32, 1953

No. 20 of 1950.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION)

BETWEEN

WUDANU KWASI, Acting Chief of Atipradaa, and MANKRADO KWASI ANSAH, Acting Chief of Wusuta (Defendants) . . . . . *Appellants*

AND

NANA OSEI TWUM, Ohene of Bukuruwa (substituted for YAW NKANSAH II, Dsasehene of Bukuruwa-Kwahu) (Plaintiff) and NANA AKWAMOA AKYEAMPONG, Omanhene of Kwahu (Co-Plaintiff) . . . . . *Respondents.*

Case for the Appellants.

RECORD.

1. This is an Appeal from a judgment of the West African Court of Appeal (Gold Coast Session) delivered on the 1st March, 1948, dismissing with costs an Appeal by the present Appellants and one Akuamoa from a judgment of the Lands Division of the Supreme Court of the Gold Coast delivered by His Honour Mr. Justice M'Carthy, Acting Chief Justice, sitting with an Assessor, on the 2nd May, 1947, in favour of the Respondents, whereby the learned trial Judge granted to the Respondents a declaration of title to certain land (but did not grant to them the injunction claimed to restrain the Appellants and the said Akuamoa from cultivating the said land or interfering with the Plaintiffs' ownership thereof). pp. 82–88. pp. 69–73.

2. The present proceedings were commenced by a Civil Summons issued on the 13th March, 1940, out of the Tribunal of the Paramount Chief of the Kwahu State (in the Gold Coast Colony) (which, by virtue of Section 48 of the Native Administration Ordinance (Cap. 76) and Section 17 (*a*) of the Courts Ordinance (Cap. 4), had original exclusive jurisdiction) by Chief Baadu II, the Chief of Bukuruwa, against Chief Tawia of Atipradaa and the said Akuamoa, alias Yaw Akoi, described as of Adukrom. The then sole Plaintiff's claim was for a declaration of title to All that piece or parcel of land situate at Kwaekesiem, which was described as being in Kwahu and as being bounded on the North by the River Faa, on the South by the River Afram, on the East by the River Volta and on the West by the Plaintiff's Stool land, and for an p. 1. p. 2, l. 1.

injunction to restrain the Defendants and their agents and servants from cultivating the said land or interfering with the Plaintiff's ownership thereof.

p. 3, l. 20. 3. On the 21st March, 1942, the suit was, pursuant to Section 75 of the Native Administration Ordinance (Cap. 76), upon the application of the Plaintiff, transferred from the Tribunal of the Paramount Chief of Kwahu to the Divisional Court for the Eastern Province of the Gold Coast Colony of the Supreme Court of the Gold Coast for hearing and determination. It did not come on for trial until the 12th September, 1946.

p. 6. 4. On the 8th July, 1942, Chief Osei Tutu, the then Chief of Wusuta (a predecessor of the second Appellant), to whom the Chief of Atipradaa
p. 5. was subordinate, was made a co-Defendant on the application of the then Plaintiff, on the alleged ground that he was interested in the area in dispute and that the Defendants, his subjects, occupied the land under his authority. His actual interest is indicated in paras. 21 and 22 hereof.

p. 17. 5. Further, on the 25th August, 1945, the Paramount Chief of
p. 19. Kwahu was on the application of the Plaintiff, joined as a co-Plaintiff
p. 18. as overlord of the original Plaintiff and on the ground that the original Plaintiff looked after the land on behalf of the Paramount Chief.

6. The original parties were largely replaced by other persons during the course of the suit—Yaw Nkansah being substituted for Kofi Baadu
p. 22. when the latter was destooled; Wudanu Kwasi, Acting Chief of Atipradaa,
p. 23. for the original Chief Tawiah of Atipradaa when the latter died; and
p. 16. Chief Djabah II for Chief Osei Tutu when the latter was destooled as Chief of Wusuta. All these substitutions occurred before the trial in the Supreme Court. In his turn the present second Appellant, as acting
Not printed. Chief of Wusuta, was on the 29th June, 1948, substituted for Chief Djabah
p. 90. after the appeal had been decided by the West African Court of Appeal. Again, on the 13th December, 1948, Nana Baadu III was substituted for Yaw Nkansah, who was, however, reinstated on the 11th April, 1949, upon Nana Baadu III being destooled.*

7. There was a further intervention before trial. The Chief of Nkwatia, another subordinate Chief under the Omanhene of Kwahu, applied, on the 31st January, 1944, to the Supreme Court to be made Defendant to the suit on the ground that the Kwaekesiem land as described
pp. 12–13. in the Civil Summons was part of the Stool lands of Nkwatia and that both the Plaintiff Chief of Bukuruwa and the Defendant Chief of Wusuta had brought the proceedings to his notice, so that he would be vitally affected by the result of the suit.

This application was opposed by the Chief of Bukuruwa and, upon
p. 15, l. 17. it being granted by the Supreme Court on the 11th February, 1944, he appealed to the West African Court of Appeal who, however, on the
p. 16, l. 33. 22nd November, 1944, dismissed his appeal. The Chief of Nkwatia,
p. 26, l. 22. however, did not pursue his claim, owing to the intervention of his
p. 32, l. 33. Paramount Chief. It is clear however that, even on the side of the Kwahus, the claim of the Stool of Bukuruwa was disputed.

* By Order in Council of the 1st August 1953 the present first Respondent Nana Osei Twum was substituted for the original first Respondent and the said Yaw Nkansah, after having been elected and installed as Ohene, and occupant of the Stool, of Bukuruwa.

8. The Plaintiff, the Chief of Bukuruwa, delivered his Statement of Claim on the 19th December, 1942, and thereby claimed title to Kwaekesiem described in the same terms as in the Civil Summons. This claim was reiterated by his Paramount Chief, upon the latter becoming a party to the suit, in his Statement of Claim of the 7th September, 1945. p. 6, l. 32. p. 21.

9. On the 17th February, 1943, the Supreme Court ordered a survey of the land claimed. This order was made in accordance with the usual practice in such cases for the purpose, among other things, of ascertaining the boundaries of the land claimed in the suit, and disputed, as a necessary preliminary to deciding a claim for a declaration of title to such land. Instead however of so doing and identifying and delineating Kwaekesiem, the designated surveyor at the instigation of the Plaintiff produced a plan (Exhibit " A ") prepared in the years 1943–1944 which shows the whole of the land claimed by the Plaintiff Chief of Bukuruwa to the west of the Volta between the Obosum River on the north and the Afram on the south (including the Volta itself) and extending westward from the Volta to lands which the Plaintiff regarded as appertaining to the Stools of other Chiefs, like himself, subordinate to the Paramount Chief of Kwaku, namely, Abetifi, Pitiko, Nkwatia and Tafo. The Surveyor entirely disregarded the necessary delimitation of Kwaekesiem, the land actually claimed, nor did he himself even indicate its approximate whereabouts on the plan and, though he stated in his evidence that " the area comprises " about 20 square miles," he did not further identify it. It is clear however that the area of 20 square miles he was then referring to was not the area edged red on the said Exhibit since such area comprises about 1,000 square miles. p. 25, l. 25. p. 25, ll. 24, 38. p. 25, l. 35.

10. Further, this plan was not referred to in the judgments either of the Supreme Court or the Court of Appeal to assist in defining the area in respect of which the declaration of title was ultimately made. It purports upon its face to show, by a red line, " Land in dispute." The land so enclosed by a red line would appear from the evidence to be more or less the same as, but not identical with, the area in respect of which a declaration was made (hereinafter called " the Extended Area ") but is clearly not the same as the land called Kwaekesiem to which title was claimed by the Plaintiff in the Native Court and was being claimed in the Statement of Claim at the time when the said plan was ordered, prepared and completed. The contents of this plan are hereinafter further explained. This plan Exhibit " A " uses as a basis the printed Government topographical maps of the area which are upon the scale of 1 : 62,500, that is 1·014 inches to 1 mile. The area so edged red is bisected by the longitude of Greenwich (00°00′) and is roughly oblong in shape with an average mean width from east to west of about 25 miles and an average mean length from south to north of about 42 miles and is, therefore, estimated to contain not less than 1,000 square miles. The said plan is divided into 54 rectangular squares by lines of latitude and longitude respectively each 5 minutes of a degree apart. It is proposed for the purpose of reference in this Case to number the squares from west to east, 1, 2, 3, 4, 5 and 6, according to longitude, and from north to south A, B, C, D, E, F, G, H and I, according to latitude. p. 25, l. 36.

There are many places referred to in the evidence, but outside the area delineated in Exhibit " A," of which the situations are material to be known. It is proposed, therefore, to refer to the Southern Sheet of the Road Map of the Gold Coast issued by the Gold Coast Government in order to identify such places. Upon this map 1·014 inches represents 8 miles. An extract from such map is appended to this Case.*

11. Kwaekesiem, the description of the area originally claimed by the Respondents, is a word indicative of locality, compounded of Kwae—forest, kesi—big, tall, siem—locality. It means, therefore, a locality covered by tall tropical rain forest and this can be approximately identified from Exhibit " A " as that area of high ground within which, on map squares 5G and 6G, are shewn in print two small hamlets or farms called Kwaekese, being 4 to 5 miles in a southerly direction from the Appellant Chief of Atipradaa's village (shown as Atikpale on Exhibit " A," square 6F) and 2 to 3 miles south-west from Asabi (square 6G) a village inhabited by the Appellants' subjects, of the origin of which there was considerable and conflicting evidence. The limits of Kwaekesiem approximately appear from the Government Survey Map incorporated in Exhibit " A," which indicates the area of tropical rain forest and distinguishes it from the surrounding areas of park country, of which latter type of country, together with areas liable to be flooded, the whole of the remaining land between the Faa and the Afram is shown to consist, save for a much smaller area of tall tropical forest, also on high ground, distant about 18 miles south-east of Kwaekesiem (2G and 2H) which is totally uninhabited. This forest area Kwaekesiem comprises the only closely settled part of the area shown on Exhibit " A " within the red border.

The land in respect of which the claim in the Civil Summons was made is not further indentified either in the evidence or upon Exhibit " A," or anywhere else. From the reference to Kwaekesiem, however, in the Civil Summons and Pleadings, it appears that it should be confined to the Kwaekesiem area, which occupies a part of the area between the Faa and the Afram and is bounded on the east by the River Volta. It is clear from the description that the land in respect of which the claim was made cannot include any land to the north of the River Faa. The maximum area which might perhaps be described as Kwaekesiem (the high forest locality) including Atipradaa, Asabi and all the inhabited places in the Kwaekese neighbourhood extends to about 20 square miles. This is, in fact, the area mentioned by the Surveyor who prepared Exhibit " A," and it would seem, in the context, that by this he was intending to indicate that that was the area of the land originally claimed, though the area in respect of which the declaration of title was granted, is some 50 times greater.

p. 25, l. 36.

p. 25, ll. 20–34.

12. The action came on for trial on the 12th September, 1946, the Plaintiffs being the original first Respondent, representing the Stool of Bukuruwa, and the present second Respondent, representing the Paramount Stool of Kwahu and the Defendants being the present first Appellant, representing the Stool of Atipradaa, the said Akuamoa (a private person), Chief Dzabra (Djaba) representing the Stool of Wusuta and the Chief of Nkwatia representing his Stool. The Plaintiffs were

* Extract in fold in back cover.

Kwahus and belonged to the Akan (Twi or Tshi speaking) group of the Gold Coast peoples and the first and third Defendants (Chiefs) were Wusutas, belonging to the Ewe* (Ewe speaking) group of the Gold Coast peoples, the second Defendant, Akuamoa, belonging to the Aveme tribe of the Ewes, the Co-Defendant Chief of Nkwatia being a Kwahu.

13. Upon the hearing of the suit the Respondents called thirteen witnesses and the Appellants seventeen. None of Respondents' witnesses referred to Kwaekesiem by name (far less identified its boundaries) or to any place which appears from Exhibit "A" to be within the high forest area. No identification of the actual parcel of land situate at Kwaekesiem and claimed by the Respondents was at any time made or attempted to be made by any of them or by the Court.

14. The Respondents' evidence referred only to some 19 places† as having been founded by them or their permission within the area of about 1,000 square miles, of which only four, Asabi (G6) Fenfaro (G6) Atipradaa (F5) and Ahupe (G5) were in the neighbourhood of Kwaekesiem. Of these 4, only one, Atipradaa, lies within the area claimed by Wusuta. Only one other place within the area claimed by Wusuta was referred to by the Respondents' witnesses, namely, Faso (E5), which is north of the River Faa and clearly no part of Kwaekesiem, which is stated in the original Plaintiff's summons and in his statement of claim to lie south of such River Faa. There are, however, some 378 inhabited places within the area edged red in Exhibit "A," and some 112 within the area of high forest (Kwaekesiem) indicated on the Government Map which is the basis of Exhibit "A." ††

pp. 2, 6.

15. At the close of the hearing on the 17th April, 1947, the Respondents' claim was enlarged to a claim for a declaration of title to an area which more or less corresponds to the said area of land and water edged red on Exhibit "A" covering approximately 1,000 square miles, of which the greater part is to the north of the River Faa, and which is a much larger area than the area of the land originally claimed, whatever the intended limits of the latter. This larger area was described as in Kwahu and bounded on the north by the River Obosum, on the south by the said River Afram, on the east by the River Volta, and on the west (not by the Stool lands of Bukuruwa but) by Abetifi, Nkwatia, Pitiko and Kwahu Tafo Stool lands.

p. 66, l. 23.

p. 3, l. 1.

This is more or less the area which, including the whole width of the River Volta (no part of which was included in the original claim), is edged red upon Exhibit "A," but the area edged red and the extended area are nowhere alleged or found to be identical.

16. The Appellants humbly submit that, subject to the land claimed being clearly identified, the trial Court has in cases of disputed title to Gold Coast land of this character particularly to consider the following classes of evidence :—

(1) Traditional evidence as to how the Plaintiff became possessed of the land claimed and thereby acquired title to it ;

* "Ewe" pronounced as "Evay".

† See Appendix I in fold inside back cover.

†† See Appendix II in fold inside back cover

(2) Evidence of use and occupation of the land claimed and of the payment of tribute in respect of it ; and

(3) Evidence by third parties, admitted or proved owners of land adjoining the lands in dispute, as to whether their boundaries on the land claimed are with the Plaintiff or with the Defendant.

17. The Appellants further humbly submit that, on questions of disputed ownership of land, occupation and possession of portions of a disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area either (A) because the portions occupied are so numerous and closely adjoining that they practically cover the whole area or (B) because the occupation is occupation of part of a distinctly bounded and defined parcel or close as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole of the field. The Appellants humbly submit that neither the Trial Judge nor the Court of Appeal appear to have regarded these principles in considering the Respondents' evidence as to use and occupation.

18. The main grounds upon which this appeal is based are accordingly as follows :—

(1) The Supreme Court had no jurisdiction to make the declaration of title actually made because the area with regard to which the Court made the declaration was not the land called Kwaekesiem (to which title had been claimed in the Native Court in which the suit was brought and from which the suit had been transferred to the Supreme Court for hearing), but " the Extended Area " and the Supreme Court had, by virtue of sections 48, 65 and 75 of the Native Administration Ordinance (Cap. 76) and section 14 of the Courts Ordinance (Cap. 4) (both as unamended and as amended by section 3 of the Courts (Amendment) Ordinance 1944), only jurisdiction to determine the issue in dispute in the Native Court and had no jurisdiction to make a declaration of title to any larger or other area ;

The Appellants will, if necessary, contend that anything is erroneous which may be gathered to the contrary from the reasons given for the decision of the West African Court of Appeal in *Ababio* v. *Ackumpong* [1940] 6 W.A.C.A. 173.

(2) If, contrary to the Appellants' submissions, the Supreme Court had had jurisdiction to make the declaration, nevertheless the declaration was erroneous and judgment should have been entered for the present Appellant because

(A) the Court should not have permitted the Respondents to enlarge their claim after the close of the evidence ;

(B) the Respondents failed to allege either the position or boundaries of the area called " Kwaekesiem " which they claimed in the Native Court and it was incompetent for the Court to grant a declaration of title to Kwaekesiem for which no specific boundaries were claimed and no means of ascertaining the same were indicated or to the area to which they actually granted a declaration one major boundary of which was not defined ;

(c) the Respondents failed to discharge the onus (which was upon them) of proving their title either to Kwaekesiem or to the Extended Area ;

(3) The declaration which was made was in any event too wide, as the Appellants did not claim to be interested in the bulk of the Extended Area.

19. The Kwahus (the Respondents) claim to be (and doubtless the Bukuruwas are) an off shoot of the Denkeras (a sub-division of the Akan racial group). The Denkeras in the 17th century were settled in what is now the southern portion of the present Colony of Ashanti, but, being defeated in the last years of that century or the earliest years of the next by the Ashantis, who are also Akans then centred around Kumasi, were driven out of what is now the Colony of Ashanti southwards into what is now the Gold Coast Colony beyond the Ofin and Pra Rivers, where the main body of them is still to be found. They have therefore no original connection with the area in dispute, but claim (or at any rate the Bukuruwas claim), according to one witness, that they refused to serve Ashanti and migrated to Bukuruwa, but whether the allegation is that this occurred at the end of the 17th century or later is not clear, as subsequently to their expulsion the Denkera in their new habitat were subdued by the Ashantis on more than one occasion. (Ellis. History of the Gold Coast, p. 106.) Moreover, this version of the matter was contradicted by the present First Respondent, who said that the Bukuruwas brought their Stool from Denkera in the time of Oti Akengteng, who, he said, was the Kumasi Chief before the time of Osei Tutu, and that this was before the defeat of the Denkeras. Oti Akengteng ruled circa 1630–1663. Osei Tutu, who expelled the Denkeras soon after the year 1700, ruled circa 1698–1730. Whenever it was that the Kwahus came into this part of the Gold Coast, their original habitat there was on or near the edge of the scarp above Nkawkaw, where their villages, including Bukuruwa, are still clustered. The distance from Bukuruwa to the Kwaekesiem area is about 55 miles.

p. 32, l. 31. p. 32, l. 12. p. 32, l. 13, cf. l. 31. cf. p. 31, l. 40–41. p. 33, ll. 12–19.

20. The Ewes on the other hand appear to have been settled along and on both sides of the Volta in this neighbourhood before traditional history begins and may be regarded for the purpose of these proceedings as aboriginal. In this connection there is an important finding of the trial Judge as follows, which accords with the known historical facts and the Respondents' own evidence as to their arrival :—

" Although the broad River Volta might well form a boundary " between the Ewes on the East and the Kwahus on the West, " it may be that the Ewes have long been settled at least in parts " of the land in dispute. The Kwahus arrived in these parts after " the Ewes."

p. 70, ll. 45–46. p. 71, ll. 1, 2.

By "the land in dispute" he appears to mean the Extended Area or possibly the area edged red on Exhibit " A " and not merely the Kwaekesiem area.

21. The evidence showed that, while the Chief of Bukuruwa claimed the whole area edged red upon Exhibit " A," the Chief of Wusuta claimed only the central portion of it, extending on the Volta from the point where the originally unnamed Gublah or Buglame Stream (the mouth of

p. 58, ll. 18–28.

which is about 1½ miles south of the Village of Nkami) enters the Volta (see south-east corner of 5G) southwards to the point where the Komla (Kwabina or Kobina) stream enters the Volta. The Komla is the originally
p. 58, l. 24. unnamed stream shown upon Exhibit "A" as falling into the Volta between Atipradaa (Atikpale on Exhibit "A") and Asabi, south of the stream Tawje (see 6F). Both of these said streams are named in pencil
p. 58, ll. 20–24. on Exhibit "A," such naming having been effected by the Appellants' Surveyor at the trial.

The Wusuta area so bounded on the east by the Volta was said to extend westerly approximately to that part of the westerly red line shown
p. 58, l. 28. upon Exhibit "A" which runs from Dedesu (1D) to Dempta (1F). The precise lines of the northern and southern boundaries claimed were not indicated either upon the Exhibit "A" or in evidence but the greater part of the Kwaekesiem area appears probably not to be within the area claimed by the Wusuta Chief but to lie south or south-east of it, and if any part be (as such greater part seems to be) outside the Wusuta area, it must also be outside the area of the Chief of Atipradaa, the original First Defendant.

p. 58, l. 26 It appeared from the evidence that the Wusuta Chief considered that the area to the north of the Wusuta area appertained to the Stool of the Chief of Aveme, an Ewe Chief whose headquarters lie east of the Volta at Gbohome.

pp. 44–45 It also appeared from the Appellants' evidence that the area to the south of the Wusuta area was claimed by the Stool of the Chief of Botoku, an Ewe Chief whose headquarters also lie east of the Volta, south of the Wusuta lands there and that this claim was admitted by Wusuta.

Ditto It further appeared from the Appellants' evidence that the area to the south of the Botoku area was claimed by the Stool of the Chief of Tonkor (Tankaw, Tongor), an Ewe Chief. At one stage in the proceedings
p. 46, ll. 7–12 before the trial judge it was ordered that the Chiefs of Aveme, Botoku and Tonkaw should be joined as Defendants; but, service upon them
p. 48, ll. 21–33 proving impossible, the Order for joinder was revoked and these Stools accordingly never became parties to this action.

22. It is therefore clear that, while the whole area edged red was claimed by the Respondents, only the central part of the area was claimed by the Appellant, the Chief of Wusuta, and that his sub-chief the Appellant, the Chief of Atipradaa, *prima facie* had no larger claim.

It is also reasonably clear that the area claimed in the Native Court, namely, Kwaekesiem, was only partly in the Wusuta (and Atipradaa) area, the southerly and apparently major part of Kwaekesiem being
p. 45, ll. 11, 12 in the Botoku area.

23. The Respondents' evidence was largely directed to the traditional history of the people of Asabi (G6) and Nkami (D6). Asabi is a hamlet on the banks of the Volta, outside the area claimed by either of the Appellants, but close to Kwaekesiem. As the extent of Kwaekesiem was never defined, it is uncertain whether the Respondents were claiming the site of Asabi as part of Kwaekesiem or not.

It is common ground that the people of Asabi and Nkami are now subjects of the Bukuruwa Stool. The traditional history put forward by the Respondents was that Asabi was founded by a former Chief of Bukuruwa before 1730 and that Adom, the father of the original Defendant Chief Tawia, had during the German occupation of Togoland (1886–1914) sought refuge from the Germans with a predecessor of the Respondent Nkansah, who permitted him to establish Atipradaa, for which tribute was paid, this tribute being continued by the said Defendant Tawiah till 1939. There was, however, no independent evidence that tribute had been paid to the Chief of Asabi in respect of any land occupied by the Chief of Atipradaa or his subjects. p. 26, l. 40 p. 27, l. 1 p. 27, ll. 25–34 p. 37, ll. 9–14

The Appellants' evidence was that Atipradaa had not been founded by Adom but previously by Frow from Wusuta, from whom Adom was the third Chief in succession, and that Asabi was founded by permission of the Ewes, and in particular of the Chief of Botoku, the Asabi Chief marrying a daughter of a Botoku sub-chief living on the western side of the Volta. This was said to have occurred before 1869, the date of the Ashanti-Krepi war, in which the Asabis are said to have fought with the Ewes (Krepis) against the Ashantis. p. 41, ll. 33–36 p. 43, l. 8 p. 44, l. 34 p. 45, l. 6 p. 45, l. 9 p. 45, l. 21

24. Nkami is a village (6D on Exhibit " A," which Exhibit indicates it has between 200 and 1,000 inhabitants) some 20 miles from Kwaekesiem and, like Asabi, outside the area claimed by Wusuta. It is common ground that the people of Nkami are now subjects of the Bukuruwa Stool. But the Respondents themselves say they are not Kwahus but fugitives from Akwamu (an Akan State, the people of which now inhabit an area part of which is south of the area edged red on Exhibit " A," and so shown thereon, but who formerly inhabited a distant area to the south-east near the present town of Nsawam). These fugitives, according to the Respondents, came to Asabi, after which the Asabi Chief settled them at their present habitat. The Appellants' evidence was that both the people of Asabi and those of Nkami had been expelled with the present Akwamus from the original habitat of the Akwamus, that they subsequently fought the Akwamus who killed their Chief, when they fled into the Tongor territory north of the Afram and then moved, as before stated, into Botoku territory where they were permitted to settle at the present Asabi. Subsequently they split and the present Nkami people went further north and, after some wanderings, settled at Nkami by permission of the Avemes. p. 31, ll. 37–40 p. 32, ll. 1–6 p. 38, l. 32 p. 39, l. 9 p. 41, ll. 5–26 p. 46, ll. 23–26

Of these conflicting stories that of the Appellants was supported in general by the independent evidence of one Ababio, a former Paramount Chief of Akwamu, and by one Donkor, the Regent of Peki State, to which Ewe State Wusuta had formerly been subordinate, an association which had ceased long before, whereas the story of the Respondents was mere assertion by themselves and uncorroborated. pp. 60–62 pp. 62–63

25. The Respondents further in their oral evidence claimed specifically that, besides Asabi, some 18 named places (farms or hamlets) in the area edged red in Exhibit " A " had been founded by them or by their permission.

The names and record references of these places are specified in Appendix I to this Case,* as well as the squares in which they are respectively to be found in Exhibit " A."

None of these places is within the area which, from the indications on Exhibit " A," can be described as Kwaekesiem (" place of the tall " forest "), and only two of them, Ahupe and Fenfarao, are near Kwaekesiem.

None of them (except Atipradaa itself) is in the area south of the River Faa which is claimed by Wusuta, one other (Faso) being in the area claimed by Wusuta but north of the Faa.

Six of them are in the area said to appertain to Tonkaw (not a party to the suit).

Two of them are in the area said to appertain to Botoku (not a party).

Nine of them are in the area said to appertain to Aveme (not a party).

p. 30, l. 11

26. A place which may possibly have been actually within Kwaekesiem is that which the Respondents' witness Robert Kojo Kaaning referred to. This witness' origin is not stated, so it is unknown whether he was an Akan, an Ewe or of some other race. His evidence was that in 1930 he had been granted by the then Chief of Asabi some land for farming " near Asabi " " in the land in dispute " and that, when about 1932 sawyers trespassed upon it, he complained to Chief Tawia, Adom's successor as Chief of Atipradaa, who referred him to the Chief of Asabi as the owner of the land. Its situation was not identified further than that it was near Asabi and also near Chief Tawia's " village." Whether by " village," Atipradaa is meant or some farming village of the Chief does not appear. No farm is shown upon Exhibit " A " as belonging to Kaaning and while it remains uncertain where it was, the reference to sawyers trespassing indicates that it may well have been in Kwaekesiem. But Kwaekesiem was only partly within the area claimed by the Appellants, so the weight of this evidence is, it is submitted, very slight. It is submitted that it has no weight against the Appellants for it was indeed the right and only proper course for the Chief of Atipradaa to refer Kaaning to the Chief of Asabi, if, as seems most probable, his farm was within the area which had been allotted, according to the Ewe tradition, to the Asabis by the Botokus. It would have been most improper for him to have himself interfered with land in which he claimed no interest but in which the Chief of Asabi and his people had the paramount usufructuary right, indefeasible so long as they behaved themselves in accordance with customary law.

27. With regard to Akuamoa, the original 2nd Defendant, the

p. 29

Respondents adduced uncontradicted evidence that, being a Presbyter of the Presbyterian Church at Dzara in Aveme (east of the Volta) he approached the Minister and Presbyters of that Church at Bukuruwa and, through their

pp. 105 & 107

mediation, obtained in 1933 from the Chief of Bukuruwa a grant of land at Adukrom (C2) for himself and a party of six other Avemes from the same and other Ewe villages east of the Volta and signed a written acknowledgment of the conditions of his tenure (Exhibit " B ").

* For Appendix I see fold inside back cover.

Adukrom is some 24 miles or thereabouts distant from Kwaekesiem in a north-westerly direction and is also north of the River Faa and, for the reasons submitted in para. 17 of this case, it is submitted that this transaction is not relevant evidence of title to Kwaekesiem or indeed of any area south of the Faa. Furthermore it was not entered into with the cognisance of any Ewe Chief and the Chief of Wusuta, when he heard of it some years later, about 1940, immediately repudiated it. p. 57, ll. 27–38

28. Another incident, evidence of which was adduced by the Respondent but which it is submitted was not relevant to the determination of the title to Kwaekesiem, for the reasons submitted in para. 17, was a dubious transaction between the Chief of Nkami and Ghazali (Ewe) Head Chief of Aveme. It was adduced in evidence because Aveme claims that the land upon which the village of Nkami stands had been granted to the Nkami people to live upon, the radical title remaining in the Stool of Aveme : Evidence was led by the Appellants that this had been admitted by a former Chief of Nkami during litigation in 1925, the deposition being put in evidence. It clearly contains an admission that during the time the Nkamis were wandering before they settled at the present Nkami, they were granted land by the Chief of Aveme at two places in succession on the east side of the Volta and this is followed by a reference to their later having, with the concurrence of the Chief of Aveme, crossed to the west side of the Volta, apparently to the site of the present village of that name, the inference being that this site also was granted to them by the Chief of Aveme (an inference which the West African Court of Appeal felt unable to accept). This was before the Ashanti-Krepe War of 1866–69. To counter this, the Respondents relied upon a dubious transaction in 1930 between the then Head Chief of Aveme and the same Chief of Nkami whose deposition is above referred to.

p. 39, ll. 36–42
p. 46, ll. 23–26
p. 64, ll. 1–3
p. 98 (Ex. L), ll. 12–20
p. 99, ll. 1 & 2
p. 87, ll. 36–46

29. The Head Chief of Aveme gave evidence as to this transaction the purport of which was that he privately proposed to the Chief of Nkami that Avemes (and Kwahus) in the Nkami area should be taxed and the proceeds shared, the Nkami Chief acting as collector, that shortly afterwards he met the Nkami Chief again when a paper in English prepared by the Nkami Chief's Clerk was read over to him as recording this proposal and he signed two documents (he being able to sign his name but knowing no English), that on returning home he showed these documents to his Clerk, who told him of their contents. They contained in fact a request by the Chief of Aveme for grants of land at Ofram Aboma and a grant accordingly by the Chief of Nkami on terms of payment of rent and rendering of tribute. On the documents coming to the knowledge of the Elders in 1931 they proceeded to fine him heavily in lieu of destooling him and destooled one of the two Aveme sub-chiefs who had been privy to the transaction, the other having died. They also sent a Linguist with deputees to Nkami to repudiate the transaction and demand the return of the documents, which were never acted upon.

p. 64. ll. 4–33
p. 60, l. 28
p. 60, ll. 3–5.
p. 64, l. 18.
Ex. H & J, pp. 103–104.
p. 59, l. 30, to p. 60.
p. 64, l. 20.
p. 47, l. 31.
p. 48, ll. 5–7.
p. 47, ll. 32–33
p. 48, l. 16.

30. The situation of Ofram Aboma was not deposed to and no such name appears on Exhibit " A," though Abomakese (A4), Aboma Salafuo (B3), Abomata (C3) and Santaboma (D2) appear.

p. 87, ll. 14 & 15. As the West African Court of Appeal refer to it as deep in the land in dispute (i.e., the land edged red in Exhibit " A ") it may be either Salafuo or Abomata, each of which is more than 20 miles distant from Kwaekesiem.

p. 34, ll. 13 *et seq.* pp. 92–93. 31. The Respondents also adduced evidence of an alleged award (Exhibit " F ") made by Travelling Commissioner Crabb, together with the agreement by virtue of which the alleged award was said to have been p. 92. made (Exhibit " D ") and the evidence (Exhibit " E ") taken by the Commissioner. Upon this alleged Award the judgment of the Supreme Court in favour of the Respondents was largely based but the Appeal Court held it inadmissible.

The Chiefs concerned in this matter were, on the one side, the Wusuta p. 71, ll. 36–47. Chief of Nframa (E5), the Wusuta Chief of Gefugi (presumably Jijagi or cf. p. 34, l. 20. Gefagi (E5)) and the Wusuta Chiefs of Chomi and Agruman (which villages are unidentified, though a village Agrama (C5) appears east of the Volta) and, on the other side, the Chief of Nkami.

It appeared in evidence that the enquiry was an executive enquiry p. 34, l. 33. held on the Governor's instructions and not of a judicial nature and it is p. 35, ll. 2–6. submitted that the decision of Mr. Crabb, being merely an executive decision, had no legal force.

32. At the close of the evidence the learned Trial Judge, upon the application of the Respondents, permitted them, as before stated, to enlarge their claim from a claim to Kwaekesiem to a claim to the Extended Area by amendment of the Summons and Statement of Claim. The Respondents were not put upon any conditions for this indulgence, nor were the Appellants given an opportunity of amending their Defence pp. 2 & 3. (or calling evidence), to meet the greatly enlarged claim. Such amendment, as made, consisted of the mere substitution in the Summons of the verbal p. 7. description set out in para. 15 of this case for the original description and a similar substitution in the first part of the Statement of Claim of the Chief of Bukuruwa, leaving the rest of that Statement of Claim and the p. 21. whole of the Statement of Claim of his Paramount Chief unaltered.

p. 6, ll. 32–36. The Statements of Claim therefore became inconsequent, the allegation being that Bukuruwa was the owner of Kwaekesiem and the conclusion a claim to the Extended Area of about 1,000 square miles. Furthermore this area is not defined by reference to Exhibit " A " and its western boundary without that definition is undefined and uncertain. The judgment, which merely grants the declaration claimed, without further definition of the area, is consequently also indefinite and it is submitted that the Declaration of title which it purports to give would on that account be of no effect, even if the Court had been competent to make the amendment.

33. On the 2nd May, 1947, judgment declaring their title to the Extended Area with costs was given by the Supreme Court in favour of the Respondents.

34. The Chief of Wusuta, however, defended (as the Judgment states) only a part of the land so claimed by the Plaintiffs, he saying, and the evidence on his part showing, that the greater part (if not the whole) of the remainder of the area belonged to the Ewe Stools of Aveme, Botoku and Tonkaw, who were not parties to the suit. p. 70, ll. 18–26.

It appeared that at some former time Wusuta claimed to have been in some position of superiority to Aveme but that this position no longer existed and they are now independent of one another. The portion actually claimed by the Appellants (by way of defence only and not of counter-claim) extends on the Volta between the stream Kobina (Komla, Kwamla) (F6), North of Asabi, on the south of the stream Gublah (Buglame) (6D), south of Nkami, on the north. p. 43, ll. 34–35. p. 54, ll. 22–28. p. 58, ll. 24–26. p. 58, ll. 20–22.

35. The learned Trial Judge (M'Carthy Acting C.J.), after summarising the course of the proceedings, mentioned as unsatisfactory that, though the trial had begun on the 12th September, 1946 (and continued on the 13th, 16th, 17th and 18th September), it was not until the 16th that Akuamoa was represented by Counsel or until the 20th that the real defendants, the Chiefs of Wusuta and Atipradaa, were so represented. By this time seven of the Respondents' thirteen witnesses had given evidence. p. 69. p. 70, ll. 6–10.

36. He then stated (in effect) that the main issue was whether the Bukuruwa Stool held " the land " (i.e., the land comprised in the amended Statement of Claim) under the Kwahu Stool as the ultimate owner and that this was a proper issue notwithstanding that the Appellants claimed interest in only part of that area and the other Ewe Stools, who it appeared were interested in the remainder, were not parties. p. 70, l. 11.

He had given at the time and gave in his judgment no reason for having permitted the said enlargement of the Respondents' claim from a claim to Kwaekesiem to a claim to this vastly larger area and indeed does not mention Kwaekesiem at all. He mentions that the land claimed by the Appellants was not delineated on the plan Exhibit " A." He then states (as is the case) that the main territory of the Kwahus lies west of the land in dispute, while the Wusutas, Avemes, Botokus and, Tonkaws belong to the large Ewe tribe. He then makes the finding before referred to (para. 20) which recognises that the Ewe were earlier in the neighbourhood, and possibly (or probably) on the ground (or some of it), than the Kwahus as follows :— p. 70, l. 34.

> " The Wusutas and the other Ewe Divisions mentioned are " established on the other side of the Volta, where they hold " territory, and have their respective principal towns. Although " the broad River Volta might well form a boundary between the " Ewes on the East and the Kwahus on the West, it may be that " the Ewes have long been settled at least in parts of the land in " dispute. The Kwahus arrived in these parts after the Ewes." p. 70, ll. 43 *et seq.*, to p. 71, ll. 1, 2.

37. These remarks of the learned Judge are evidently directed to the well-established Gold Coast Customary law that the first settlers on land thereby acquire title to such land (for themselves and their

community) and indicate his view that it was probable that Ewes were original occupants of at least part of the land edged red in Exhibit " A " and thereby became owners thereof.

That his opinion (that the Volta might well have formed a boundary between the Ewes and Kwahus) did not lead him to find it so to have been, was doubtless influenced by his knowledge that lower down, immediately below the area edged red on Exhibit " A," the lands appertaining to the Akan State and Paramount Stool of Akwamu are on
p. 26, l. 41. both sides of the Volta, so that it clearly was no obstacle to settlement. Exhibit " A " shows that its average width at the part he was considering 10 was about a quarter of a mile from the east to the west bank. Bukuruwa is some 55 miles from the nearest point on the west bank, and the Paramount Chief of Kwahu's village rather more.

But the learned Judge considered that such probable title had been displaced by subsequent events which he proceeds to discuss, namely :—

(1) The Ashanti-Krepi War (1866–1869) ;

(2) The annexation of Togoland by Germany (1886–1918) ;

(3) The alleged arbitration before Travelling Commissioner Crabb in 1903.

38. As to the Ashanti-Krepi War, this was fought on the east of the 20
p. 71, l. 10. Volta. The learned Judge, after stating this, proceeds to say :—

p. 71, l. 15 *et seq.*

" It seems probable that any Wusutas then settled on the " West bank of the Volta on the land in dispute would have fled " before the enemy and that for some time at any rate there could " have been no question of the Kwahus serving Wusutas or any " other Ewe Stool. Conditions in these parts continued to be " unsettled for a number of years. It is likely therefore that at " least some of the Wusutas who fled before the enemy resettled on " the land in dispute after the withdrawal of the Ashantis. The " Wusuta case is that the Wusutas regained dominion over the 30 " land."

It is respectfully submitted that substantially the whole of this passage is unsupported either by evidence or by known historical facts. There was no evidence given to indicate that anything that happened during or consequent upon the Ashanti-Krepi war at all affected the
p. 58, l. 10. previous status of the land west of the Volta. As this War was fought
p. 55, ll. 30–32. on the other or east side of the Volta, east or south of the area, it appears more probable that such War, if it had any effect at all, would cause an influx of Krepis from the disturbed area and so strengthen their hold upon it. It is not the Appellants' case that the Wusutas regained dominion 40 over the land, but that they at all times held dominion over it. The historical facts are that the Ashanti-Krepi war was not a successful war from the point of view of the Ashantis and their allies, and that they eventually withdrew after the loss of not less than 136 of their Chiefs and nearly half their troops. (Claridge. History of Gold Coast, Vol. II, p. 4 ; Ellis. History of Gold Coast, p. 283.)

Furthermore, this war arose out of and was part of operations by Ashanti against the British Government, whom they were attacking

through their allies the Krepis, so it is submitted that any acquisitions which might have been made by Ashanti or Ashanti allies therein ought not to be recognised. But no such acquisitions were proved, the Ashantis and their allies withdrawing empty handed after some pyrrhic victories over, and a heavy defeat by, the Krepis. (Claridge, Vol. I, p. 577 and *ante*; Ward. Short History of the Gold Coast, p. 162.)

39. The learned Judge then referred to the annexation in 1886 of Togoland by Germany, whereby the main body of the Ewes on the east bank of the Volta were cut off from their compatriots on the west. He states that it was a feature of German policy to weaken tribal organisation and that the evidence established that they prohibited their subject Ewes on the east bank from crossing the Volta and prevented their asserting any territorial rights in respect of British Territory. He does not, however, find that they thereby lost any property in the land they may theretofore have had or that it was occupied by others (of which there was no evidence, nor does, in the customary law, mere possession, however long, oust a previously existing title). He notes that this state of affairs lasted from 1886 to 1914 and that on this background must be viewed certain events in 1903, namely, the enquiry and alleged award referred to in paragraph 31.

p. 71, l. 23.

p. 55, ll. 24–27.

40. In that year there was an enquiry held on the instructions of the Governor of the Gold Coast Colony in the course of which the Wusuta sub-chief of Nframa, three other Wusuta sub-chiefs (of Agruman, Chomi and Gefugi) and the Kwahu Chief of Nkami entered into a written agreement dated 21st September, 1903 (Plaintiffs' Exhibit "D"), "to have the dispute "about the land settled before Travelling Commissioner Crabb at Nkami "in the presence of either the King of Kwahu or his Linguist." This agreement does not define the area then in dispute and there is no evidence that it included Kwaekesiem. Thereafter Mr. Crabb made a Report to the Secretary for Native Affairs, dated the 8th November, 1908 (Plaintiffs' Exhibit "F"), which the Respondents claimed to be an Award. The Appellants objected that it was wholly inadmissible in that the enquiry from which it proceeded was not held under the Commission of Enquiry Ordinance or under the Order of any Court and further that the Chief of Bukuruwa was not a party to the said agreement. Nor was the Chief of Wusuta, his headquarters being in German territory. The Respondents also tendered in the Supreme Court a certified copy of the evidence taken by the Travelling Commissioner (Plaintiffs' Exhibit "E") to enable the Court to see the scope of the enquiry, the subject matter of the dispute and the part taken at the enquiry by the Chiefs of Nkami, Asabi, Bukuruwa and Wusuta (meaning the Wusuta Chief of Nframa). The Appellants did not object to Exhibit "E" being so used.

p. 92.

pp. 92–93.
p. 35, ll. 1–6.

p. 35, l. 20.

p. 33, l. 23.
not printed.

The learned Judge ruled, upon the Appellants' objection, that the Report (Exhibit "F") was admissible as an award, binding not only the parties to the agreement but all who had taken part in the enquiry, which he found to be not only the Chief of Nkami but also his superior, the Chief of Asabi, and their overlord the Chief of Bukuruwa, who were entitled to rely upon it as evidence of their title to the land then in dispute, which land the learned Judge held to have been more or less the same as that in dispute before him, meaning thereby the "Extended Area."

p. 35, l. 29.
pp. 92, 93.

p. 72, l. 19 to p. 73, l. 20.

41. In his judgment the learned Judge further held that, though this report, held by him to be an award, did not operate as an estoppel against the Appellants, it was evidence against them, notwithstanding that the principal Wusuta Chief had not been a party to it and had been unable to defend his rights.

p. 92.

42. It is respectfully submitted that even if Exhibit " D " had been a submission to arbitration, the learned Judge was in error in treating

pp. 92, 93.

the copy Report (Exhibit " F ") as an award and admitting it accordingly and that the West African Court of Appeal were right (assuming there was

p. 84, ll. 37–45.

an arbitration) in holding that Exhibit " F " was not an award, but merely a report to the Governor of the effect of a parole (non-written) award, and that there was no legal evidence before the Court as to the terms of the actual parole award.

43. It is, however, respectfully submitted that the Court of Appeal

p. 84, l. 36.

was in error both in holding that Exhibit " D " was a written submission to Arbitration and also that, if it was, a parole award was not excluded, and that there are accordingly other valid objections to the reception of the alleged award beyond that found by the Court of Appeal, namely :—

(1) Exhibit " D " is an agreement between illiterate African Chiefs and therefore it is not to be presumed that they understood English or either the literal meaning or the legal effect of the document.

(2) Being an agreement between Africans it is to be presumed that they contracted in accordance with native law and custom and English law was excluded unless it were proved that it had been expressly adopted by them.

It is accordingly submitted that the circumstances under which the persons who entered into Exhibit " D " came to do so should have been, but were not, proved and particularly, as it is contended that it was a submission to the arbitration of the Government Executive Officer, Mr. Crabb, that the document was interpreted and its terms and implications were explained and approved by them and especially that it was intended to confer upon the arbitrator powers which are not consistent with customary law, and that on that ground any alleged award ought to be rejected as not proved to be binding.

p. 92.

(3) Exhibit " D " does not purport to be an agreement that the dispute should be settled by Mr. Crabb but settled before him . . . in the presence of either the King of Kwahu or his Linguist (spokesman and official representative of the Kwahu State). This points to, and if it were so interpreted to the Chiefs would indicate to them, the holding of a " palaver " in the presence of Mr. Crabb, the object being to settle the dispute by discussion between the parties to it and by their coming to a voluntary agreement, with the assistance of Mr. Crabb, an executive officer of the Government of the lately constituted Gold Coast Colony, as to their respective rights. It points to a conciliation meeting in accordance with custom, at which neither the political officer present nor either of the contending parties had the right or power to impose their

decision. It is clear that this meeting was not so conducted nor was any agreement arrived at, nor did the Respondents either allege or prove any such agreement or any action in accordance with any such agreement or with the alleged award either by the Gold Coast Government or the parties. Political Officers of the Gold Coast Government and even the Governor himself had not then, and have not now, power to take away their land from anyone or to decide claims to it. Neither the Government nor the Crown had any interest or lawful power to dispose of land in the Gold Coast Colony except such as had been acquired by purchase.

(4) If the matter were not being dealt with by custom but Exhibit " D " was a submission to arbitration governed by English law, the applicable law was the law of England as on the 17th July 1874 (Supreme Court Ordinance 1876 Laws of the Gold Coast 1910 Revision sections 14, 17 and 19) and the applicable provisions were the Common Law Procedure Act 1854 section 11 to 17 inclusive and the proceedings do not conform to the general law or the Statute in that— p. 92.

(A) Exhibit " D," if a submission, does not show what was " the dispute about the land," either what was " the land " or the nature of the dispute.

(B) No written award, as prescribed by the Act, was made.

It is further respectfully submitted that if any agreement or lawful award had proceeded from Exhibit " D," it would not have bound the principal Defendant, the present Appellant Chief of Wusuta, because neither he nor his predecessor in title was party to Exhibit " D " or proved to have been cognisant of it. p. 92. p. 92.

44. The learned trial Judge disposed of this argument substantially on the ground that it was expedient for administrative reasons and in the public interest the dispute should be settled one way or another and that the best in the circumstances was done to settle it by the alleged award, which was therefore effective to divest the Chief of Wusuta of his land. p. 72, ll. 31–32.

It is respectfully submitted that these reasons are irrelevant and that the title of the Chief of Wusuta could not be divested in this matter.

45. The learned trial Judge made no comments on any of the evidence, whether of traditional history or of occupation or any other evidence adduced by the parties beyond that adduced by the Respondents relating to the alleged award, but having decided that such alleged award was binding, he accepted it as settling the case. He however added :—

" But having weighed the evidence outside the award my " view is that the balance is slightly in favour of the Kwahu " Stools. p. 72, ll. 39–45. p. 73, ll. 1–11. p. 73, l. 14.

" For my part I do not propose to discuss the evidence in " detail. I would however state that it does appear that at present " there are more Ewes on the land than Kwahus."

This latter circumstance he considered was probably due to movements
p. 73, ll. 22, 23. which had taken place since the date of the alleged award in 1903. This inference he drew from the alleged award, which, he considered, negatived any contention that, immediately before the advent of the Germans, the Wusutas were in control of the land or that such was the position between then and the time of the award, which he stated was also the impression which he had derived from the (rest of the) evidence but he made it clear
p. 73, ll. 30–32 that in his final conclusion he had been influenced by the award.

46. It is submitted that obviously, apart from the alleged award, he considered that the title of the Respondents was at least doubtful to the area (of about 1,000 square miles) which they had been permitted by him to claim by the said amendment and that, apart from the strong influence upon his Judgment of the alleged award, he would not have felt justified in finding (as he proceeded to do) in favour of the Respondents and grating the declaration claimed with costs.

It is submitted in any case that, upon the principles submitted in paragraph 17 of this case, he was in error in granting a declaration of title to the whole of the land claimed by the Respondents, or to the whole of the land claimed by the Appellants to be Wusuta land, or to the whole of the land Kwaekesiem, or indeed to any part of Kwaekesiem unless and until the boundaries of Kwaekesiem had been defined.

It is further submitted that the form of the declaration made cannot
p. 73, l. 33. be sustained in law as, in following the amended Statement of Claim, it fails to define the boundaries of the land either by a sufficient verbal
cf. p. 7, ll. 26–34. description or by reference to Exhibit " A." The boundary on the west " by Abetifi, Nkwatia, Pitiko and Kwahu Tafo Stool lands " is, in the absence of further definition, entirely uncertain, nor is there anything indicated in the judgment by which the boundaries of these four Stool lands can be ascertained. It is notorious that in the Gold Coast the ownership and extent of Stool lands is in frequent dispute and their boundaries are seldom, if ever, self evident.

47. The learned trial Judge does not appear to have paid any attention to the admitted evidence of present occupation provided by Exhibit " A," presumably because of his view that the only period to be regarded was that between the Ashanti-Krepi War of 1866–69 and the alleged award of 1903 (both inclusive) and that subsequent happenings
p. 73, l. 23. did not, as he expressed it, affect the legal position. It is submitted that he should have considered and given due weight to all events up to, and the position at, the date of the issue of the Summons on the 13th March, 1940. The position, substantially on that date, as to the use and occupation of all parts of the area edged red in Exhibit " A " is shown on such exhibit. It is respectfully submitted that, as analysed in paras. 57 to 60 of, and Appendix II to, this Case,* it contains valuable evidence which does not appear to have been considered either by the Trial Judge or by the Court of Appeal.

48. From this judgment the first three Defendants appealed to the West African Court of Appeal on grounds substantially as follows :—

p. 74, ll. 20–26. p. 77, l. 14 to p. 78, l. 10. p. 78, ll. 24–43. (A) the inadmissibility of the alleged award and the unfairness of the Enquiry which preceded it ;

* For Appendix II see fold in back cover

(B) failure of the Respondents to discharge the burden of proof required to entitle them to a declaration of title; pp. 74, l. 19 & ll. 27–32. p. 76, l. 10 to p. 77, l. 4.

(C) misdirection by the Trial Judge of himself on the facts and inferences of fact and failure of the Trial Judge properly to consider and weigh the evidence. p. 76, l. 31 to p. 77, l. 13.

49. The Court of Appeal (their Honours J. A. Lucie-Smith O.B.E. C.J. Sierra Leone (Presiding J.) J. H. Coussey and Samuel Okai Quashie-Idun J.J. Gold Coast) pronounced a single judgment, which was delivered by His Honour Mr. Justice J. H. Coussey on the 1st March, 1948, whereby they dismissed the Appeal with Costs. p. 82.

They do not refer at all to Exhibit "A" and it is clear that they wholly misapprehended the extent of the area with regard to which the declaration of the title had been given, for, in the first sentence of their judgment, they state that "the Plaintiffs obtained a declaration of title to a large area of land, about 20 square miles in extent, having as its eastern boundary the River Volta." p. 82, ll. 20–24.

As before stated, the actual area of the land is about 1,000 square miles.

It is respectfully submitted that this very great error alone is sufficient to cast the gravest doubt upon their decision.

50. Like the Trial Judge, the Appeal Court paid no heed to the rival traditions of the parties and so far as history is concerned, began with the Ashanti-Krepi War of 1866–69. But they mistook the judgment of the Trial Judge. He (without evidence or historical support) had considered it probable (and merely probable) that any Wusutas on the land in dispute would have fled thence before the enemy but likely that some of them might have resettled there after the Ashanti withdrawal. The Appeal Court however say that the Trial Judge positively held that the Ashanti did actually drive the Krepis, including the Wusutas, from the land in dispute, misapprehending his words which they cite, those words themselves not being justified by evidence or known history. p. 71, ll. 15–22. p. 83, ll. 16–23.

From this erroneous premise they draw the conclusion that, as the Kwahus were allies of the Ashantis, when the Ashanti army receded, the Kwahus as allies of the Ashantis, remained in possession of the land in dispute as owners, the Ashantis advancing no claim thereto. p. 83, ll. 20–23 and ll. 36–40.

It is submitted that even if the premise had been correct, the conclusion does not follow from it. Nor was there any evidence that the Kwahus, during or following the Ashanti-Krepi war, were or remained in possession of the land in dispute in right of the Ashanti conquest. Nor was that a claim which the Respondents had put forward, nor did they allege that, having so acquired the land by conquest or having acquired it by whatsoever other means, they had allowed the conquered Wusuta and other Ewe people to occupy parts of the land for cultivation so long as no adverse claim was made. The Respondents' case appears to have been that, save for the Atipradaa people, the Ewes on the west

of the Volta were merely intruders and it does not appear that the Respondents were prepared to concede any lawful occupation to other Ewes.

It is respectfully submitted that the conclusion of the Court of Appeal on this point cannot be sustained.

p. 83, l. 44 to p. 84, l. 45. p. 84, l. 46 to p. 85, l. 13.

51. The Appeal Court rejected the alleged award, and the proceedings leading up to it, for the reason stated in para. 42 of this case, and they also excluded (it is submitted rightly) certain alleged admissions by the Ewe Chief of Fasu (E5), a village on the Volta.

p. 85, ll. 13–29.

52. But the Trial Judge's statement that, having weighed the evidence outside the award, his view was that the balance was slightly in favour of the Kwahu Stools, they regarded as a general finding of fact in the Respondents' favour on the evidence before the Court, and, as the judgment before them did not contain any analysis of that evidence, they resorted to their powers under Rule 31 [*sic*] of the West African Court of Appeal Rules to examine the evidence for themselves.

p. 85, ll. 26–29.

It is apprehended that the reference should be to Rule 26 which reads as follows :—

> " 26. The Court may from time to time make any order " necessary for determining the real question in controversy in " the appeal, and may amend any defect or error in the record of " appeal, and may direct the Court below to enquire into and " certify its finding on any question which the Court thinks fit to " determine before final judgment in the appeal, and generally shall " have as full jurisdiction over the whole proceedings as if the " proceedings had been instituted and prosecuted in the Court as a " Court of first instance, and may re-hear the whole case, or may " remit it to the Court below to be re-heard, or to be otherwise dealt " with as the Court directs."

p. 85, ll. 31–36.

53. The Appeal Court stated that the principle to be applied was " that the onus is on the Plaintiffs to satisfy the Court that they are " entitled on the evidence brought by them to a declaration of title and that " they must rely on the strength of their own case and not on the weakness " of the Defendants' case, and further that, if the whole evidence in the " case be conflicting and confused and there is little to choose between the " rival stories, the Plaintiffs fail."

This principle had been laid down in previous decisions of the West African Court of Appeal and it is submitted that, if it had been considered and applied by the Trial Judge, he should and would, upon the view he took of the evidence, at least have non-suited the Respondents with or without liberty to take a fresh action as he thought fit (a course permitted by Order 39 in the 3rd Schedule to the said Courts Ordinance).

54. On reviewing the evidence, however, the Appeal Court considered that it was far from slightly in favour of the Respondents and that, upon such review, they were entitled to the declaration sought. p. 85, ll. 37–40.

This view they based upon the Respondents' evidence as to —

(1) the alleged grant of land at Atipradaa near Asabi (para. 23 of this Case);

(2) the transaction with Robert Kojo Kaaning (para. 26 of this Case);

(3) the transaction with Akuamoa (para. 27 of this Case);

(4) the transaction between the Chiefs of Aveme and Nkami (paras. 28 and 29 of this Case);

(5) the evidence of the Akroso Chief (not before referred to).

55. It is obvious however that this view is primarily based upon, and their interpretation of the evidence coloured by, their mistaken assumption that the Trial Judge had found as a fact that the Kwahus had acquired the land by conquest (or as legatees of the supposed actual conquerors, the Ashanti) during the Ashanti-Krepi war, for they say :—

"The traditional evidence as found by the Trial Court is "consistent in our view with the conditions existing to-day." p. 85, ll. 41–42.

This reference to traditional evidence can only refer to the Appeal Court's mistaken version of the finding of the Trial Judge concerning the effect of the Ashanti-Krepi war, for the Trial Judge had made no comment on any other traditional evidence or any of the five matters mentioned in para. 54.

It is submitted that these five matters taken either together or separately, even if the Respondents' version was uncontradicted, clearly are not sufficient in themselves to entitle the Respondents to the declaration which they obtained.

56. It is submitted that, in expressing their opinion in favour of the Respondents, the Appeal Court omitted to consider the very important evidence contained in the plan Exhibit "A". They do not refer to Exhibit "A" at all, and if they had considered it they could not have been under the serious misapprehension that the declaration of title which they affirmed related to an area of 20 square miles or (it is submitted) that the then state of affairs was consistent with the Kwahus having in or about 1869 acquired by conquest, and having since held dominion over, this area of some 1,000 square miles, or that they were at the time of the hearing in effective occupation of any parts of it except two districts, one associated with Asabi (G6) and the other with Nkami (D6).

57. Exhibit "A" was an agreed plan and from the Surveyors' evidence it seems that they indicated upon it all the signs of possession of both Kwahus and Ewes. Inspection of the plan indicates that their p. 25, l. 32. p. 58.

work was performed meticulously, Exhibit " A " appearing to show and classify according to its occupants every inhabited place and many ruins, besides fetish places and the ruins of them, within the area edged red.

This area edged red divides itself naturally into three, namely, (1) the west bank of the River Volta, comprising places either actually on the bank or within a quarter of a mile of it, (2) Kwaekesiem, the area of high forest on high ground near Asabi (G6) and Atipradaa (F6), the centre of which is near the point at which F5, F6, G5 and G6 meet (3) the hinterland, comprising residue of the area edged red.

The first of the areas of which the Kwahus seem to be in effective occupation is the village of Asabi (G6) together with the part of Kwaekesiem near Asabi, and also possibly the west bank of the Volta around and extending south from Asabi from the mouth of the stream Komla (Kwabena) (F6) on the north to the mouth of the River Afram (I5) on the south.

The part of Kwaekesiem of which the Kwahus seem to be in effective occupation is that nearest to Asabi, lying to the south-east of an imaginary straight line drawn from the source of the stream Komla (Kwabena) (this stream being the southern boundary of the land claimed by the Wusuta) to the summit of the hill Ohenebeppo (Chief Hill) 2½ miles distant and thence to the edge of Kwaekesiem, indicated on Exhibit " A " as about 1 mile further.

p. 58, l. 25.

The remaining part of Kwaekesiem lying to the north west of this imaginary line appears from Exhibit " A " to be in the effective occupation of the Wusutas.

A detailed examination of the Kwaekesiem area affords the following figures (in summary form) of inhabited places (mainly, if not entirely, individual farms) and ruins, including Fetish Ruins.

Kwahus	54
Ewes	55
Disputed	1
Unclaimed	2
Total	112

The parts of Kwaekesiam in the respective occupations of Kwahus and Ewes appear from Exhibit " A " to be of approximately equal size.

58. The Kwahus may also possibly be considered in effective occupation of the west bank of the Volta from the north of the Afram up to the southern Wusuta boundary at the mouth of the Komla (Kwabena) stream, about a mile north of Asabi.

Examination of Exhibit " A " yields the following summary of the position along the whole length of the west bank of the Volta from the River Afram on the south to the River Obosum on the north, this being

the stretch included within the red line on Exhibit " A " as claimed by Bukuruwa. The whole stretch, as appears from para. 21 of this Case, is said by the Ewes to belong from south to north to the Ewe sub-divisions of the Tongors, the Botokus, the Wusutas, and the Avemes respectively. The Tongors and the Botokus are from the Afram to the Komla (Kwabena), the Wusutas from the Komla to the Gbuglo and the Avemes from the Gbuglo to the Obosum. p. 40, l. 39 to p. 41, l. 3.

Section	*Tongor-Botoku*	*Wusuta*	*Aveme*	*Totals*
ALL PLACES—				
Kwahus	23	0	8	31
Ewes	2	36	20	58
Disputed	0	0	2	2
Unclaimed	1	0	4	5
Totals	26	36	34	96
RUINS—				
Kwahus	1	0	2	3
Ewes	2	5	8	15
Disputed	0	0	1	1
Unclaimed	0	0	0	0
Totals	3	5	11	19
Length of bank (approximate)	22½ miles	22½ miles	19½ miles	64½ miles

It appears from this summary that, on the stretch from the Afram to the Komla, there are 23 Kwahu inhabited places and no Ewe inhabited places, two Ewe places formerly existing being in ruins.

59. The second area of which the Kwahus appear to be in effective occupation is the village of Nkami, also on the west bank of the Volta but in the area which the Ewes say appertains to Aveme.

Apart from Nkami, the above Table shows that from the Komla on the south to the Obosum on the north there are only seven places undisputably claimed by the Kwahus against ·56 undisputably claimed by the Ewes, the seven Kwahu undisputed places being all the Aveme section. In the Wusuta section from the Komla on the south to the Gbugla on the north there are no Kwahu places, either undisputed or disputed, against 36 undisputably claimed by the Ewes.

It is submitted that, in this state of affairs, it was certainly erroneous to make the declaration of title in respect of any part of the west bank of the Volta from the Komla northwards to the Gbugla, which is the only part in which Wusuta is interested.

60. With regard to the hinterland, that is, the remainder of the area apart from Kwaekesiem and the west bank of the Volta, inspection of Exhibit " A " shows that the greater part is entirely unoccupied, there being however a sparse sprinkling of occupied places in the north west, in squares B2 (southern part), C2, D2 and E2 (northern part), a sparser sprinkling along and between the River Lufui and the River Faa (D4, D5, E4, E5 and F4) and an even sparser sprinkling along the Nyimpe Stream (C5). The first and largest group is mixed Kwahu and Ewe occupation with Ewes predominating, the second is entirely Ewe except for one Kwahu in the east of F4, and the third and smallest group is mixed, with Ewe predominating.

The southern portion (nearly half of the area edged red on Exhibit " A ") is almost wholly uninhabited, as is the north east. And many other considerable areas are the same.

The position as to habitation, square by square, of the whole area edged red is summarised in Appendix II to this Case.*

The totals of this Appendix brought into relation with the figures as to Kwaekesiem and the west bank of the Volta are as follows :—

	Kwaekesiem	*West bank Volta*	*Rest of Area*	*Totals Whole area*
Kwahus	54	31	91	176
Ewes	55	58	108	221
Disputed	1	2	23	26
Unclaimed	2	5	20	27
Totals	112	96	242	450

It is submitted that the facts of occupation disclosed by this analysis of the evidence contained in Exhibit " A " is not compatible with the opinion of the Court of Appeal that the Kwahus had acquired and held the area by right of conquest and had permitted the conquered Ewes, theretofore the owners, to occupy parts of the land for cultivation. If such had been the case there would have been some substantial evidence of this and of the acknowledgment of the Kwahu title.

p. 83, ll .37–41.

61. Apart from the undisputed acknowledgment of the Kwahu title by Akuamoa (see para. 27 of this Case), the only evidence of such acknowledgment was as follows :—

(I) the alleged grant of land at Atipradaa by the Chief of Asabi to a predecessor of the First Appellant (see paragraph 23 hereof) ;

(II) the alleged grant of land to Robert Kojo Kaaning (see paragraph 26 hereof) ; and

* For Appendix II see fold in back cover.

(III) the transaction between the Chiefs of Aveme and Nkami (see paragraphs 28 and 29 hereof).

62. The Appeal Court attached importance to the Respondents' witness Kweku Dumfe (a Kwahu headman at Ahupe) not having been cross-examined as to the alleged grant of land at Atipradaa. p. 86, ll. 1-3. pp. 26-28.

This witness had been called to corroborate the evidence of Nkansah II (the original first Respondent) and Counsel had not, at the time when they gave their evidence on the 12th and 13th September, 1946, been instructed. It was not until the 16th that Akuamoa was represented or until the 20th that the major defendants and present Appellants first took part in the hearing and were represented by the same Counsel by which time the Respondents had closed their case. p. 70, l. 6. p. 37, l. 32.

On the 17th Nkansah II was re-called for cross-examination, this cross-examination being, it seems, an attack on the basis of the Respondents' case, that the Asabis had been original settlers and that the Nkamis had derived title from them. (See paras. 23 and 24 of this case.) It is clear, therefore that Akuamoa, who alone was represented, was denying that the Kwahus (Bukuruwas) had original title and inferentially that they were in a position to make the alleged grant of land at Atipradaa or anywhere else, but he was an Aveme and so had no particular interest in the Wusuta town of Atipradaa or in Kwaekesiem, from which his farm was far distant. p. 33.

It is submitted that the absence of express cross-examination on the part of Akuamoa's Counsel is therefore of no significance.

63. So far as Robert Kojo Kaaning's transaction is concerned, Akuamoa, as an Aveme, had no interest in it or in the neighbourhood of Kwaekesiem and there was therefore no cause for his Counsel to cross-examine on his behalf, upon the failure to do which the Court of Appeal comment.

64. The Court of Appeal neither accepted or rejected the Aveme explanation of the transaction between the Chiefs of Aveme and Nkami but considered that the Aveme Chief's evidence was in itself expressive of the Respondents' title. The words upon which they rely are :— p. 87, ll. 15-31.

> " Exhibits ' H ' and ' J ' bear my signature. One day I " visited Chief of Nkami at Nkami privately. I told him that my " subjects were farming *on his side* and that we should arrange to " tax them and share the proceeds."

They considered this an admission that the Chief of Aveme's subjects were farming on Kwahu land in the control of the Chief of Nkami, namely, land on the western side of the River Volta as opposed to Aveme or Ewe land on the eastern side of the River, and that " the Kwahus were to " receive tribute for the occupation of their land while part of the money " collected would go to the Ewe Chief of Aveme not in right of the land but " because the Ewe people were his subjects." p. 87, ll. 26-28.

It appears from the words " on his side " being italicised or underlined in the judgment of the Appeal Court that this interpretation of the evidence is based upon these words. It is submitted that neither they nor the passage as a whole, especially in its context, bear this construction. " On his side," it is submitted, merely points to locality and cannot safely be extended to title. But if it can and should, it is ambiguous. The Aveme case was that the Nkamis had been granted their land by the Avemes and as such they had, from the Aveme point of view, an undoubted and undisturbable right to farm it without interruption by the grantors or persons claiming under them. If therefore Avemes farmed upon it, it would avoid disputes and be reasonable if they were taxed and the proceeds divided between the two Chiefs. It was not however within the competence of either Chief to make such an arrangement without the consent of his Council, and in this connection it is significant that the Aveme Chief says he visited the Nkami Chief privately.

65. Further, it is submitted that the Court of Appeal have taken the quotation out of its context. It is preceded by the assertion that a former Chief of Nkami had truly admitted that the Nkamis got their land from Aveme. It is submitted that what immediately follows cannot reasonably be construed as the contradictory admission by the Aveme Chief which has been extracted from it by the Court of Appeal.

p. 64, ll. 1–3.

p. 64, ll. 10–15.

The quotation is also followed by evidence of the same proposal reduced to writing " to the effect that any of our subjects farming on the " western side of the river should pay a tax to be shared by us two Chiefs, " and that at the end of each year they should present two sheep for each " Chief."

It is clear therefore that the proposal made was that the subjects of both Chiefs should be taxed (the tax to be collected by the Nkami Chief) and that an annual acknowledgment should also be made, and not, as the Court of Appeal assumed, that only Avemes should be taxed.

p.87, ll. 32–35.

66. The Appeal Court also derive some confirmation of the supposed tradition of acquisition by conquest from the evidence of the Respondents' witness, Kofi Djanti, the Linguist of the Chief of Akroso.

According to Exhibit " A " the Respondents say that the lands beyond the Obosum River which forms the northern boundary of the area edged red belong to the Akrosos, but the Appellants say these lands belong to the Nkunyars (Nkonyas).

The linguist in question agreed with the Respondents, saying that the land on the south side of the Obosum was Bukuruwa land. This witness admitted that his people were Akans and Denkeras, that is, of the same origin as the Kwahus, and had no knowledge of the tradition or of the Aveme or Wusuta Chiefs or of there being any Ewe Chiefs on the " land in dispute." The land in dispute at this time was, or included, Kwaekesiem, south of the River Faa and far distant from the Obosum.

In the circumstances it is submitted that this evidence was either irrelevant or at best entitled to very little weight.

67. The only evidence of the Appellants to which the Appeal Court referred was the alleged admission in other litigation by a former Chief of Nkami (referred to in para. 28) that the site of Nkami had been granted to his people by the Aveme Chief. The Court of Appeal held that this inference was too uncertain to be accepted and that (as is the case) there was nowhere in the Chief's evidence a definite statement to that effect or to the effect that the Chief of Aveme had granted any land to the Nkamis on the west of the Volta. p. 87, l. 36. to p. 88, l. 11.

68. There was however a considerable body of evidence led by the Appellants which appears as well, or better, authenticated and as probable as that led by the Respondents and which the Trial Judge had not rejected, merely holding that the evidence outside the alleged award was slightly in favour of the Respondents, being influenced erroneously by his conjectures as to the effect of the Ashanti-Krepi war. It is submitted that, if the Court of Appeal had not approached this evidence with a like (but greater) misconception as to this war, they must at least have found the whole evidence conflicting and confused and with little to choose between the rival stories. p. 40 *et seq.* p. 73, l. 14. p. 85, ll. 34–36.

69. The Appellants therefore contend that the Judgment of the Trial Judge and of the West African Court of Appeal were erroneous and should be set aside, and this action dismissed, or, alternatively, that the Plaintiff-Respondents should be non-suited with leave to bring another action, for the following, among other,

REASONS

(1) BECAUSE the Supreme Court of the Gold Coast had no jurisdiction to make the declaration of title actually made as to the area in respect of which it was made, which area was greater than the area to which title was claimed in the Native Court in which the proceedings originated.

(2) BECAUSE the Supreme Court had no jurisdiction to make a declaration of title in this action in respect of an area to which the Appellants laid no claim.

(3) BECAUSE in the light of known historical facts and the evidence given at the trial (so far as admissible) the Respondents have not discharged the onus of proving their title either to Kwaekesiem or the Extended Area.

(4) BECAUSE the Respondents never defined or identified the position or boundaries of Kwaekesiem, nor was the western boundary of the Extended Area ever sufficiently defined or identified.

(5) BECAUSE the Supreme Court should not have permitted the Respondents to enlarge their claim after the close of the evidence.

RAYMOND WALTON.

(For Appendices I and II and Extract from Government Map see fold in back cover.)

No. 20 of 1950.

In the Privy Council.

ON APPEAL

from the West African Court of Appeal
(Gold Coast Session)

BETWEEN

WUDANU KWASI, Acting Chief of Atipradaa, and MANKRADO KWASI ANSAH, Acting Chief of Wusuta (Defendants) . . . *Appellants*

AND

NANA OSEI TWUM, Ohene of Bukuruwa (substituted for YAW NKANSAH II, Dsasehene of Bukuruwa Kwahu) (Plaintiff) **and NANA AKWAMOA AKYEAMPONG, Omanhene of Kwahu** (Co-Plaintiff) . . . *Respondents.*

Case for the Appellants.

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