

Privy Council Appeal No. 94 of 1912.

Atta Kwamin - - - - - *Appellant,*
v.
Kobina Kufuor - - - - - *Respondent.*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST JULY 1914.

Present at the Hearing:

LORD KINNEAR.

LORD SHAW.

LORD PARMOOR.

[*Delivered by* LORD KINNEAR.]

Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts; and the learned Judges below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this Committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two Courts, unless "it be shown with absolute clearness," to use the language of Lord Herschell, "that some blunder or error is apparent in the way in which the learned Judges below have dealt with the facts." It

is true that Lord Herschell's rule applies in terms to those cases only in which the judges have been unanimous; and one of the Judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned Judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt.

The controversy relates to certain lands called Bibianiha in the Western Frontier district of the Gold Coast Colony; and the question to be decided is whether the respondent Chief of Enkawie, who was plaintiff in the action, is bound by an agreement alleged to have been made in 1899 in the name of his predecessor Ntwiegye the younger, who was then chief, to surrender in favour of a chief styled Kwasio Tinney, of Pataboso, in the district of Sefwhi, all right and title in the lessor's part of a lease of gold mines, and in the property of Bibianiha comprised in it. Chief Ntwiegye was not himself a party to this agreement, nor was he present when it was made, but he is said to be sufficiently described as the Chief Aichil Aigay, which is supposed to be an *alias* of Ntwiegye, and to have been represented by his linguist Kojo Badu, who signed the memorandum of agreement, by making his mark, or touching the pen with which the mark had been made. The memorandum recites that a lease for 99 years had been made in 1891 by Chief Kwasio Tinney of certain gold mines within the lands of Bibianiha in Sefwhi to Dr. Arthur Mather Kavanagh, since deceased, and purports to record an agreement whereby "in consideration
" of the sum of 300*l.* to be paid on or before

" the 10th of May 1899 by the Chief Kwasié
 " Tinney to Kojo Badu, for and on behalf of
 " Chief Aichil Aigay, the latter chief recognises
 " the lease and withdraws all claims, demands,
 " rights, titles, privileges, advantages, benefits to
 " and arising from the afore-mentioned lease and
 " the Bibianiha property comprised therein."

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

which the transaction arose, and the conditions under which the memorandum was executed.

The lands of Bibianiha are at some distance from Enkawie, and since the delimitation of the frontier in 1906, they have been placed within the Gold Coast Colony, whereas Enkawie is in Ashanti. The origin and early history of the Enkawie right are not clearly brought out in evidence. But it is proved that for a considerable, if indefinite, period before 1891, when the lease to Kavanagh was granted, the respondent's predecessors as Chiefs of Enkawie held the lands as part of the possessions of their family stool, and exercised their right of ownership by levying rents or tribute from members of other tribes whom they permitted to occupy them. Among these were natives of a tribe called Appolonians, who came upon the land to mine for gold. They explained their object to the people of Sefwhi, whose territory is immediately adjacent to Bibianiha; Eduampou, the Chief of Sefwhi, reported the matter to the Chief of Enkawie, who gave permission to the Appolonians to work the gold upon the Bibianiha lands. In return they paid a certain proportion of the gold extracted to the Sefwhi Chief, who paid over one half as tribute to the Chief of Enkawie. But, the actual collection for this purpose seems to have been generally made by a Sefwhi tribesman named Kwasié Tinney as representing his chief. Matters were in this position when, in 1890, Dr. Kavanagh appeared on the land in search of a mining concession. This was reported by Tinney to Ntwiegye of Enkawie, who consented to a lease being given to Kavanagh for mining purposes. The lease referred to in the minute of agreement above mentioned was accordingly granted for 99 years at a rent of 300*l.* a year. It is made

in favour of Kavanagh and his assigns, and before the date of the alleged agreement it had passed into the hands of an English Limited Company, the Bibiani Goldfields Company, who still hold it by a title which is not disputed by either of the parties to this litigation. On the face of it Tinney appears as lessor, but there can be no question that it did not in reality proceed upon any exclusive title in him, but was granted by him, with the authority of the Chief of Enkawie and also of his own immediate chief, Yaw Gebill, of Sefwli, who had by that time succeeded Eduampon. Tinney's name as lessor of course implies an assertion of a right and title to grant the lease, but not necessarily of an independent right of property in the lands comprised in it. If they belonged to Enkawie, the owner was Ntwiegye; if they belonged to Sefwli, as the appellant maintains, the owner was Yaw Gebill; and both of these chiefs authorised the lease. Yaw Gebill did so by countersigning the lease by his mark; and Ntwiegye did so orally before the lease was executed. This difference implies no admission of conflicting claims on the part of an Ashanti Chief, who knew nothing of the practice of creating or transferring rights by written documents. It must be admitted that in the absence of written title the nature and extent of the rights possessed by the Sefwli chiefs are left in considerable obscurity. The learned Chief Justice is of opinion that neither Tinney nor the Sefwli Chief can properly be called tenants, and there is evidence tending to show that they were caretakers for Enkawie. But however their right of occupation might be legally defined, the material point is that before the agreement of 1899 it was not an exclusive right of property. Nothing was done to relieve them of their liability to pay tribute to the Chief of Enkawie, or to derogate from his

paramount right. The Court below has accordingly taken it as well established in evidence that at that date the ownership was still, as it had been for generations, in Ntwiegye of Enkawie, and that the only question for consideration was whether it had been effectually surrendered by the alleged agreement. This, indeed, is the assumed basis of the agreement itself, which must be altogether ineffectual if Ntwiegye had no good title to confirm or reject the lease. From this point of view, the first question to be decided is whether the memorandum was, in fact, authenticated by Kojo Badu touching the pen. This is not in substance or effect the signature of a written contract, but a symbol of assent which must be proved by oral testimony, and the testimony is conflicting. The Court, however, has held it to be sufficiently proved that Kojo Badu touched pen after his mark had been made by a witness named Duncan, whom Captain Way, the manager of the British Company, appears to have called in for the purpose of attesting the execution of the document. This point, therefore, must be taken as decided in the appellant's favour. But it does not go far to solve the more important questions, whether Kojo Badu was empowered to make any such contract for his chief, and whether he knew the meaning of the paper which he was supposed to sign.

As to the first of these points, there is no evidence to prove that Kojo Badu had any antecedent authority to make a new contract with Tinney. At that time there was no dispute between Ntwiegye and Tinney. But the rents due by the English Company had been unpaid for several years, and according to the respondent's evidence, which the learned Judges have believed, the sole purpose for which Kojo Badu and certain elders of the tribe were sent to Cape

Coast was to get the Enkawie share of these rents. It was argued that the respondent's own evidence shows that a contract of sale was intended, because he says that Badu was "told "to go with Tinney to Cape Coast for the "purchase money of the Bibiani lands"; and it is said that purchase implies sale. But the respondent was speaking in Fanti, and without questioning the general accuracy of the Court interpreter, it can hardly be assumed that the native witness was using the words of his own language with exact reference to the conceptions of English law. It is evident indeed, from another passage in his evidence, that the distinction between a sale and a lease for 99 years, if he understood it at all, was not present to his mind, because he says that "when the land was leased to the white "man," Tinney did not go to Enkawie about the sale, but he sent messages, "and my ancestor "permitted him to sell." No stress therefore can fairly be laid upon the mere use of such terms as purchase and sale in the mouths of native witnesses; and whatever may have been the respondent's understanding of their legal import, it is certain that he did not intend to suggest the notion that Ntwiegye had authorised a sale to Tinney. He makes it perfectly plain that his chief's instructions to Badu and his companions were that they should go along with Tinney to Cape Coast where they and Tinney together were to collect 1,000*l.* from the white man, and to divide the money. Tinney was not expected to purchase the land and pay the price, but to collect overdue rents from the white man who was already in possession. For much the same reasons the statement of the appellant's witness Kwesie Barku that Ntwiegye's messengers were told "to sell the lands to Tinney" may be disregarded. This witness is discredited,

by the comment of the learned Judges on his testimony as to the execution of the memorandum, and on this point he is thrown over by the appellant himself. On the other hand Mr. Justice Gough who saw and heard the witnesses, states expressly that he was favourably impressed by the evidence of the respondent. But assuming Barku's evidence to be perfectly honest, it is confused and self-contradictory. He agrees with the respondent that the 1,000*l.* for which Badu was sent was to be collected from the white man; and the notion of a sale to Tinney was probably a mere blunder. At most, this is an ambiguous phrase which cannot be set up against the great weight of evidence tending to prove that when Ntwiegye gave his instructions to Badu there was no dispute with Tinney, and that "beyond telling Badu to go and get the money, "Ntwiegye gave them no other instructions." This is entirely in accordance with all the probabilities. The Chief Justice points out with great force that there was "no reason why Kojo "Badu should have been deputed to give away "the Enkawie rights to Tinney." They were in agreement as to the white man's lease, and they were also agreed that his rents in which they were to share were in arrear. It was perfectly natural that they should join in a demand on the white man; but it is not intelligible that Ntwiegye should desire to sell his right to Tinney, in consideration of something less than the share of rent which he would be entitled to recover, if he kept his land unsold. It is said that Badu would not have touched pen if he had not been authorised to consent to the agreement. But it is proved that Ntwiegye knew nothing of the agreement either before or after it was signed; and the evidence as to its execution by Tinney, and Badu is loose and unsatisfactory to the last degree. The best

evidence has been lost by the death of both of these men. But the Courts below had to decide on the evidence actually adduced; and there is nothing in that to suggest that any negotiation took place between them, or that there was any reason for negotiation before the memorandum was put before them as a completed document, and the marks set upon it, which were to stand for their signatures. It was a document in the English language, and it was presented to them for signature by Captain Way, the manager of the English Company, in his house at Cape Coast, it was interpreted by a native clerk in his employment, and when it had been signed, neither the document itself, nor any copy of it was delivered to either of them. It was retained by Captain Way as his own document, and when the trial took place, it was still in possession of the English Company. It was obtained by Captain Way in return for payment of 900*l.* of arrears of rent, and it is manifest that its true purpose was to confirm his Company's right to the concession. Nevertheless, it purports to be a contract between Kojo Badu and Tinney; and that is said, not unnaturally, to be a singular form of instrument to adopt if the mutual rights of the two chiefs were not to be adjusted. But the learned Chief Justice observes, and this is a point on which his experience gives weight to his observation, that owing to the terms of the Concession Ordinance, Captain Way had a material interest to hold under a concession, dated before 1895. He thinks it "fair, therefore, "to assume that Captain Way was anxious to "retain the advantage given by the lease of "1891 rather than have a new joint lease from "Ntwiegye and Tinney, dated in 1899." He considers that the rents were withheld until the agreement had been signed, and he adds, "there "can be no doubt that the agreement was made

“ by the European concessionaires for them and “ in their interest.” It would have served that purpose if it had been no more than an explicit recognition of the lease that had been granted by Tinney ; and in that case, it might have been within Badu’s authority to sign it as representing his chief. But the question is whether he signed it in the full knowledge that it went beyond this purpose, and made over to Tinney of Sefwhi, the Eukawie Chief’s whole right, title, and interest in the Bibiani lands. It is very possible that superfluous words may have been inserted by an unskillful English draftsman with the notion that they would somehow make the confirmation of the lease more explicit or more effectual. But however this may be, there is not a shadow of evidence that they were inserted because of a new bargain between Badu and Tinney, or that their meaning and legal effect was explained to either of the natives. The only evidence tending to show that they understood the agreement at all is that it was read over to them in the Fanti language by a native of the Gold Coast named Kraku in the employment of Captain Way ; and this is plainly not enough to show that they assented to it with an intelligent appreciation of its contents. Kraku, who is still alive, was not examined, as he ought to have been, and even if it be assumed that the Fanti language possesses an exact equivalent for each of the English legal terms which are brought together in the Memorandum, it cannot be supposed that Badu could appreciate the legal effect of a multiplicity of words expressing unfamiliar conceptions on their being once read to him. He had no legal adviser, and no English adviser of any kind to explain the document. It is very probable that he understood that the paper he was asked by the lessee to sign related

only to the lease or to the rents which he had been sent to collect. It is not, however, proved that he acted under that impression. But the possibilities of misunderstanding are so obvious as to render it imperative on the appellant who alleges his intelligent consent to a contract expressed in a language which he did not understand, to prove that it was clearly explained to him. For this purpose it was indispensable to examine Kraku, and the appellant's failure to put him in the witness box is equivalent to an admission of his inability to prove his case by the best attainable evidence.

In these circumstances the learned Judges have rightly thought it material to consider how far the agreement has been acted upon, because a subsequent acceptance by Ntwiegye would have bound him as effectually as an antecedent mandate. The appellant relies upon a receipt appended to the agreement. But the value of the receipt depends on the same consideration as the validity of the contract. There is no other evidence that the sum of 300*l.* was paid to Ntwiegye as "the consideration" mentioned in the agreement. It is proved that he received a larger sum, but to account of the rent to which he claimed to be entitled. All the other evidence of subsequent conduct shows that neither Ntwiegye nor Tinney knew anything of an agreement by which the former had abandoned his rights in Bibiani. No copy of the agreement was given to either; and when Badu returned from his mission he told his Chief nothing about any such contract. He brought back with him 420*l.* as the Enkawie share of the 900*l.* of arrears paid by Captain Way, after certain deductions which it is immaterial to examine. Ntwiegye would therefore be left under the belief that his mission had been exactly accomplished. But a more material fact

is that Tinney continued to recognise the Chief of Enkawie's right in the lands by paying over to him a share of the rents received from the lessees; and a number of letters have been produced in which he distinctly admits the right of Enkawie. The Judges also attach considerable importance to an event which occurred after the respondents' accession to the chiefship. The respondent had heard that a paper lease had been granted, and also that a cane or rod had been presented to Tinney by the European lessees inscribed with the words "Bibiani Gold Fields, Limited, to King Quesi Tinney, 1902." "By the native mind," says the Chief Justice, "this would be regarded as evidence that Tinney was owner of the land." But on the respondent's demand, Tinney sent the cane to him, and agreed to send him the lease when he should obtain it from his lawyer, and the learned Judge says that "to anyone acquainted with the native mind this would indicate that Tinney knew that the respondent was the real owner of the land."

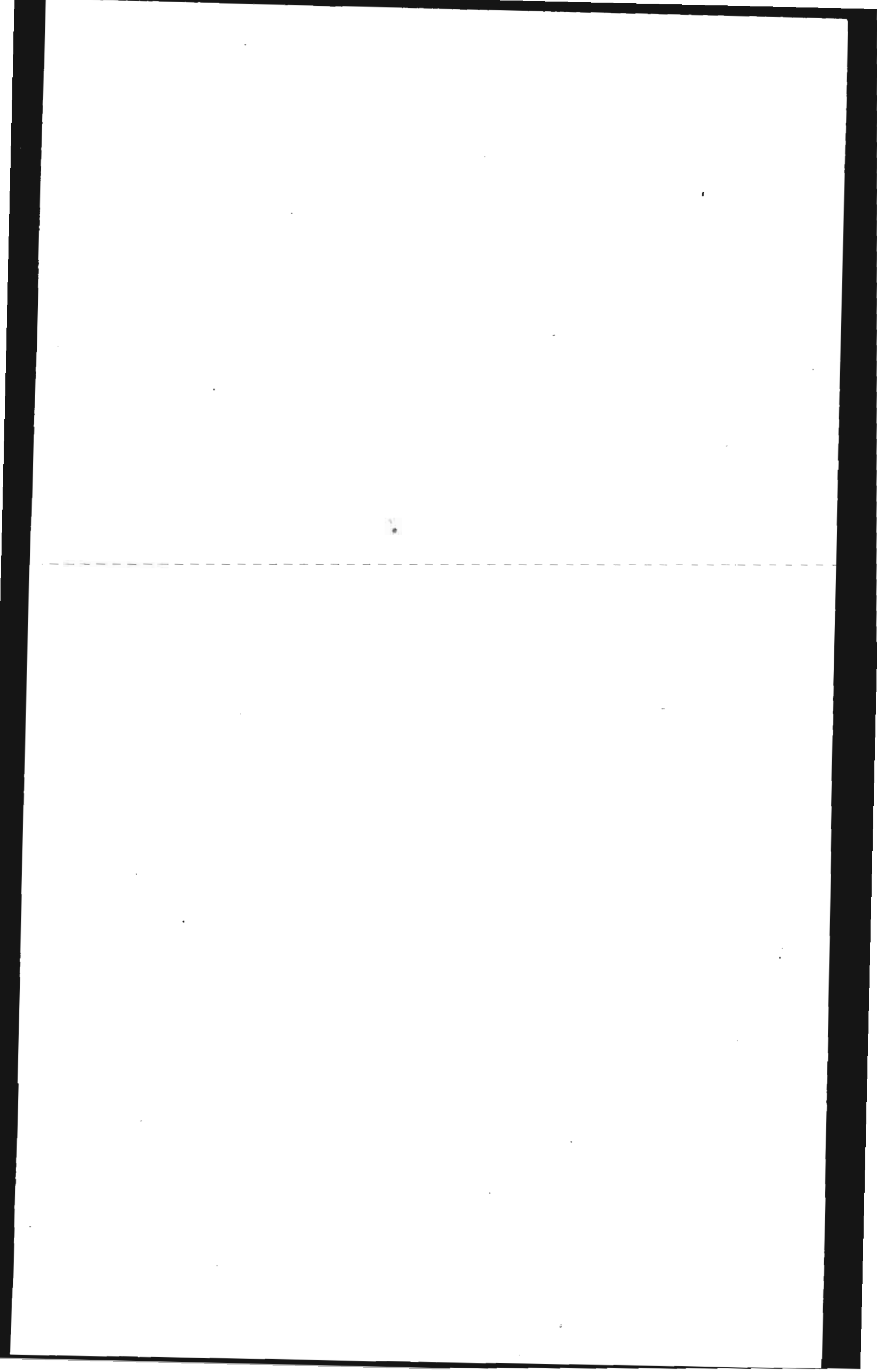
Notwithstanding these considerations, it is said to be a mere assumption that Kojo Badu did not know the terms of the contract. But this is inaccurate. The question is whether his knowledge is proved, and the respondent cannot be required to prove a negative. The learned Judges say in effect that the assertion that he signed the agreement in knowledge of its contents is so improbable that they refuse to believe it, on the evidence adduced. This is a perfectly legitimate method of reasoning; and it is impossible for their Lordships to say that they are so clearly wrong that their judgment must be reversed. But the respondent's case does not depend upon Badu's state of knowledge. It may be that this would afford no sufficient ground for setting aside a contract which Badu had

been duly empowered to make, since in that case the Chief might well have been held to have taken the risk of his own agent's intelligence. But its true importance lies in the valuable light which it throws on the fundamental question of his power to bind the Chief of Enkawie. The learned Chief Justice says he is satisfied that Badu would not have signed away his chief's lands without orders to that effect; and that observation would have afforded a very strong argument to the appellant, if it had not been accompanied by a clear opinion that Badu did not understand what the agreement meant. It is material on the other hand to observe that if Badu's authority to contract is not proved by direct testimony, it is just as little to be inferred from any assertion implied in his consent to sign.

The dissent of Mr. Justice Earnshaw is, as he explains, based entirely on the contract. But the learned Judge assumes that the contract is binding which, with great respect, is the very question in dispute. The contract itself does not prove that one of the parties was empowered to bind a third person, nor that a native of Africa understood a legal instrument in the English language. These are matters of fact which must be proved by the party who avers them. The respondent's case is not that a contract binding upon him should be set aside on the ground of fraud or misrepresentation, but that no contract was ever made which could bind him or his predecessor. So far as this rests on want of authority in the person professing to bind him, the law is perfectly clear. But in so far as it rests on mistake or ignorance it is by no means to be governed, as the learned Judge seems to assume, by the same considerations as a purely English contract. The principle of law is the same in both cases, but the presumptions of fact are widely different if a contract is

subscribed, without negligence, in the honest belief that it is a document of a totally different nature, it is not binding upon the subscriber, not by reason of fraud or misrepresentation but because the mind of the signer did not accompany his signature. If he is excusably mistaken as to its actual contents he never intended to sign and in law he never did sign the paper to which his name or mark is appended. But then when a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it. But there is no presumption that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence.

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



In the Privy Council.

ATTA KWAMIN

2.

KOBINA KUFUOR.

DELIVERED BY LORD KINNEAR.

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