standing in the plaintiff's farm. And is so far this reason that the entry by the defendants into the plaintiff's farm was held not no be a trespass. But the defendant's right of precedence to timber on the land does not in any way abridge the plaintiff's legal

rights and protection to his crops. It may be observed with interest that the Act does not spell out the customary rights, privileges and interests of the local population over the demised land, as did the Concession Ordinance, Cap 136, s 13 (6)–(9). Nonetheless those rights, in my view, are legal. Not because they are declared so by and enactment but because they are immemorial customary rights and priviledges which members of the local population of the stool land hve always enjoyed; whether their possession of the land was by the right of occupation or by permission from the stool. Specifically those customary rights, in my opinion, are preserved not because the are accepted from the defendant's lease, exhibit 1, but rather that they are rights of the subjects which cannot be alienated by the stool for which the President acts.

Further if it were noted that exhibit 1 was contractual only between the President and the defendant, there could be no question that the plaintiff, was not bound by its terms. Consequently, I think the plaintiff's redress for the damage to his crops was not dependent on the terms and conditions of the lease, but based on his common law rights against an infringement of his proprietary interest. I therefore take the view that the onus is on the defendant, and not on the plaintiff, to show that the compensation clause, 2 (1) of exhibit 1, was binding on the plaintiff. I am satisfied that learned counsel has not been able to show that the provisions of section 16 (4) and (5) of Act 124 import a power for the administrator to determine the compensation rates. It follows that the trial court was not bound by the compensation clause in exhibit 1. In my opinion, the learned trial judge's approach to the assessment of the social damages was right in principle; save as to what we shall say on the quantum.

The appellant's second ground of appeal was that 'because the acreage method of assessing the special damages could be applied in the instant case the court erred in not applying 'that method'. Computation by the acreage of the number of cocoa trees destroyed in claims for damages appears to have been in recent times first ventured upon in these courts in the unreported case of *Appiah v Gliksten (WA) Ltd* before Lassey J (as he then was) at High Court, Sunyani. The merits of this mode of calculation are lucidly explained in the judgment of this court delivered by Amissah JA in JA in *Glikstein (WA) Ltd v Appiah* (supra) on the appellate hearing of that case. At 452-453 of the judgment this is what the court said:

> "The rationale for this method of calculation is that according to good agricultural practice an acre should contain a certain number of trees to give maximum production and this number would depend on the optimum spacing between any two trees of that species. If one plants the trees too closely and therefore exceeds the number of trees, this will not increase the yield per acre. All other factors remaining the same, the yield per acre would remain the same. In other words a farmer does not increase the yield per acre from his farm by ignoring sound agricultural principles and growing more trees therein than the acre can take. But the result of the old method of calculation of damage is that the farmer with more trees per acre, though not

> making more or out of the acre than his model farming brother, was bound to reap more than his brother out of the devastation of the farm. This, I think, is sufficient justification for the abandonment of the old method."

I however, agree as advanced by Mr. Amofa, that assessment by the acreage is a rule of practice and not a principle of law, and that this court is not bound to follw is as precedent. But I also think that where a rule of practice has the merit of scientific approach, and thus more likely to result in greater fairness to the parties, the lawyers conservatism might do well to employ science as a handmaid of legal reasoning to advantage. I would permit myself to add quickly that care must always be taken that a rule of practice should not become a rule of thumb with a danger to override any conflicting general principles of law relating to damages in such claims. In the instant case, two items of acreage of the damage caused either by loading, felling or by way of caterpillar etc, trucks and (b) estimated number of cocoa trees damaged.

The acreage of 11.68 and the total of 5,067 damaged trees found by the court were based on the evidence of the leader if the inspection team. Questioned as to how he arrived at the number 10' X 10' we have 400 cocoa trees or approximately 400 cocoa trees in 1 acre ..." This evidence was not seriously challenged. Indeed, the defendant was present at the inspection by his agent and all along the impression was given that the defendant accepted the figure of 5,067. Besides, the defendant later called this very witness, after his evidence as a common witness, to give evidence for him. That I think shows faith in the credibility of that witness.

Assessment by the acreage as I understand it is a means of ascertaining the number of trees affected in a case of devastation to crops. If that number is agreed upon by the parties, then I do not think there is room for preference between actual numeration and calculation by the acreage. In the *Appiah* case (supra) the respondents disputed the figures obtained by actual court, and so arose the question of choice between actual counting and computation by the acreage. In the instant case, the learned trial judge was not faced with any choice because there was after the inspection no dispute on the figure of 5,067 arrived at 1 am of the opinion that there in no substance in this complaint.

To revert to the award of special damages of ¢60,804, it is complained, in essence, that the learned judge acted on wrong principles when he took unto account the age and annual yield of cocoa trees. It is said that a consideration of those matters made the award partake of prospective damages, which will then be general damages.

I think there is no argument that here it is the actual value of the cocoa trees that the plaintiff is entitled to as compensation. And on principle, a plaintiff is required to prove such loss. But the evidence in support will of course depend on the nature of the subject matter among other things. What is the price of a cocoa tree on the market? How may loads dose a five–year old tree bear as compared with a ten–year old? These questions seems to defy practical answers; but certainly the value of a five–year old bearing tree may differ from that of a

fully matured tree. These I think are factors which might help determine the economic usefulness of the crop and its pecuniary value. For that is what the plaintiff wants as compensation. The price per load of cocoa is a useful index of the value of trees lost, and that cannot be divorced from age and yield. In my opinion, the learned judge was right in principle in considering the factors as he did. His reasoning cannot be faulted.

By the nature of the subject matter, the support of value called for the exercise of the judge's discretion in arriving at a fair and reasonable rate. While we do not seek to substitute our discretion for his, it seems to us that the figure arrived at was excessive and therefore an erroneous assessment of damage.

We think the rate of nine cedis per tree and not twelve cedis would be a fair and reasonable figure. In the result, the award of ¢60,804 is reduced by ¢15,201 and the sum of ¢45,603 is substituted for the judgment in favour of the respondent here. Save as to that variation the appeal would be dismissed.

FRANCOIS J.A. I agree.

WIREDU J.A. I also agree with the conclusion.

Appeal dismissed.
Damages reduced.
J A A