27, 1956

No. 8 of 1953.

In the Privy Council.

ON APPEAL

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

BETWEEN

KWEKU MINTA EBU, Krontihene of Koshea (substituted for NANA PRAH AGYINSAIM, Defendant) . . . . . *Appellant*

AND

CHIEF KWAMIN ANTRADU ABABIO (substituted for CHIEF KOBINA SEI, Plaintiff) . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal by the Defendant against a judgment of the West African Court of Appeal (Gold Coast Session) pronounced upon the 5th January 1952, which dismissed an appeal from a judgment of the Supreme Court of the Gold Coast pronounced upon the 15th October 1949 by Acting Judge L. G. Lingley whereby he granted to the then Plaintiff, the present Respondent, a declaration of title and £100 damages for trespass. p. 37. p. 30.

2. The parties are litigating on behalf of their respective Stools, the original Plaintiff and the present Respondent being the Ohene (Divisional Chief) of Assin Bisiasi and a sub-chief of the Omanhene (Paramount Chief) of the State of Assin Apimanim in the Gold Coast Colony, and the original Defendant and the present Appellant being the Ohene of Koshea and a sub-chief of the Omanhene of Assin Attendaso in the same Colony. Each party alleges that the land in dispute is attached to his Stool and not to the Stool of the other party, but there is no counterclaim. The land actually in dispute is shown upon a plan, Exhibit D, which has been reproduced for the purpose of this appeal and is on the scale of 2½ inches to 1 mile. The area measures approximately 7 miles from north to south and from east to west is in its northern part some 4 miles across diminishing towards the south to about 2 miles across.

The Plaintiff alleges that this area is part of a larger area called "Swedru" which is attached to his Stool and extends towards the west. p. 3, l. 26.

p. 5, l. 27. The Defendant alleges on his side that the area (which he refers to as Owirekyi land) is part of the larger area of Koshea land which extends towards the east from the northern part of the disputed area.

3. The main question in the present appeal is whether the Plaintiff discharged the burden of proof that lies upon a Plaintiff who claims a declaration of title. It is submitted that for the reasons which are hereafter given, the Plaintiff did not discharge such burden of proof and that judgment should have been for the Defendant upon the Plaintiff's claim and that both the trial Court and the Court of Appeal erred in law in granting and upholding respectively a declaration of title to the Plaintiff.

THE PRESENT SUIT.

p. 1. 4. The present suit was instituted on the 12th June 1930 in the Tribunal of the Provincial Council of Chiefs by the then Chief of Assin
p. 4, ll. 21–32. Bisiasi against the then Ohene of Koshea. The then Chief of Assin Bisiasi instituted the suit because of the cutting of a boundary by the Koshea people through land claimed by the Plaintiff which, it is alleged, resulted in the destruction of a large number of cocoa trees for which the
p. 2, ll. 3–4. damages of £100 were claimed. After certain abortive proceedings, the suit was still pending before a Judicial Committee of that Tribunal when, by virtue of the Native Courts (Colony) Ordinance 1944, the Land
p. 3, l. 23. Court of the Central Judicial Division of the Supreme Court of the Gold Coast became seized of it.

p. 2. 5. Pursuant to an Order of the Supreme Court, pleadings were delivered. From these pleadings it appears that the main issues were which of the parties had acquired title by original occupancy (which both claimed) and what had been the possession of the respective parties.

As to original title by occupancy, both parties claimed to be Etsis and as such the original occupiers of the land and each party alleged that the other party was an immigrant who had been permitted to occupy land belonging to the opposite party.

6. It was common ground and is common knowledge that, in this part of the Gold Coast Colony, the Etsis are the earliest known inhabitants from before historical times and, as such, were the first known owners of the land. It was also common ground that the Assin community (who are of Akan race) were much later immigrants, it being common knowledge that the Assin people were expelled from Ashanti in historical times upon occasions and dates which are known and that they were received and settled in this area, where they re-formed themselves as the present two States (Aman) already mentioned of Assin Apimanim and Assin Attandasu, each under an Omanhene establishing peacefully an Assin political overlordship over the Etsi communities who became subordinate to Assin political paramountcy but whose radical ownership of the land would not be affected, there having been no conquest of the Etsis by the Assins.

R. 3, l. 39. 7. Both parties alleged in their pleadings that they had a number
R. 6, l. 1. of named " villages " upon the land in dispute. A " Krom " (" Village ")

may and frequently does consist of one, two or three huts only or thereabouts and it seems that most of the settlements alleged were of this character. Ex. D.

The Plaintiff complained in his Statement of Claim that, during the period of 19 years prior to his Statement of Claim during which the action had been pending, the Defendant had permitted people to occupy portions of the land in dispute as tenants but did not allege in his Statement of Claim that he, the Plaintiff, had at any time done the same or that his people had farmed upon it during that period. He also alleged that he had granted many concessions on Swedru land, naming three in particular. p. 4, l. 33. p. 4.

The Defendant in his Defence alleged long and undisturbed possession of the disputed area, the making of extensive cocoa farms upon it, and the exercise of rights of ownership such as granting rubber rights, gold prospecting rights, allowing settlement of strangers and the sale in 1929 of two portions of the land. p. 6, ll. 10–25.

8. Chief Ababio, the present Respondent, gave evidence supporting in general terms the Statement of Claim that he and his people were Etsis and original inhabitants and had granted to the Defendants their lands. No representative of the Stools of Adansi, Ekyianu or Morkwa whose lands, as well as those of the Defendant, admittedly bounded the disputed area on the north, east and south were called in support of his tradition and title. p. 9, l. 4. p. 8, ll. 39–44.

9. Much evidence was given as to the cutting in 1930 of a boundary by Defendant which cutting had led to the Plaintiff instituting this action. This boundary, according to the Plaintiff and his witnesses, was cut from Subriso on the east bank of the River Prah, immediately below the confluence of the River Subin, in a more or less southerly direction to the Asensu Stream, passing close to the east side of the village of Senchiem where is the rivulet Esukessi and then passing on to the Asensu Stream, presumably in the same general direction, the cutting of the boundary lines near Senchiem resulting, it is alleged, in the destruction of a large number of cocoa trees in the farms situate near Senchiem belonging to the Plaintiff and his subjects, in respect of which destruction the damages of £100 were claimed.

Plaintiff's Pleadings and Evidence.
p. 4, ll. 22–32.
p. 8, ll. 16–17, ll. 21–27.
p. 10, ll. 1–11.
p. 11, ll. 18–45. + p. 12, ll. 1–7.
p. 12, ll. 20–36.

Defendant's Evidence
p. 16, l. 24 to p. 17, l. 10.
p. 18, ll. 23–27.
p. 19, ll. 18–28.
p. 20, ll. 12–13.
p. 21, ll. 23–25.

Surveyor's Evidence
p. 25, l. 32 + ll. 35–38.

The above boundary line so alleged to have been cut in 1930 prior to action is not however the boundary which the Defendant asserted as part of his defence in the action.

The boundary claimed by Defendant, as shown upon plan Exhibit D, runs from the confluence of the Subin with the Prah in a south-easterly direction up the Subin for about three miles to near Wombasi and thence, leaving the Subin, in an irregular southerly course to the River Asensu, the lower part of this course being along the Adwo Stream to its confluence with the Asensu. The site of the boundary said by the Plaintiff to have been cut from Subiso to the Asensu, including the cocoa allegedly damaged, is therefore wholly outside the disputed area, as are the villages (Kroms) of Appiah, Atta and Frimpon.

Confusion appears to have been caused at the trial of this action because there was not, as is usual in land cases proceeding in the Supreme Court, an agreed plan of the disputed area prepared under the direction of the Court. There does not appear to have been any plan whatever before the Court when the evidence of the Plaintiff and his witnesses was given. It has been laid down that it is usually necessary for a Plaintiff to produce a plan to show clearly the area (i.e. the area in dispute) in respect of which a declaration of title is claimed against the Defendant. At the close of the
p. 15, ll. 29-36. Plaintiff's evidence however, the Plaintiff on the 15th September 1949 put in an unchecked plan, Exhibit B, copied by Mr. Selby, Licensed Surveyor, from an earlier plan, Exhibit A, which he had made in 1941 in connection with litigation between the present Plaintiff and the Chief of Morkwa, which showed a large area then in dispute between the Plaintiff's Stool and the Stool of Morkwa. Such plans included the area now in dispute. It is conjectured that Exhibit A was prepared in order to delineate the claim of the Plaintiff's Stool (Bisiasi Assin) but no evidence was given which clearly elucidates whether this was so or not. The Stool
p. 15, l. 36. of Koshea was not represented when the boundary shown upon it was surveyed.

p. 25. On the 29th September 1949, being the last day of the trial, the said Plaintiff's Surveyor, Mr. Selby, was re-called by the Defendant and put in Exhibit D, which is a revised and up-to-date version of that part of the former plans which had included the disputed area, which plan Exhibit D shows clearly for the first time what was the disputed area and the location of a number of places which had been mentioned in the evidence of the parties.

10. The Plaintiff, Chief Ababio, in his evidence claimed the following villages as his :—

p. 8, l. 47. Kyeikrome (E4), on the east bank of the Subin,
p. 8, l. 19. but admitted that it was also claimed by Defendant
p. 9, l. 4. Wombuasi (E5),
p. 8, l. 19. but admitted that this also was claimed by Defendant
Borfukrome (?) a mere hunter's camp, not on plan.

But on the other hand he admitted that he did not know the following places shown on the plan as within the disputed area :—

p. 9, l. 8. Owirenkyi (F3)
p. 9, l. 9. Nkata (? Inkura F3)
p. 9, l. 9. Mbaakro (G3)
p. 9, l. 9. Dadiasu (F5) a hunter's camp
p. 9, l. 11. Dadiakun (G3).

Ababio admits not knowing the following places :—

p. 9, l. 12. Buabinkrome (G3)
p. 9, l. 13. Attachen (F5)
p. 9, l. 13. Bawarisu (F3)
p. 9. l. 13. Atwiminasu (F3)
p. 9, l. 15. Inpunsu (Mpunpunisu F6 outside)
p. 9, l. 16. Fahiakotwil (F3)
p. 9, l. 16. Yaw Bronyikrome (E4).

And he admitted that the Defendant had put tenants upon the land in the following places :—

Prabonso (F3) — p. 9, l. 10.
Atwirebuanda (presumably Ackwabuanda F5) — p. 8, l. 20. / p. 9, l. 10.
Ashiresu (Akyiresu) (F3) — p. 9. l. 11.
Abokyikrome (E4) (on east bank of Subin). — p. 9, l. 14.

And that he knew (but he gave no further evidence concerning)—

Egyei (Agyei) (F4) — p. 9, l. 8.
Bisiduasi (E2) — p. 9, l. 13.
Fokyjakrome (EF4) — p. 9, l. 14.
Abrokwakrome. — p. 9, l. 15.

He stated that the following villages were claimed by the Defendant :—

Appiakrome (E5) — p. 8, l. 21.
Atakrome (E5) — p. 8, l. 21.
Frimponkrome (E5) — p. 8, l. 21.

but the plan Exhibit D shows these villages are not within the disputed area, though they are to the east of the line of boundary which is alleged to have been cut in 1930, and in fact they are not claimed by Defendant.

11. The next and principal witness for the Plaintiff was one Kweku Kyi the headman of Senchien (E.6) a place said to have a population of 70 people including children. This man was a subject of Assin Attandasu but his village is on Plaintiff's land about one mile outside the extreme southern end of the western boundary. This witness alleged that land was granted to his ancestor by an ancestor of the Plaintiff which included the whole of the disputed area and that he paid tribute to Plaintiff. He alleged that this was at the time of Amankwatia (i.e. about 90 years before) but he gave no evidence of any occupation or use of any part of the disputed area by his people and appeared to know little about it. — pp. 9–10.

12. The next witness was one Yaw Krom an inhabitant of Senchiem and also an Assin Attendasu subject, who stated he paid tribute to Plaintiff in respect of cocoa farms and gave evidence of the alleged trespass by the Defendant when cutting a boundary track in 1930. But it seems that these farms are close to the village of Senchiem and outside the disputed area, this witness appearing to be under a misapprehension before referred to as to the position of the boundary of the disputed area and to be assuming that the Defendant claimed as his boundary the track cut in 1930. Yaw Bredu (Bedu), brother of the last, corroborated his brother's evidence as to the alleged trespass and damage to cocoa farms in 1930. He admitted that the Defendant had put Akwapims (i.e. strangers) on the disputed area. Kofi Kra, a stranger from Ashanti, gave evidence that his family had obtained lands from the Plaintiff for cultivation at Bisidruasi (E.2) at the edge of the Prah River, that they were paying Plaintiff Ebusa on the produce of their cocoa farms there and that people came regularly to make canoes with Plaintiff's permission. — p. 11. — p. 11, l. 10. — p. 12. — p. 13.

Kobina Kessie, a subject of Assin Apimanim, gave evidence that his ancestor 30–40 years before had founded Kyiekrome (E.4) on east bank of Subin, as a hunting camp, and paid 1/3rd of his proceeds to — pp. 13–14.

Plaintiff, that, on the death of Kyei, he went to the village and found Defendant's representative in charge of the village, that there was a dispute, following which the village was burnt down, he being charged but acquitted at Assizes of doing so and that he had not returned on instructions of the Plaintiff.

p. 14. Kofi Wi an inhabitant of Ewisam (D.3) on the east bank of the Prah outside the disputed area and an Etsi, like the Plaintiff, gave evidence, that he hunted on the other (disputed) side of the Prah and that an ancestor Darko had founded Nsankasa (E.4) village, then in ruins, 20 to 30 years previously.

Nsankasa is distant about 1/4 mile from the bank of the Subin on the western edge of the disputed area.

p. 14. Kofi Mensah an inhabitant of Ewisam, gave evidence that his grandfather Kofi Suboa, a stranger from Ashanti, had founded the village of Abuanan (E.3) and had had cocoa farms there, of which the witness was in possession and paying ebusa to Plaintiff and giving him share of game. Abuanan is about one mile from the east bank of the Prah near the western edge of the disputed area.

This concluded the Plaintiff's evidence of occupation.

p. 15. 13. The only further evidence called by the Plaintiff in support of his title was Kweku Efilfa, presumably an Etsi, his people being Etsis, who stated that he was Regent of the Plaintiff's Paramount Stool of Assin Apimanim and that the Stool lands of Assin Apimanim bounded the Plaintiff's Stool lands between Bediadua (F.6) to Onyina Tushie (G.5) where the boundaries of Plaintiff, the Assin Apimamim Stool lands and the Ekyianu Stool lands converged to a single point (where, on Exhibit D, is marked " Pillar P.E.G.4 ").

As to tradition, he deposed that the Plaintiff was an Etsi, an aboriginal, but that the Assins (" Nkyi's people ") came from Ashanti and assisted the people of Akoti or the Akropons who granted land to Nkyi. He further deposed that the Defendant migrated from Konkoma in Ashanti, that he knew Defendant's land and that the boundary starts at Ninkyi, an ancient boundary, according to information given to him by his elders. He had his own lands elsewhere and, under cross-examination, he admitted that he had not been through the land in dispute.

He gave no explanation of how the Defendant came to possess the land which admittedly he possessed.

p. 16. 14. A Registrar of the Supreme Court was called, after the other witnesses for Plaintiff, to produce certain records (including that of the said litigation between the Plaintiff and the Chief of Morkwa) but none of these were admitted.

p. 28. After the close of the whole of the evidence the Registrar was
p. 45. re-called. He produced Exhibit H, a copy notice addressed to the Plaintiff by a former Registrar bearing date 17th June 1938 of the hearing of a Concession Enquiry No. 2287 (Kwansama Concession). Subsequently
p. 28, l. 28. Exhibits F and G were put in being Certificates of Validity Nos. 191 and
pp. 40, 42.

192 granted by the Supreme Court of the Gold Coast Colony to William Joseph Crook on the 21st August 1907 as to the Inkotwabasa Dredging Concession and the Ofin Aboyi or Offin Southern Bank Concession respectively. The position of the former of these Concessions is shown upon Exhibit D (Sections D.1 and D.2 and E.1 and E.2) as partly extending into the disputed area. The position of the latter Concession is not shown upon Exhibit D and no part of the banks of the Offin River is within the disputed area.

With regard to Exhibit H, this also relates to a concession upon the p. 44.
10 south bank of the Offin River, no part of which bank is within the disputed area.

15. The first witness on Defendant's side was Prah Agyinsaim, the Defendant Chief of Koshea, who admitted that he had caused a boundary p. 17, ll. 1–6.
track to be cut 19 years before as a boundary between his Stool lands and those of Morkwa whom he regarded as his neighbour there and not the Plaintiff. He denied that the cutting had caused the alleged damage. He gave detailed evidence concerning each place mentioned in his Defence to show the existence of villages or the granting of permission to strangers to farm or to collect rubber upon tribute, the granting of permission to
20 prospect parts of the area for gold and manganese, in some cases before 1930, the grant of permission to strangers to build canoes in 1918 upon p. 18.
paying tribute and the sale of land in 1929 and at other times and so on.

He also gave evidence that his people were Etsis and original p. 17, l. 7.
inhabitants, their original settlement having been at Owirenkyi (F.3), p. 18, l. 10.
then Inkuta (F.3), and, after battles with the Denkyiras, of their founding Koshea.

With regard to the litigation between the Plaintiff and Morkwa, p. 19, l. 5.
this had been subsequent to the present case and he had, as a witness p. 19, l. 30.
in that case, stated his boundaries as he had claimed them in the present p. 19, l. 3.
30 suit (which are as shown upon Exhibit D). p. 5, l. 33.

He denied that he had heard of any Concession granted by Plaintiff p. 19, l. 36.
(scilicet, affecting the disputed area), but he had heard of a dredging concession granted by Plaintiff at the confluence of the Prah and Offin (scilicet, outside that area, which the Offin South Bank Concession was).

16. Defendant's witness Kobina Abokyi a stranger deposed that he p. 20.
had founded Abokyikrome (E.4) and had farmed there 19 years without disturbance on land given him to cultivate by Defendant, paying 24/– for cocoa land (presumably "rum" or "aseda"). He went on the land before the litigation started.

40 Kwami Ewuah, Defendant's linguist, deposed that Kyeikrome (E.4) p. 20.
had been founded by his ancestor Ampoma, who was succeeded by Kyei. He himself had made cocoa farms there two years after Ashanti war (the last Ashanti war having been in 1900) and was not disturbed. He had introduced Abokyi to Defendant. He also gave evidence of the Defendant having licensed the cutting of timber, the making of canoes (the latter about 20 years earlier) and the tapping of rubber. He also verified the line of boundary claimed by Defendant between the Subin and the p. 21, l. 23.
Asensu.

p. 21. Kojo Forjuor, a Koshea man, deposed that he started cocoa farming at Ahyiresu (F.3) 15 years before, finding one Achempong his elder already farming cocoa there, and having large cocoa trees.

p. 22. Kobina Sekyi, a stranger, gave evidence of taking land as tenant of Defendant about 21 years earlier at Abuakwa (F.3).

p. 22. Kweku Kuma, a stranger, gave evidence of tapping rubber, 47 years earlier at Prabonso (F.3) paying tribute to Defendant's sub-chief.

p. 23. Kofi Kyeikyei, a stranger, from Wassau, a canoe maker, gave evidence that during the influenza epidemic (1918) he and four companies of Wassaws made canoes at Ahyiresu (F.3) and round about with the permission of Defendant and that he had gone back since twice undisturbed by Plaintiff.

p. 24. Kofi Amuasa, a stranger, deposed that he had lived at Bawaraso (F.3) 25 years by permission of Defendant; paying him tribute throughout.

This concluded the Defendant's evidence as to occupation.

17. Evidence on behalf of the Defendant of tradition was given
p. 24. by two neighbouring indepdendent chiefs. Kobina Ntrakwa, Ohene of Jukwa, representing the Paramount Chief of Denkyira, confirmed the Defendant's tradition of a war between his people and the Denkyiras in which he said the Denkyiras had destroyed Koshea and that this was before the Assin Attendasus had come.

p. 25. Kobina Binfor, Ohene of Dompasi in Adansi, a sub-chief of the Omanhene of Adansi, deposed that he was the border chief and had boundary with Koshea at confluence of Offin and Prah from Okorsu, the Kosheas had been there all the time, they did not migrate.

p. 26. 18. Kofi Odee (Kofi Obie) a stranger, gave evidence of purchasing land from Defendant about 27 years previously and produced the conveyance of it to his brother Kwesi Pobee and himself. This deed is dated the
p. 46, to p. 49. 29th September 1945 and recites sale on or about the 14th May 1927 when "livery of seizin" had been given in accordance with native custom. The land so sold is shown in Exhibit D (F.4 & 5 and G.4 & 5) part being shown as within the disputed area.

p. 27. 19. Further traditional evidence was given by Yaw Fosu, Head Linguist of the Paramount Stool of Assin Attendaso and linguist for 25 years, representing the Paramount Chief. He deposed that his people had migrated to and fro from Ashanti 7 times, finally settling at Fanti Nyankumasi (their present Headquarter town). The Koshea were at Owerenkyi, they were not migrants but original inhabitants known as Etsis. They had not come from Konkomba near Lake Bosumtwi (as Plaintiff alleged).

20. The trial had taken place before Acting Judge Lingley sitting with Odikro Kweku Danso as Assessor. After hearing the evidence the Assessor, on the 15th October 1949, gave his opinion that both sides and also the Morkwa people were aborigines, and he remarked that the Plaintiff's evidence that Defendant was an immigrant was only supported

by a single witness who came from Plaintiff's own State, whereas Defendant's contrary case was supported by two independent witnesses, representing the States of Denkyira and Adansi. p. 29.

He considered that the Plaintiff in the circumstances had failed to prove his case.

21. Upon the said 15th October 1949, the Acting Judge delivered judgment. p. 30.

(A) As to whether the Defendant and Plaintiff respectively were aborigines or immigrants he considered the evidence insufficient to justify a finding, Plaintiff's evidence on that point as reasonable as Defendant's and did not attach the importance to the point which the Assessor had done but preferred to rely upon more recent events. As to these he accepted the evidence of the Plaintiff and his witnesses as reliable (but without setting out what that evidence in his opinion proved or analysing it in any way).

(B) He considered the evidence of the Defendant and those of his witnesses who come from the land unsatisfactory for which the reason he gave was that, in his opinion, all those giving evidence for the Defendant as tenants came on the land after the dispute had started (i.e. after the alleged cutting of boundary near Senchiem in 1930). The tenant witnesses were Kobina Abokyi (19 years in occupation) Kobina Sekyi (21 years occupation) and Kofi Amusa (25 years occupation). While the first of these does not prove occupation before the dispute in 1930, the second and third do so and there was no evidence that this was not so. The learned acting Judge made no specific comment, adverse or otherwise, as to the witnesses coming from the land who were not tenants but Defendant's subjects i.e. Kwami Ewuah and Kojo Forjuor, the former of whom proved occupation from at least 1902 to 1949 and the latter for a period which can be estimated as at least 21 years, nor did he refer to the evidence of strangers who did not come from the land, namely, Kweku Kuma, who gave evidence of Defendant's acts of ownership 47 years earlier (i.e. about 1902), and Kofi Kyeikyei, of such acts of ownership in 1918 (31 years earlier and subsequently). p. 31, l. 4. pp. 20 & 22. p. 24. pp. 20, 21. p. 22. p. 23.

(C) The learned Acting Judge also considered the Defendant's evidence unsatisfactory when describing his boundaries but does not indicate in what respect he found it so, save for an alleged discrepancy between the Defendant's present claim and the boundary drawn on the plan in the Morkwa case (i.e. Exhibit A) in which he had, the judge remarked, been a witness though not a party. The learned acting judge does not refer to the fact that, owing to the default of the Plaintiff, there had been no plan precisely delineating the disputed area at the time when Defendant gave his evidence, a deficiency which was never made good by the Plaintiff, though at a later stage the Defendant, who was under no obligation to do so, caused such a plan to be made. p. 31, l. 9. p. 18, l. 22. p. 25.

It is submitted that, in these circumstances, the Defendant's description in evidence of his boundary was satisfactory and the best he could do. It is printed in the Record, page 16 lines 25 to p. 33 and further referred

to on page 17 lines 1 to 6, p. 18 lines 22 to 37, page 19 lines 3 to 5 and 18 to 28. It is submitted that, in this remark, the learned acting judge has transferred the burden of proof of boundary from Plaintiff to Defendant.

p. 31, l. 15. (D) The learned acting judge considered " the evidence about the concession most material," and in his opinion, there was no proper attempt by the Defendant to explain it. The Plaintiff had however put in evidence concerning 3 concessions (vide para. 14 of this Case), so it is not known which concession he was referring to and considered should have been explained by the Defendant.

p. 19, l. 36. There was no evidence that the Defendant had any knowledge of the only concession which affected the area ; he appears to deny knowledge of it and it is submitted that no further explanation was incumbent upon him, and that, in any case, for the reasons indicated in para. 25 (G) of this Case, his title would not have been affected by any knowledge on his part.

p. 31, l. 17. (E) The learned acting Judge considered Exhibit E of no assistance
p. 46. to the Court, but gives no reason why he considered that this evidence
p. 26, l. 9. of a sale of land, partly within the disputed area, several years before the present dispute arose, was not of assistance, at least as evidence of an act of ownership *ante litem motam.*

p. 31, l. 19. (F) The learned acting judge also considered it unsatisfactory that the evidence (of tradition and boundary) given by representatives of other chiefs had not been given by the chiefs themselves. The witnesses referred
p. 24. to were Kobina Ntrakwa, Ohene of Jukwa, a Divisional chief representing
p. 25. the Omanhene of Denkyira, Kobina Binfor, the Ohene of Dompasi, who was a Divisional chief of the Omanhene of Adansi but did not claim to
p. 27. represent that Paramount Stool and Yaw Fosu, Chief of Odumase, representing the Omanhene of Assian Attendaso, being the Head Linguist. It is however entirely in accordance with custom for even a private person or a head of family to give evidence by deputy, which evidence is by custom treated as that of the person represented ; and giving evidence by deputy, by reason of taboos and other things, is even more usual in the case of a Paramount Chief, who, if summoned as a witness, would, as the proper course, send the linguist to give evidence, as did the Paramount Chief of Assin Attendaso in the present suit. The Ohene of Dompasi appears to have been giving evidence on behalf of the Stool of Dompasi as the actual neighbour of the Plaintiff and not on behalf of the Paramount Chief. The learned acting judge states that the evidence given was not satisfactory but does not say in what respect or respects. None of this evidence was shaken in cross-examination, and it is submitted that it greatly supports the Defendant's case that his people were the original inhabitants and as such owners of the disputed area and were Etsis.

p. 31, l. 22. (G) In the result the learned Acting Judge found the Plaintiff entitled with costs to the declaration of title asked for and the £100 damages for trespass he had claimed.

pp. 34–35. 22. The Defendant duly appealed to the West African Court of Appeal. Owing to the abdication of Nana Prah Agyinsaim, the original Defendant, the West African Court of Appeal, on the 2nd January, 1952, substituted the present Appellant as Defendant-Appellant.

23. On the 3rd January 1952 the Court of Appeal dismissed the appeal, delivering a written judgment on the 5th January 1952. They saw no reason to differ from the Judge's acceptance of the evidence given on behalf of the Plaintiff and rejection of the evidence given by the Defendant and his witnesses who had come from the land and his conclusion that the tenants giving evidence for the Plaintiff had come on the land after this dispute had started. p. 36. p. 37.

The Court of Appeal treat the reference of the trial judge to an unidentified concession as a reference to Ex. F, the Certificate of Validity No. 191, granted by the Supreme Court to one William Joseph Crook in 1907, as most material evidence in favour of the Plaintiff. Upon the whole matter they saw no reason to differ from the trial judge that the Plaintiff had established his right to the declaration asked for and dismissed the appeal with costs. p. 40.

24. Upon the 26th June 1952 the Defendant-Appellant was granted leave by the West African Court of Appeal to Appeal to Her Majesty in Council and has duly preferred his Appeal. p. 39.

SUBMISSIONS

25. The following respectful submissions are made on behalf of the Defendant :—

(A) Neither the Trial Judge nor the Court of Appeal have proceeded upon the proper principle that a plaintiff claiming a declaration of title must rely upon the strength of his own case and not upon the weakness of the case for the Defendant, or, if they considered that they were proceeding upon such principle, which is not evident from either judgment, they misapplied it. Neither judgment indicates in what particulars the Plaintiff's case was strong, except on the one matter of the grant of a concession, which the trial judge did not identify but the Court of Appeal identified as the subject of Ex. F, the Inkotwabasa Dredging Concession (shown upon Exhibit D as the Nkotwabasa Concession. See section D.1, D.2, F.1, F.2). p. 40.

(B) The evidence of the Plaintiff, when examined, is insufficient to entitle him to a declaration of title, even on the footing that the case for the Defendant is weaker, which it is submitted is not so.

(C) In such a dispute as the present, the first question, logically and chronologically, to be considered is the traditional evidence regarding the acquisition of a title to the disputed area, especially as under customary law such a title is not liable to be displaced by the operation of anything in the nature of a Statute of limitations. Behind that question lies another viz.: What weight is to be attached to that evidence. Evidence of tradition must be accepted with great caution, because of the difficulty of checking false statements, including modifications to fit tribal self-esteem

which may be put forward bona fide but incorrectly. It must therefore be tested by its probability and its accord with known facts. When the actual facts are strong and tending strongly towards one side, traditional evidence in conflict is entitled to little weight, but its value increases greatly in so far as it fits in with the known facts and a traditional title because of paramount importance when the known facts, and especially the present facts, are not
p. 30, ll. 23–32. sufficient to displace such title. The Trial Judge in the present case, expressly held that neither party had established a traditional title. The Plaintiff therefore failed in limine on this head. The 10 Court of Appeal acquiesced without any comment at all.

(D) As to the bearing of the actual facts on the issue of title, the Trial Judge evidently considered that acts of ownership after the dispute had started (in 1930) should be disregarded. Assuming such acts ought to be disregarded and that the evidence of the Plaintiff ought to be taken as fully accepted, all that this evidence
pp. 13–14. amounts to is (*vide* paras. 10, 11 and 12 of this Case) that Kyiekrome (E.4) had been founded by a subject of Plaintiff 30 to 40 years earlier but had been abandoned to Defendant's representative
p. 14. (evidence of Kobina Kessie), and that Nsankasa had been founded 20 by a person, not stated to be a subject of Plaintiff but perhaps one, 20 to 30 years before but it was then abandoned in ruins. Two other places were claimed within the disputed area, namely Bisidruasi
p. 13. and Abuanam. As to Bisidruasi, a stranger from Ashanti said his family had obtained lands for cultivation from Plaintiff and were paying Plaintiff Ebusa on their cocoa and that people came there regularly with Paintiff's permission to make canoes but there was no evidence that anything of this had been done before the dispute arose.

p. 14. As to Abuanam, another stranger gave similar evidence, but 30 here again, there was nothing to show that this had started before the dispute began. Exhibit D shows Abuanam also as ruins. There was therefore evidence of acts of ownership within the disputed area at 4 small places at most, two of which had been abandoned and two of which were not shown to have been in existence before the dispute arose.

(E) There was no evidence that any of the witnesses from Senchiem had holdings within the area, the strong indications being that the cocoa farms which they referred to as damaged, when Defendant caused a boundary to be cut in 1930, were close to 40 the village of Senchiem and so not within the disputed area. But even assuming one or more of these farms were just within the disputed area, this would add only one more locality to the above four.

(F) The farms referred to in the evidence are not farms in the English sense but small patches of ground, yielding in some cases merely subsidence crops and in others cocoa. All of these five places are on or near the westerly edge of the disputed area and

miles apart, and even if all are accepted, as evidence of acts of ownership and occupation by or under the Plaintiff within the period held material by the Trial Judge, that fact yields no inference that the whole of the disputed area, which measures some 7 miles in length and from 2 to 4 miles in width, is also in the exclusive ownership of the Plaintiff. In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area, unless the portions so occupied are so numerous and so closely adjoining that they practically cover the whole area or alternatively the occupation of a small area in a larger area with a defined and existing boundary can be reasonably attributable to a right of ownership of the larger area, neither of which conditions exist in the Plaintiff's case.

(G) The same considerations apply to the part of the Inkotwabasa Concession which is within the disputed area. This part of the Concession is on the extreme north-western verge of the disputed area and its extent is small compared with the extent of the disputed area. But there are other considerations adverse to the Plaintiff with regard to this. There was no evidence of any occupation of this part of the area at any time either by the Plaintiff or his subjects or by the grantee of the Concession or that the Defendant at any time was aware of the grant of such concession by the Plaintiff. Such grant is therefore of no evidential value against him and should not have been taken into consideration by the Trial Judge or the Court of Appeal.

Furthermore the mere grant of a Certificate of Validity in respect of a concession does not establish the grantor's title. It establishes the grantee's title against all the world and that the terms of the concession are fair and binding on the true owners of the concession area, whomsoever they may be. Were it not for these provisions of the Concession laws of the Gold Coast no capitalist could safely expend monies on development, having regard to the notorious uncertainties of native titles.

26. It is humbly submitted that, upon the evidence of the Plaintiff, the Defendant had no case to answer, save as to the claim for £100 damages for damage done to cocoa farms on the borders of Senchiem outside the disputed area. On the footing that this damage was done in an area which Defendant does not now dispute is attached to the Plaintiff's Stool, the Defendant cannot now dispute the judgment for damages of £100 in view of the findings of the Trial Judge that in fact damage to that extent was done. In his grounds of appeal to the West African Court of Appeal there was no ground challenging this part of the judgment of the Supreme Court. As to all other matters, the Defendant respectfully submits that this Appeal should be allowed with costs before Her Majesty in Council and in the Courts below and that the judgment of the West African Court of Appeal of the 3rd January 1952 (whereof the reasons were given upon the 5th January 1952) should be set aside and the Judgment

p. 32.

of the Supreme Court of the Gold Coast of the 15th October 1949 should be reversed save as to so much of it as awarded £100 damages to the Plaintiff for the following, among other

REASONS

(1) BECAUSE there was no evidence entitling the Plaintiff to a declaration of title to the disputed area :

(2) BECAUSE the Supreme Court and the Court of Appeal erred in law in granting and upholding respectively such a declaration of title :

(3) BECAUSE the Supreme Court and the Court of Appeal acted upon irrelevant evidence relating to the grant of Certificate of Validity No. 191.

T. B. W. RAMSAY.

J. T. WOODHOUSE.

No. 8 of 1953.

In the Privy Council.

ON APPEAL

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

BETWEEN

KWEKU MINTA EBU *Appellant*

AND

KWAMIN ANTRADU ABABIO . . . . *Respondent.*

Case for the Appellant.

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