19, 1957

No. 1 of 1952.

# In the Privy Council

## ON APPEAL
*FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION).*



BETWEEN

JOSIAH KORKWEI QUARMINA ARYEH, DANIEL SACKEY QUARCOOPOME, JOSEPH AMOS LAMPTEY, CHARLES AMOO ANKRAH, claiming as Head and Representative of MANTSE ANKRAH Family, JAMES ROBERT ANKRAH, A. DINNAH ANKRAH and AFLAH QUARCOOPOME (Defendants in Suit No. 32 of 1947 transferred from the Ga Native Court "B") *Appellants*

AND

NAA QUARDUAH ANKRAH and ROBERT ADJABENG ANKRAH (otherwise known and called ARDAY ANKRAH substituted for MARK DAVID ADJABENG ANKRAH otherwise KWAKU NYAME ANKRAH, claiming for and on behalf of MANTSE ANKRAH Family, (Plaintiffs in transferred Suit No. 32 of 1947 from the Ga Native Court "B") *Respondents*

AND BETWEEN

CHARLES AMOO ANKRAH claiming as Head and Representative of MANTSE ANKRAH Family (Defendant in Suit No. 112 of 1947 in the Supreme Court of the Gold Coast) . . . *Appellant*

AND

ROBERT ADJABENG ANKRAH (substituted for MARK DAVID ADJABENG ANKRAH otherwise KWAKU NYAME ANKRAH) claiming for and on behalf of MANTSE ANKRAH Family (Plaintiff in Suit No. 112 of 1947 in the Supreme Court of the Gold Coast) . . . . . *Respondent.*

# Case for the Appellants

RECORD.

1. This is an Appeal from the West African Court of Appeal which by its judgment of the 22nd February, 1951, affirmed, by a majority, p. 155.

the decision of Jackson, J., in the Land Court of the Supreme Court of
p. 122. the Gold Coast, Eastern Judicial Division, of the 15th October, 1948, decreeing both Suits No. 32 of 1947 and No. 112 of 1947, which had been consolidated and heard together by him.

2. The questions for determination in this Appeal are :—

(A) Whether, according to Ga Customary Law, the children of three uterine brothers are members of one family or can form one family for the purpose of inheritance or succession to self-acquired property of one of the said brothers, on the demise of the last of them without leaving him surviving a descendant in the female line.

(B) Whether, in particular, according to the said law, the family of one Mantse Ankrah, who died intestate about 1844, includes the collateral relations of the deceased (his mother having predeceased him without ever having had a daughter) in the succession to a landed property known as "Awudome" near Accra, which was the self-acquired property of the late Mantse.

(C) Whether, in any event, the Respondents were entitled in Suit 112 of 1947 to recover damages for trespass against the Appellants or to the injunction therein claimed since, upon the view of the facts put forward by the Respondents, the Appellants were lawfully co-owners of the property in question.

3. The following narrative is taken from the Judgment of Jackson, J. :—

p. 124 l. 13. *et seq.* "Now Manche Ankrah was one of the three sons born of a woman named Amanua, the other two being Ayi and Okanta, and whilst admitting that the Plaintiff M. D. A. Ankrah is a member of the Manche Ankrah Family as the Defendants do by their pleadings, it is quite clear that by reason of the fame achieved by this man in the Barme War of 1830, and when this land was given to Manche Ankrah by a people grateful to him for his services in that war, the descendants of the two brothers, namely Ayi and Okanta, have identified themselves with his name, a fact which again tends to cloud the issue and which is one relating to the law of devolution of real property in the Ga State upon the death intestate of a person who, in his lifetime, has become the owner of what is commonly known as self-acquired property, and as to whether succession is shared among the members of the extended family or whether it is confined to the immediate descendants of one branch of that family alone.

"The Plaintiffs' case is that on the death of Manche Ankrah intestate the land Awudome acquired the character of family land and became the property of all living members of the three branches namely Ayi, Okanta and the children of Manche Ankrah, while the Defendants aver that, by Ga custom, upon the death of the brothers Ayi and Okanta, the interest in the land reverted to the immediate descendants of Manche Ankrah, to the exclusion of the children of either Ayi or Okanta."

4. It is now well established as a broad general proposition that, upon the death of a Ga intestate, his self-acquired property passes to some or all of his matrilineal relatives as a body and is under the control of one of them, but his children of a lawful marriage are entitled to some portion of such property. In the present case it has been found that on Mantse Ankrah's death his mother was no longer alive, and it was admitted that he never had a sister. The Appellants contend, as already referred to, that this resulted on the death of the brothers in the exclusion of the collateral relatives.

p. 129, l. 11.
p. 156, l. 1.

5. On the Gold Coast, the body of matrilineal relatives is usually referred to in the English language as " the family," but this term is ambiguous. The term " family " among other meanings may refer to matrilineal relatives of an individual or may be limited to the descendants of such individual. In the present case, however, the Appellants submit that the Ga custom of succession by the children of the self-acquired property of their father necessarily restricts the term " Family " to the latter connotation, and it is the failure of the majority of the Judges in the Courts below to appreciate this fundamental distinction which, the Appellants respectfully contend, has led to errors in their conclusions.

6. There has been previous litigation between some of the parties to this Appeal or between some one representing alleged members of the wider family of Mantse Ankrah and strangers.

On the 17th August, 1931, His Honour Roger Evans Hall, Acting Chief Justice of the Gold Coast, gave judgment by consent in Transferred Case No. 22 of 1930 in favour of the Plaintiff, Nee Ankrah Quansah, representing himself and the members of the Mantse Ankrah family in respect of the land " Awudome " against Mantse Amponsah, the Defendant. The case was settled on the terms, *inter alia*, that the Plaintiff in his representative capacity obtained a declaration of title against the Defendant. The Plaintiff Nee Ankrah Quansah, previously known as William Adjabeng Solomon, was a direct descendant of Nii Ayi. It is in evidence that William Adjabeng Solomon (Nee Quansah Ankrah) lent money to the Mantse Ankrah family to fight a case against the Otublohum Mantse who was claiming the land in question from the Mantse Ankrah family and it was agreed that he should join the family to fight it. He was subsequently appointed Head of the Mantse Ankrah family with the latter's authority in 1929. It is significant that on the 24th November, 1922, he gave an undertaking that he would not claim any remuneration for his services as the Family's attorney nor would he seek to recover from them anything which he might spend or might have spent in connection with the property known as " Awudome " in consideration of their appointing him their attorney.

p. 248.
p. 29, l. 28.
p. 84, l. 30, *et seq.*
p. 241, l. 15.
p. 85, l. 8.

7. In 1941 a suit was brought by J. K. Q. Aryeh, D. S. Quarcoopome, J. A. Lamptey, A. A. S. Williams, A. D. Ankrah, F. Amarteifio and Delphina Ocquaye for and on behalf of themselves and as representing the direct descendants of Mantse Ankrah against one Malam Dawuda and M. D. A. Ankrah (the same Mark David Adjabeng Ankrah hereinbefore referred to) in the Tribunal of the Senior Divisional Court of the Ga State, Gbese, Accra, Gold Coast, in which the Plaintiffs claimed a declaration that they were the owners of the said land " Awudome " and mesne profits.

p. 171.

p. 172. The suit was subsequently numbered No. 68 of 1941 in the Tribunal of the Paramount Chief of the Ga State and was followed by a Statement of Claim dated the 21st April, 1941.

p. 197. 8. The Plaintiffs in the said Suit, on the 3rd August, 1942, applied in the Provincial Commissioner's Court of the Gold Coast, Eastern Province, Koforidua, to transfer the Suit to the Divisional Court, Accra, and ultimately the transfer was made and the Suit numbered as Transferred p. 208. Suit No. 3 of 1943.

9. In the present proceedings, to wit, on the 24th August, 1948, p. 28, l. 9. the record in the Transferred Suit No. 3 of 1943 was put in by Mark David 10 Adjabeng Ankrah (one of the Plaintiffs herein) and was admitted by p. 197, *et seq.* consent, being Exhibit " 4," and the record of the proceedings in the Ga p. 112, l. 32. Native Court No. 68 of 1941 was put in by a witness for the same Plaintiff and was admitted without opposition on the 2nd October, 1948, and p. 171, *et seq.* marked Exhibit " 6 " in the present proceedings.

10. In the course of his evidence given on the 1st November, 1943, before the Divisional Court the said Mark David Adjabeng Ankrah said, *inter alia*, as follows :—

p. 218, ll. 27–37. " Manche Ankrah's mother was called Amanuah. She came from Denkyera. She had three sons, Manche Ankrah, Nii Ayi and 20 Okantah . . . Manche Ankrah had a different father from the other brothers. I am a descendant of Nii Ayi. He died before Manche Ankrah . . . Okantah succeeded Manche Ankrah . . . Okaidja of Gbese was the father of Nii Ayi and Okantah. Their mother was not married to Okaidja according to native custom. Because they were illegitimate Ankrah gave his own name to his brothers."

11. After completing the recording of the oral and documentary evidence in the transferred Suit No. 3 of 1943, the learned Judge, Quashie- p. 228. Idun, Acting Judge of the Supreme Court, on the 13th November, 1943, 30 gave judgment non-suiting the Plaintiffs on the ground that Mark David Adjabeng Ankrah was the representative of the Stool and that, therefore, the Defendant Dawuda and the said M. D. A. Ankrah had committed no trespass on the land. He concluded, *inter alia*, as follows :—

p. 230, l. 38, *et seq.* " I want it to be understood by the parties that this Court does not adjudge the Defendants as owners of the property. The judgment of the Court is that the Plaintiffs have failed to prove their case in the action."

p. 231. 12. The Plaintiffs appealed to the West African Court of Appeal. Their appeal was dismissed by the West African Court of Appeal on the 40 23rd March, 1944. The judgment, which was read by the learned President, stated, *inter alia*, as follows :—

Ex. " 5," p. 267. " It is true that the actual *ratio decidendi* in the Court below is not very clear, but the ordinary rule of native customary law as to descent of property through the female line *prima facie* applies in this case, and in our opinion no sufficient evidence has been adduced to show that any other method of descent applied in this particular case. Hence we are satisfied that the learned trial Judge had no alternative but to non-suit the Plaintiffs."

13. On the 20th July, 1947, Naa Quarduah Ankrah and Mark David Adjabeng Ankrah brought p. 2.

PRESENT SUIT

No. 1077/47 in the Ga Native Court " B " against the Defendants, now the present Appellants, claiming damages for trespass on land situate and being at " Awudome " and breaking the pillars thereon, and also for an injunction restraining the said Defendants their agents servants and workmen from entering upon the said premises and interfering therewith pending the hearing and determination of the suit.

On the 2nd August, 1947, Mark David Adjabeng Ankrah brought a p. 3.
further suit No. 112 of 1947 in the Supreme Court of the Gold Coast against M. Captan of Accra. He claimed to be suing for and on behalf of Mantse Ankrah Family of Otublohum, Dadebanna, Accra, in respect of the same land known as " Awudome." He alleged that Captan had trespassed on " portion of the said Plaintiff's Family land " (therein more particularly described) by entering the said land and fixing pillars and name plates thereon. He again claimed damages for trespass and a perpetual injunction restraining the Defendant his agents and/or workmen from further entering and committing acts of trespass on the said land.

On the 29th August, 1947, the Supreme Court of the Gold Coast p. 4.
passed an order directing that Charles Amoo Ankrah should be joined in the said case No. 112 of 1947 as Co-Defendant as Head and Representative of Mantse Ankrah Family of Otublohum Accra, " who claims title to the land subject matter of dispute."

On the 22nd September, 1947, the Supreme Court of the Gold Coast p. 5.
ordered Suit No. 1077/47 pending before the Native Court " B " at Accra to be heard and determined by a Judge of the Lands Division at Accra. It was subsequently renumbered No. 32 of 1947 on the file of the said p. 122, l. 38.
Lands Division.

14. By his Statement of Claim, dated the 22nd September, 1947, p. 6.
the Plaintiff in Suit No. 112 of 1947 alleged that the property in dispute was a stool property belonging to Mantse Ankrah family; that he was the customary Acting Head and lawful representative of Mantse Ankrah Family and caretaker of Mantse Ankrah Stool properties and lands thereto attached, of which Awudome was one; that by reason thereof he could lease or sell any plot or plots with the consent and approval of the principal and accredited members; that it was improper and illegal for any member of the Mantse Ankrah families to purport to deal with the Awudome land in any way without first consulting him in accordance with Native Custom. He, therefore, claimed a declaration that the Mantse Ankrah Stool was in possession as owner of Awudome, damages for trespass, and an injunction restraining the Defendant (Captan) and the Co-Defendant (Charles Amoo Ankrah) from entering upon or in any way interfering with the said land.

15. On the 9th October, 1947, the Defendant (Captan) filed his p. 8.
Defence, in which he stated that he was not in a position to deny or admit the allegations contained in the Plaintiff's Statement of Claim, but that he bought the land in question from C. A. Ankrah (the Co-Defendant).

p. 9. 16. On the 9th October, 1947, the Co-Defendant (Charles Amoo Ankrah) filed his Defence. He admitted that Awudome was the property of the Mantse Ankrah family. He denied that Ankrah Quansah (alias Quansah Solomon) ever occupied the Mantse Ankrah Family Stool, but that in his (Ankrah Quansah's) lifetime he was empowered by the Principal members of the said Mantse Ankrah Family to be a caretaker of the Stool and properties attached thereto. He denied that the Plaintiff (M. D. A. Ankrah) had ever been appointed Acting Head of the Mantse Ankrah by those entitled by Native Custom so to appoint, but he claimed that he (the Co-Defendant) was the Head of the said Family, having been so appointed in November, 1945, in accordance with all customary rites. He contended that he was the rightful person to alienate any property of the Mantse Ankrah Family, and that the property in dispute was sold to the Defendant (Captan) by him with the consent and concurrence of the Principal members of the said Mantse Ankrah Family.

p. 12. On the 14th October, 1947, the Plaintiff joined issue with the Co-Defendant, Charles Amoo Ankrah.

p. 11. 17. The Plaintiff on the 14th October, 1947, filed a short formal Reply to Defendant Captan's Defence to the effect that the material evidence to be adduced at the trial would bring to light the actual fact as to whether the Defendant Captan bought the land from the right person.

p. 13. 18. On the 3rd December, 1947, the Plaintiffs filed their Statement of Claim in Suit No. 32 of 1947 (referred to in paragraph 13 hereof). The first Plaintiff (Naa Quardah Ankrah) sued in her personal capacity, and the second Plaintiff (Mark David Adjabeng Ankrah) in a representative capacity as the duly appointed representative of the Mantse Ankrah Family of Accra, alleging that they were both members of the said Manche Ankrah family. The Statement of Claim set up substantially the same case as was set up by the Plaintiff in Suit No. 112 of 1947 (*supra*, paragraph 14) as to the second Plaintiff's position and authority to deal with the land in question. It further pleaded that the second Plaintiff's appointment as the representative of the Family and his right to deal with the said Awudome land had been concluded in Suit No. 3 of 1943, *J. K. Q. Aryeh & Others* v. *Malam Dawuda & M. D. A. Ankrah* (referred to in paragraphs 7 to 12 of this Case) and that the Defendants in the present suit were estopped and precluded by the judgment in that suit from denying the second Plaintiff's appointment and authority aforesaid. The Plaintiffs claimed a declaration of title of the Mantse Ankrah family to the land known as " Awudome," and damages for trespass.

p. 15. 19. On the 4th December, 1947, an order was passed by the Supreme Court consolidating Suits Nos. 112 of 1947 and 32 of 1947.

p. 15. 20. On the 11th February, 1948, the Defendants in Suit No. 32 of 1947 filed their Defence. Apart from the allegation in the Statement of Claim that the Plaintiffs were members of the Mantse Ankrah Family the Defendants denied the allegations contained in paragraphs 1, 3 and 8 of the Statement of Claim. In answer to paragraphs 4 and 5 of the Statement of Claim the Defendants pleaded that the alleged appointment

of the second Plaintiff (Mark David Adjabeng Ankrah) had been annulled by the accredited principal members of the family, and that the Defendant (Charles Amoo Ankrah) had been appointed Head of the Family in November, 1945, in accordance with due customary rites. They further pleaded that the first Plaintiff was estopped from claiming any individual proprietary interest in the land in dispute by reason of a judgment of the Ga Native Court of the 28th July, 1947. The Defendants finally pleaded in answer to paragraphs 6 and 7 of the Statement of Claim that they were not estopped by the judgment in question (set out in paragraph 12 hereof) from disputing the second Plaintiff's claim still to be representative of the family inasmuch as the judgment did not pronounce him to be the Head of the Family, nor did the said judgment preclude the members of the Family from electing a proper Head of the Family which they had done in November, 1945, as aforesaid.

21. The Plaintiffs filed their Reply on the 25th February, 1948, which amounted to a joinder of issue. p. 17.

22. The case was heard in the Land Court on eleven days in the months of August, September and October, 1948. At the close of the proceedings the learned Judge reserved judgment. Judgment was delivered on the 15th October, 1948. After an introduction by way of narrative, part of which is set out in paragraph 3 of this Case, the learned trial Judge first dealt with the Plaintiffs' plea that the second Plaintiff's appointment as representative of the Family and his authority and right to deal with the Awudome land was the subject-matter of the Suit No. 3 of 1943, *J. Q. K. Aryeh and Others* (*Plaintiffs*) v. *Malam Dawuda and M. D. A. Ankrah*, and that the Defendants herein were estopped and precluded by the judgment in that suit from denying the second Plaintiff's appointment and authority aforesaid, and he came to the conclusion that it was safer to view the statement as to customary law made by the West African Court of Appeal, set out in paragraph 12 of this Case, as "*obiter dicta*." p. 122.

23. The learned trial Judge then stated as follows :—

> "The Statement of Claim in both actions include a prayer for declaration of title to the land known as Awudome and the principal, if not the entire, issue at this trial was whether M. D. A. Ankrah the 1st Plaintiff as the Caretaker and Acting Head of all three branches of the Mantse Ankrah Family had the right of dealing with and alienating the land subject to the consent of the principal members of his family, or whether that right was vested in Charles Amoo Ankrah the Defendant as being the elected Head of the branch of that family who were the direct descendants of Manche Ankrah. p. 127, l. 8.
>
> The issue is one which depends solely upon what is the Ga customary law as to the rights of inheritance to the land called Awudome."

His Lordship then dealt with the ordinary Fanti or Akan Customary law which he took to be that, before any part of community land can be divorced from the use of the community, a wider consent to alienation is required and that the consent which is required is that of the Head and the p. 128, l. 29. p. 130, l. 15.

principal members of the families who are directly descended from the mother of the person who first acquired the land. He then proceeded to the peculiar law of succession according to Accra, i.e., Ga Customary law, and cited the weighty opinion of Mr. Edmund Bannerman that " the mother does not come in at all, but the inheritor of the property is bound to take care of her ' *durante vita* ' and at her demise to bury her decently."

p. 131, l. 36. 24. The learned Trial Judge then referred to the case of *Sackey* v. *Okantah* (Divisional and Full Court Judgments 1911–1916) p. 88 in which the then Chief Justice of the Gold Coast, Sir Philip Crampton Smyly, said as follows :— 10

p. 132, l. 3. " I have given a good deal of consideration from time to time to this question of succession among the Gas and am of opinion, though there are certainly witnesses to the contrary, that the whole weight of the evidence goes to show that the Ga Law of succession whether the property is self-acquired or not, is that the brothers succeed first to the property, then it descends to the nephew failing which to the children, the brothers to succeed must be of the same mother with the deceased, and the nephew must be the sister's child."

p. 132, l. 11. The learned Trial Judge, however, thought that the crux of the matter in 20 the case appeared to be not only who is the " successor " to the property, but what are that successor's rights when making grants of sales of family lands, since a successor cannot dispose of that interest in his lifetime without the consent of the principal members of the families, and he could find nothing in that decision which bears upon this point. The Appellants respectfully submit that the whole reason of the requirement for having the consent of the principal members of the families in ordinary Akan or Fanti law is that the right to succession in such families is an ever-present *spes succesionis* throughout all the families which may ripen into an actuality at any time and it would, therefore, be inequitable to dispense with the 30 consent of the principal members of all the related families, whereas in Ga law as enunciated by his Lordship, Sir Philip Crampton Smyly, the only persons who could be prejudicially affected by alienations would be the brothers and nephews and the family composed of the direct descendants of the original grantee, in this case the actual Mantse Ankrah and his Stool.

p. 132, l. 27. 25. The learned Trial Judge then referred to the case of *Sarah L. Ribeiro and Others* v. *Elizabeth Mingle*, cited by the Appellants' Counsel, in which judgment was given by the Tribunal of the Paramount Chief of the Ga State on the 4th July, 1944, and which decision was subsequently 40 affirmed on appeal to the Land Court by M'Carthy, J., on the 14th December, 1945. The facts in that case (unreported) were that Charles and Henry Mingle built a house in Horse Road, Accra, and by his Will Henry devised to his brother Charles his whole interest in the house. Upon the death of Charles intestate in 1933 an elder brother named Joseph succeeded to his estate in Horse Road. Joseph died in 1943. The children of Charles then claimed the estate in the house from the children of Joseph and obtained judgment for recovery of the premises as against the children of Joseph, and it was held that the direct descendants of Charles L. Mingle were

entitled by Ga Customary Law to exclusive possession of the land in question, the descendants of Charles L. Mingle's uterine brother, Joseph, having no rights in the land.

26. The learned Trial Judge was of opinion that the issue in *Mingle's* case (*supra*) was the same as that discussed by the West African Court of Appeal in *Aryeh and Others* v. *Malam Dawuda and Ankrah* (referred to in paragraph 12 of this Case). In this connection the Trial Judge expressed himself as follows :— p. 228, *et seq.*

" Now the decision of the Tribunal was affirmed by M'Carthy, J., in the Land Court on the 14th December, 1945, and the learned Judge must have been aware of the decision given by the West African Court of Appeal on the 23rd May, 1944, since he was one of the Judges who subscribed to that decision. It is for these reasons as well as for those I have given earlier that I entertain doubt as to whether that finding of the West African Court of Appeal was ever intended to be of greater force than ' *obiter dicta.*' If it was, then clearly the Native Tribunal when it gave its judgment 24 weeks later was bound by it and it should not have been affirmed by the Land Court." p. 133, l. 1, *et seq.*

The Appellants respectfully submit that the remarks in the judgment of the West African Court of Appeal in the case cited in the preceding paragraph hereof were *obiter*, for the judgment appealed from of Quashie-Iden, Ag. J., had expressly stated that " this Court does not adjudge the Defendants as owners of the property " and there had been no appeal by them against that finding.

27. The learned Trial Judge then asked the question : " Would the children of Joseph Mingle have no say in the sale of property to which they might enjoy an interest in the event of Henry's line becoming extinct ? " The Appellants need only repeat what they have implied in paragraph 24 of this Case that the only persons who could object to alienations would be those who belonged to the family composed of the direct descendants of the original grantee. The Appellant (Charles Amoo Ankrah) has consistently pleaded that he can only make alienations with the consent of the principal members of the Mantse Ankrah's family, and it appears that the purported alienations to Captan and Joseph Commey Ankrah were made by him with such consents. p. 133, l. 19, *et seq.*

28. The learned Trial Judge then dealt with the oral evidence as to Customary Law and said as follows :— p. 133, l. 34. p. 134, l. 10.

" The preponderance of evidence before me given by witnesses who could properly be described as being expert in native customary law was that not only would the consent of all three lines of the family be necessary before a valid grant or sale of land could take effect, but that every member of the three lines had an interest in the land to the extent that if they wished to farm upon it they could do so or give up all tribute upon seeking and obtaining the consent of the caretaker of the land.

" Upon the question of native customary law I also called an independent witness Nii Ayikai II. When I say he was indifferent

[independent ?] I mean he was called by neither of the parties, but attended the Court at a request made to him by me through the District Commissioner and was selected by the District Commissioner as being a member of the Ga State Council.

" He testified that he was unable to say what was the customary law in the Otublohum Quarter but that he was conversant with what was recognised as the custom of the Ga State. Now I will say here that at no time has it been suggested to me that the custom in Otublohum differs in any respect to what is known as the Ga custom and that is the custom upon which Counsel have told me that all parties rely.

" The evidence of this witness was given in the clearest possible terms, and it can be summarised as confirming the essential elements of Akan law as to the rights of inheritance to and alienation of land to be the Ga custom. It afforded complete corroboration of the witnesses called by the Plaintiffs who affirm that all members of each of the three lines have an interest in the land and whose elders must be consulted before it can be alienated."

p. 134. 29. The learned Trial Judge then analysed extracts from the evidence of this witness, who first agreed in examination-in-chief that when all the brothers die leaving only children the property goes to the eldest child of the man who bought the land, but qualified this later in answer to the Court when he stated that the children of the other brothers of the original owner were not cut out. This analysis did not, however, contain the conclusion of the evidence of this witness when he was asked in re-examination :—

p. 45, l. 28.

" *Q.* . . . Supposing that the uterine brother who succeeded had children at the time of his death—what is the position ?

*A.* The land would be divided equally among the children.

*Court to Assessor :* What is your opinion as to that answer ?

*Assessor :* I do not agree with that answer. The property goes back to the children of the original owner."

p. 121, l. 27. 30. The Assessor had maintained to the end of the trial his opinion to the contrary when he said :—

" In my view the customary law is that on the death of Nii Ankrah, Nii Ayi and Nii Okantah the property of Nii Ankrah should go back to his direct descendants to the exclusion of the children of Ayi and Okantah as the property did not belong to Amanua and because the mothers of the children of Nii Ankrah, Nii Ayi and Nii Okantah are outside the Ankrah family. I disagree with the expert witnesses and agree with the decision of the Native Court Case referred to (1944) . . ."

It is respectfully submitted that the opinion of an Assessor in Native Law and Custom appointed to sit with the trial Judge under section 25 of the Courts Ordinance of the Gold Coast [Cap. 4] selected from " the list of suitable persons prepared by the District Commissioner of the District in

which the Law Judge is sitting " should have been preferred to that of the expert in question, where the witnesses disagreed, both on principle and for the reason given by such Assessor, where the alleged expert gave no reason for his Opinion.

31. The learned Judge then came to the following conclusion :—

" I hold therefore that by the native customary law the persons p. 136, l. 20.
who are entitled to make a valid grant of Ankrah family land to a member of that family is the Head of the Family and the principal elders of each of the three sections of that family and that the same
10 rule applies as to its alienation to strangers.

In the absence of a Head of a Family I find that his duties devolve by custom upon the person appointed to be the Caretaker and Acting Head and that such appointment can only be made by the principal Elders of each of the three sections of the Family."

The learned Judge relied on the finding of Quashie-Idun, J., in the case of *Aryeh and Ors.* v. *Malam Dawuda* (referred to in paragraphs 7 to 12 of this Case) that Mark David Adjabeng Ankrah had been appointed to represent the Stool of the late Mantse Ankrah in all matters connected with the Stool and Stool lands, that the Stool was in fact in his possession
20 as Caretaker, and that he had the right to represent the family Stool in those proceedings. The learned Judge held that that decision had established that Awudome was a part of the Stool lands of the family and that Mark David Adjabeng Ankrah was the accredited caretaker for the family of those lands, and those facts the Defendants were estopped from denying. He stated, quite rightly it is respectfully submitted, that the sole issue was did " the family " mean the three branches known as Mantse Ankrah, Ayi and Okanta, or did it mean the Mantse Ankrah line alone, and he thought that if Awudome was the heritage of all three branches, the first proposition was the correct one. He found support for this in the
30 pleading of the Defendants in their Defence admitting that the Plaintiffs were members of the Mantse Ankrah family.

32. The Appellants respectfully submit, what they have already urged in paragraph 5 hereof, that the word " family " is ambiguous. It may, among other meanings, refer to a wider family which might embrace the whole body of living matrilineal relatives, but may also refer to the restricted " family " where the Ga family law of succession is concerned, and a failure to recognise this distinction has led the learned Trial Judge into error. (Cf. *Nee Mensah Larkai* v. *Amorkor* [1933] 1 W.A.C.A. 323.) There appears to be nothing irregular in the appointment of a member of
40 a wider family to be the head of a family without necessarily making him a member of the restricted family, and an instance of this was the appointment of Nee Ankrah Quansah, a member of the Nii Ayi branch, to be the head of the Mantse Ankrah branch in 1922, referred to in paragraph 6 of this Case. The learned Trial Judge, by reason of the fact that he had lost sight of this fundamental distinction, misread the evidence p. 95, *et seq.*
of Nii Amu Nakwa. He does not disbelieve this witness that Charles Amoo Ankrah was elected Head of Mantse's Ankrah's family, presumably in November, 1945, but he deduces from the fact that he says that the former was elected Head of the lines of Okanta and Nii Ayi as well, that

p. 138, c. 11. this negatives the case of the Defendants that it is by Charles Amoo Ankrah's right as Head of the Family of the direct descendants of Mantse Ankrah alone that he sold part of Awudome without consulting the elders of the other two branches, affirming that the land is the family property of the direct descendants of Manche Ankrah alone.

p. 139, l. 5. 33. The learned Judge concluded his judgment on the main issue by finding that Awudome was owned jointly by the three branches of the Ankrah Family known as the Mantse Ankrah, Ayi and Okanta lines and that the Plaintiff M. D. A. Ankrah was the Caretaker and Acting Head of that said joint family and was entitled to a declaration in those terms.

p. 141, l. 8. He gave Naa Quardah Ankrah an injunction though her Counsel had expressly stated that he led no evidence on her behalf, and he gave costs against her.

In regard to the Defendant Captan he gave damages for trespass, which it was agreed, should be nominal and which he assessed at £1.0.0. He granted an injunction against him in the terms prayed for in the Writ of Summons.

As against the Defendant Charles Amoo Ankrah the learned Trial Judge gave damages for trespass assessed at £50 and an injunction as prayed for.

p. 142. 34. Being dissatisfied with the judgment of the Land Court delivered on the 15th October, 1948, and having obtained final leave to appeal therefrom on the 29th November, 1948, the Defendant, Charles Amoo Ankrah, in Suit No. 112 of 1947, on the 4th December, 1948, appealed to the West African Court of Appeal.

p. 143. On the 7th January, 1949, the Defendant Captan, likewise appealed to the West African Court of Appeal.

pp. 143 and 144. On the 25th March, 1949, the Defendants in Suit No. 32 of 1947 likewise appealed to the West African Court of Appeal.

p. 145. On the 23rd January, 1951, the West African Court of Appeal passed an Order substituting Robert Adjabeng Ankrah in place of Mark David Adjabeng Ankrah recently deceased.

35. The Appeal against the judgment of the Land Court was heard on the 23rd, 24th, 25th and 26th January, 1951, by a Bench of the West African Court of Appeal composed of their Honours (now Sir) Arthur Werner Lewey, President, Sir James Henley Coussey and (now Sir) Kobina Arku Korsah, Judges, Gold Coast, who on the 22nd February, 1951, gave judgment dismissing, by a majority, the said Appeal.

p. 155. 36. In his judgment, dismissing the said Appeal, Coussey, J.A., stated that the Plaintiff had supported his claim to be the accredited head and representative of the three families by a written authority, which was undoubtedly signed by members of all three branches of the p. 266, l. 8. family including Charles Amoo Ankrah, who now claimed that the property belonged to the Mantse Ankrah alone, and that, prior to the Plaintiff, W. A. Solomon alias Quansah Solomon, had been appointed Attorney and

Caretaker of the stools and lands, and that the Defendants had contended that Solomon had acknowledged that he had been appointed only by the Mantse Ankrah branch of the family in a memorandum signed by members of the family in the year 1922 ; that that document, however, referred to the " members of the Ankrah family " ; that it was not signed exclusively by the Mantse Ankrah branch, and that in the course of the cross-examination J. K. Q. Aryeh, a Defendant giving evidence as a direct descendant of Mantse Ankrah, had admitted that in 1922 when Ankrah was referred to, it referred not only to Mantse Ankrah's but to all three sections, as the brothers Ayi and Okantah had adopted the name.

The Appellants respectfully contend that the learned Judge of Appeal has fallen into the same error as the learned Trial Judge, who had failed to appreciate the distinction between members of the wider family commonly known as Mantse Ankrah Family comprising the descendants of the three brothers (Ankrah, Ayi and Okantah) and the more restricted Family of Mantse Ankrah in so far as that distinction affected fundamentally the rights of the two families to property originally owned by Mantse Ankrah in his own right, and this error has coloured all the subsequent appreciation of the conduct of the parties. The indisputable facts are that the property in question was the self-acquired property of the Mantse Ankrah, that he died intestate without leaving any mother or sister's son surviving him. The conduct of the parties cannot alter those indisputable facts, and once the distinction between the restricted and wider families is appreciated, there is nothing inconsistent in the appointment of a member of the wider family to be a Caretaker of the property of the restricted family. Moreover, the position of Caretaker and Head of a Family is one to which the holder can be elected from the restricted or wider families of the clan.

The learned Judge of Appeal then dealt with the litigation of 1941 and held, erroneously it is respectfully submitted, that the Defendants were rightfully held to be estopped from re-opening those issues. p. 157, l. 6, *et seq.*

On the question of Ga native customary law the learned Judge of Appeal agreed with the trial Judge and held that there was ample evidence to support his finding. He referred to the decision of Smyly, C.J., in *Sackey* v. *Okantah* (Gold Coast Divisional and Full Court Judgments (1911–1916) p. 88) and to the Ga Native Court decision in *Sarah Ribeiro* v. *Elizabeth Mingle* (referred to in paragraphs 24 and 25, *supra*), and he said as follows :— p. 157, l. 25, *et seq.*

> " I have given very careful consideration to these authorities but I am unable to hold that they go so far as to establish such a rule or that they are strictly applicable to the facts of this case. The argument involves the proposition that land of a family stool, undivided at the death of Okantah, the brother and successor of Mantse Ankrah, could then revert to the direct descendants of the grantee as their heritage thereby losing its character of stool family property. I am unable to agree with that." p. 158, l. 11.

Lewey, J.A., delivered a short judgment agreeing with the conclusions of Coussey, J.A. p. 158, l. 27, *et seq.*

p. 159, l. 23, to p. 162, l. 11.

37. Korsah, J.A. (now Sir Kobina Arku Korsah, Chief Justice of the Gold Coast) dissented and was of the opinion that the Appeal should be allowed. The learned Judge of Appeal, at the commencement, said as follows :—

p. 159, ll. 31–38.

> " This case is but another example of the erroneous use of the word ' Family ' by the parties, in a sense other than its accepted legal interpretation, by the Courts in the Gold Coast, in accordance with Native Customary Law of inheritance or succession to property ; in view, however, of the fact that there is evidence on record which in my opinion clearly proves that the parties are not members of the same family, according to native law, I desire to draw attention to some of the relevant matters which I hope will explain the grounds upon which I base my decision."

His Lordship then dealt with the judgment of the West African Court of Appeal in 1944, the conclusion of which is set out above in paragraph 12 of this Case and said as follows :—

p. 160, ll. 10–16.

> " The evidence adduced by the parties proves that neither the Plaintiffs nor the Defendants are descendants through females, from the woman Amanua, the mother of the said three brothers— Mantse Ankrah, Ayi and Okantah, the first of whom had originally acquired the property ; consequently neither the Plaintiffs nor the Defendants can claim to be members of the family of the woman Amanua and of which the said three brothers were members according to native customary law."

p. 160, l. 17, *et seq.*

His Lordship then dealt with the Ga customary law of inheritance or succession to real property with respect to the rights of the children of the owner of self-acquired property as recorded at p. 110 of Sarbah's Fanti Customary Law, 2nd Edition, where, in reply to questions by Chief Justice Hutchinson in the year 1891, on Ga Customary Law, the late Edmund Bannerman of Accra, an acknowledged authority of the highest repute, stated with respect to self-acquired property that—

> " Real property descends the same as personal property with this exception, that it is inherited in conjunction with the children of the deceased of that marriage and such real property cannot be disposed of without the children's consent."

and he also cited the opinion of Mr. Justice Smith on native tenure published by the Gold Coast Government in 1891, and recorded at p. 274 of the same edition of Sarbah's Fanti Customary Law, in support.

His Lordship then stated as follows :—

p. 160, l. 41.

> " In my opinion this view of the Ga customary law of inheritance or succession to self-acquired real property declared by these two eminent lawyers, has been approved by judgments of Courts of competent jurisdiction in this country, as the Ga customary law, in the following cases, viz. : *Sackey* v. *Okantah* (Div. and Full Court Judgments 1911–1916) and *Sarah L. Ribeiro and Ors.* v. *Elizabeth Mingle and Ors.* (Judgment by the Tribunal of

the Paramount Chief of the Ga State on 4th July, 1944) which was subsequently affirmed on appeal to the Land Court of the Supreme Court, by M'Carthy, J., on 14th December, 1945."

The cases cited by his Lordship have already been referred to in paragraphs 24 and 25 of this Case.

38. His Lordship then continued as follows :—

" I am aware of no authority on Ga customary law, and none p. 161, ll. 1–11.
was cited by Counsel for Plaintiffs-Respondents in support of the proposition that when the last of the three brothers died without
10 leaving a nephew or other descendants of their mother Amanua, through the female line, the children of Ayi and Okanta, became entitled to join the children of Mantse Ankrah to form a family consisting of three branches. According to native law, as I understand it, children of three brothers cannot form one family ; even children of the same father by two wives cannot in native law be members of one family for the purpose of inheritance or succession to property ; because every child can only be a member of his mother's family."

39. Dealing with part of the evidence of Nii Ayikai II, a sub-chief
20 of the Ga State, upon whom the Court below relied and whom Coussey, J.A., described as the expert, and analysing it, his Lordship accused him of prevarication, and cited the criticism of expert witnesses contained in Redwar's comments on Gold Coast Ordinances, at p. 83, and then said :—

" It seems to me, that even if there had been no clear declara- p. 161, ll. 40–49.
tion of Ga customary law of inheritance or succession to property prior to the judgment by the Tribunal of the Paramount Chief of the Ga State in *Ribeiro and Ors.* v. *Mingle and Ors.* this judgment should receive greater weight than the statement of a sub-chief of the same State on the same points four years after the said
30 judgment.

It will further be noted that the opinion of the Assessor who tried the case with the Judge, approves the views I have expressed of the opinions expressed by the late Edmund Bannerman and Mr. Justice Smith in 1891."

The opinion of the Assessor and his reply to the question of the trial Court whether he agreed with the particular answer of the witness, Nii Ayikai II, have already been set out in paragraphs 29 and 30 of this Case.

The learned Judge of Appeal concluded his judgment by saying that p. 162, l. 11.
in his opinion the appeal should be allowed.

40 40. On the 3rd September, 1951, the West African Court of Appeal granted final leave to appeal to Her Majesty in Council in respect of those persons who had subscribed the Bond. No leave was granted in respect of the Defendant, M. Captan, presumably because he had not subscribed the Bond. He is not, therefore, a party to the Appeal. p. 162, l. 34.

41. The Appellants respectfully submit that their Appeal should be allowed with costs, the judgment of the majority of the West African Court of Appeal should be reversed and that the judgment of Korsah, J.A., should be affirmed, for the following, among other,

## REASONS.

(1) BECAUSE the three lines of Mantse Ankrah, Ayi and Okanta do not form a single family for the purpose of succession according to Ga native customary law.

(2) BECAUSE the property in question was self-acquired property of Mantse Ankrah.

(3) BECAUSE on the death of the last three of the brothers the self-acquired property of Mantse Ankrah vested in his direct descendants alone.

(4) BECAUSE the Respondents failed to prove that according to native customary law they were members of the family of Mantse Ankrah.

(5) BECAUSE the learned trial Judge misdirected himself on the customary law applicable to succession among Gas, and the majority of the Judges of the West African Court of Appeal fell into the same error.

(6) BECAUSE neither the Trial Judge nor the majority Judges in the Court of Appeal paid due regard to the views of the assessor or to the decided cases as to native customary law.

(7) BECAUSE the judgment of Quashie-Idun, Ag. J., of the 13th November, 1943, and of the West African Court of Appeal of the 23rd March, 1944, in *Aryeh & Ors.* (*Pltffs.*) v. *Malam Dawuda & Ano.*, did not operate as an estoppel against the Appellants.

(8) BECAUSE on the facts and circumstances of this case the document dated the 16th February, 1942, referred to as a Power of Attorney, did not avail the Respondents.

(9) BECAUSE the burden of proof in land cases is always on the Plaintiff, and the Respondents in the present litigation should at least have been non-suited.

(10) BECAUSE the reliefs granted in Suit 112/1947 should not have been granted against the Appellants.

(11) BECAUSE the judgments of the trial Judge and of the majority Judges in the Court of Appeal were wrong.

(12) BECAUSE the judgment of Korsah, J.A., was right.

PHINEAS QUASS.

GILBERT DOLD.

No. 1 of 1952.

# In the Privy Council.

## ON APPEAL

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

BETWEEN

**JOSIAH KORKWEI QUARMINA ARYEH AND OTHERS** . . *Appellants*

AND

**NAA QUARDUAH ANKRAH AND ANOTHER** . . . . *Respondents*

AND BETWEEN

**CHARLES AMOO ANKRAH** . *Appellant*

AND

**ROBERT ADJABENG ANKRAH** *Respondent*

# Case for the Appellants.

A. L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1,
*Solicitors and Agents for the Appellants.*

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