

6-11-63

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39/1961

IN THE PRIVY COUNCIL

No. 25 of 1960

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

UNIVERSITY OF LONDON
V.C.I.
1956
INSTITUTE OF FINANCE
LEGAL STUDIES

B E T W E E N

R.B. WUTA-OFEI Defendant-Appellant

63611

- and -

MABEL DANQUAH Plaintiff-Respondent

CASE FOR THE APPELLANT

10 1. This is an Appeal from a judgment of the West African Court of Appeal of the 29th November, 1956, affirming a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division (Lands Division) of the 2nd September, 1955.

Record
pp. 67-74
pp. 39-49

20 2. On the 10th April, 1948, the above-named Plaintiff-Respondent (hereinafter called "the plaintiff") brought a suit in the Ga Native Court "B 3", sitting at Accra in the Eastern Province of the Gold Coast, against the above-named Defendant-Appellant (hereinafter called "the defendant"). The suit was numbered No. 175 of 1948 on the file of the said Court. In her suit the plaintiff claimed to be the owner of a certain piece or parcel of land, more particularly described therein, which she alleged was granted to her by the Stool of Osu (Christiansborg) in the year 1939 in accordance with native custom, and that the said grant was later confirmed and evidenced by an Indenture dated the 31st December, 1945, and registered in the Deeds Registry as No. 381 of 1946. The plaintiff further alleged that the defendant had trespassed on the plaintiff's land and that he claimed to have obtained a conveyance of the said land from the head of the Alata Quarter of Osu. The plaintiff claimed as against the defendant a declaration of her title to the land in question, £50 damages for trespass by

p.1
p.2

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continuing to build a block wall around the said land, and an interim injunction restraining the defendant, his agents or servants from further trespass on the said land.

p.3

3. On the 31st day of December, 1952, the Supreme Court of the Gold Coast, Eastern Judicial Division (Land Division) passed an order transferring plaintiff's suit from the said Native Court "B 3" to the said Land Division, which was then numbered No. L.42/1952. Although Nii Kwabena Bonne III, the Osu Alata Mantse, was not a party to the proceedings before the Native Court, it appears that in the Land Division he was made a Co-Defendant at his own instance.

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p.40, 1.9

p.4

4. On the 16th July, 1954, the suit came before Van Lare, J., who ordered pleadings to be filed. The plaintiff on the 5th August, 1954, filed a Statement of Claim, which expanded her Civil Summons in the Native Court already hereinbefore referred to, and she now claimed (a) as against both defendants a declaration of title of ownership to the land and hereditaments thereon and (b) as against the first defendant only (i) recovery of possession; (ii) mesne profits from the date of the writ in the Native Court till possession of the said land was delivered to the plaintiff, and (iii) a perpetual injunction restraining him, his agents, tenants, tenants' servants or licensees from further trespass upon the plaintiff's land.

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p.7

5. In their Statement of Defence both defendants pleaded in paragraph 2 that the alleged grant by the Osu Stool conferred no title in the land in question upon the plaintiff because five years before the alleged grant the Osu Stool, acting by the Head of the Alata Quarter of Osu, had granted the said land to the first defendant; and in paragraph 3 they pleaded that the latter had been in possession of the land for about ten years before he commenced to build thereon. In paragraph 4 of the Statement of Defence the second defendant pleaded that as Mantse of Osu Alata Quarter he was one of the principal elders of the Osu Stool and the proper person, according to custom, to allot portions of Osu Stool land to members of the said Quarter, of which Quarter the first defendant was one. In paragraph 5 the defendants further pleaded that the first defendant as a subject of the Osu Stool was entitled to occupy and build on

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portion of the Stool lands of Osu, and that where such land occupied and built upon by him appears to have been granted by the said Stool to another subject he could not be ejected from and deprived of the said land in favour of the other subject, and that in such circumstances the Stool would have to replace the other subject with another piece of land.

10 On the 21st day of June, 1955, the defendants were permitted to add a new paragraph 6 to the Statement of Defence. It was in the following terms:- pp.17, 18

20 "By Ordinance No. 44 of 1940 entitled Accra Town (Land) Ordinance now Cap.87 Government acquired an area of land including the land in dispute and shown in plan No.X1621 from Nii Noi Owoo II, Mantse of Osu; James Coleman, Acting Mankralo of Osu and other elders of Ashanti Blohum, Nii Adja Beblenseh and Nii Amen Bonne and others representing the Stool of Alata.

Government undertook by indenture of 6th February, 1948, to divest itself of that land at a later date. Even up to the present date Government has not divested its interest of the land. Therefore at the date of the action, plaintiff had not title to the land."

30 6. On the 14th October, 1954, the plaintiff filed a Reply to the Statement of Defence, which amounted to a joinder of issue. p.8

40 7. The hearing of the suit began on the 1st March, 1955, when the plaintiff and her witnesses gave evidence, and was continued on the 20th June, 1955, when the defendant began his evidence, who was followed by his witnesses on the following two days, when after arguments on both sides, the learned trial Judge reserved judgment. On the 2nd September, 1955, he delivered judgment for the plaintiff, as prayed, with costs. In the course of his judgment the learned trial Judge said, inter alia, as follows:- p.9

"Dealing with the facts of the case I accept the evidence of the plaintiff and of Mr. Adolphus Lokko and I am satisfied with the evidence supplied by the Deed of Conveyance Exhibit "A" and copy of the layout of the area,

p.41, 11.26
et seq.

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Exhibit "F", that in March, 1939, the Osu Stool made an oral grant of the land in dispute to the plaintiff and duly confirmed it by instrument. On the authorities I hold that it is the oral grant which is decisive and the written instrument is merely a confirmation. By reason of the said grant with effect from March, 1939, the plaintiff became owner and entitled to possession of the disputed land. I accept the evidence that at the time of the grant to the plaintiff the area including the land in dispute was unoccupied and unalienated Osu Stool land. I also find that the area is nowhere near the Alata Quarter, and not contiguous to it. It lies at a considerable distance away to the north of the Alata Quarter. I am not prepared to hold that the area is land which could be described as an Outskirt land of the Alata Quarter, and I have no evidence that the said area was at any time allotted to any quarter or recognised as belonging to the Alata or any other quarter of Osu, Christiansborg. It is my view therefore that the area including the land in dispute was the property of the Osu Stool and not property of the Osu Alata Stool."

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pp.42-47

8. The learned trial Judge also rejected the first defendant's account that the Osu Alata Stool had made a customary grant of the land in dispute to him in 1935 as alleged, and the alleged custom pleaded in paragraph 4 and 5 of the Statement of Defence (set out in paragraph 5 of this Case) as to the obligation of the Osu Stool, where there are competing grants from the same Stool, to replace the plaintiff's land with another piece of land to her.

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p.47, 1.22
et seq.

9. The learned trial Judge then dealt with the plea set out at the end of paragraph 5 of this Case, and said as follows:-

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"It appears that by Ordinance Cap.87 of the Laws of the Gold Coast, certain lands including the disputed land became vested in the Crown as from the 26th October, 1940, and acquired for rehousing and other purposes connected therewith. It is provided by Section 2(2) of the Ordinance that when in the opinion of the Governor there is no longer any

need for any particular part of such lands to remain so vested, the Governor may, I repeat may, by Order published in the Gazette direct that any particular part of such lands shall cease to be so vested etc., etc., and such particular part shall be held and enjoyed as though the same had never been assured or vested in trust to the Crown. It would appear that round about the year 1948 the Crown expressed its opinion of no longer having need for certain parts including the disputed land of the acquired area; and government undertook to divest itself formally on the said unwanted parts. In the meantime, portions of the land to be divested including the land in dispute, have been released to the appropriate Stools by a Deed of Release and Covenant dated 6th February, 1948, Exhibit "8A", but a formal Divestment Order has been delayed, Exhibit "4", and appears to have remained delayed up to the present. It is not suggested that government still has any interest in the area released under Exhibit "8A", but it has been argued that in the absence of a formal Divestment Order, title in the released area including the land in dispute still remains in the Crown, and that the plaintiff had no title in respect of which she could properly bring this action. It is my view that by the time 1st defendant started his building operations on the disputed land, and that is to say, and at the commencement of this action the Crown had covenanted to divest itself of its interest in the said land and by that undertaking sufficient declaration against interest had been made. I find that the Crown had legally undertaken to do a certain thing, that was to publish a formal divestment Order, and applying the rules of equity I look on as done what ought to be done. In deciding the honesty of the case I am to look at the intent rather than to form. If I were to hold otherwise I should be violating the rule contained in the maxim: 'Equity will not suffer a wrong to be without a remedy.'

10. The Defendant-Appellant respectfully submits that the learned trial Judge has misdirected himself in law in applying the equitable maxim "Equity will not suffer a wrong to be without a remedy" to the facts of the present case, for in the present case

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the Defendant-Appellant will contend that Equity must suffer many a wrong if the person praying for relief is not the one entitled to the remedy, and this applies also to the maxim "Equity looks on that as done which ought to be done."

pp.107-110

The deed of the 6th February, 1948 (Ex. "8A") is between the Stool of Osu and the Governor. By it the Stool releases the Governor from certain obligations and the Governor covenants with the Stool that the Governor will by order made under section 2(2) of the Ordinance direct that certain land will cease to be vested in the Colonial Secretary for the time being in trust for His Majesty. The plaintiff is not the Stool of Osu and in so far as the contract to promulgate the Order is enforceable, which is denied, she has no right to enforce it, for it is res inter alios acta. There is no time limit named in this deed within which the Order was to be made and therefore even the Stool could not have compelled the Governor to make the Order, as the discretion when to make it remained in the Governor. A fortiori, the maxims would not apply even in favour of the Stool as against the Government. (See De Beers v. British South Africa Co. [1912] A.C.52 at pp.65-66).

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11. The learned trial Judge concluded his judgment, apart from a direction that the Defendant-Appellant should have a period of three months from the date of his judgment to remove whatever he might have put on the said land, and that mesne profits should be calculated from the date of the judgment and not of the writ, in the following terms:-

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p.48, 11.23-36

"Further I uphold Mr. Enchill's submissions, which I consider a complete answer to this defence, and I therefore alternatively hold that at the commencement of this action the plaintiff was entitled to the legal ownership, as against the defendants, of the reversion expectant upon the termination by the Crown of its legal ownership to the land and hereditaments, subject matter of the suit, pursuant to the covenants entered into by the government Exhibit "8A", and also by virtue of the provisions of section 2(2) Cap.87 the plaintiff is currently the equitable owner entitled to the beneficial enjoyment of the disputed land and hereditaments, and therefore competent to bring this action."

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The Defendant-Appellant respectfully submits that the learned trial Judge has misdirected himself in law in treating the whole dispute as governed by the alleged equitable ownership of the Plaintiff-Respondent, and the Defendant-Appellant contends that the learned trial Judge overlooked the question as to whether the alleged possession of the Plaintiff-Respondent could prevail as against that of the Defendant-Appellant, which will now be considered.

10 12. It is clear that at the time of action brought
the legal title of the land in dispute was vested
in the Chief Secretary or his successor in office.
It is submitted that, even accepting the findings
of the learned trial Judge that the Plaintiff-
Respondent had obtained a grant of land from the
Osu Stool in 1939, that is before the Ordinance
Cap.87 was in force, and had obtained a confirmation
by deed dated 31st December, 1945, that is after the
20 Ordinance in question had been enacted, the Plaintiff-
Respondent had not proved that immediately prior to
the entry of the Defendant-Appellant she was in
possession. If she was not in possession she could
not maintain an action for trespass, for by Section
2(1) of the Ordinance the property in dispute was
vested absolutely and indefeasibly in the Chief
Secretary in trust for His Majesty free from all
competing rights of all kinds whatsoever, whether
proprietary, possessory or otherwise. Her evidence
is that she caused pillars with the initials "M.D."
30 to be placed on the four corners of the plot, but
she does not say when she caused this to be done.
She also says that the site was being looked after
by her mother, but again without any reference to
the period. She does not give any details of what
acts her mother did on her behalf. It does not
assert, (far less prove), that her mother did any-
thing at all on the land, far less anything there
which amounted to an assertion of the Plaintiff-
Respondent's right of ownership, such as cultivating
40 it or turning third parties off. There is therefore
the bare act of erecting pillars on some date which
date is not proved. If the plaintiff at that time
had a title to the land, the legal possession so
established by the erection of the pillars would
remain in the plaintiff, notwithstanding her want
of actual occupation and use, until possession was
actually taken by a stranger (that is to say, until
she was dispossessed), or until the cessation of
her title. Upon the cessation of her title, if
50 her possession was not in fact being maintained by

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any actual user, such possession would also cease (See Brown v. Notley, (1848) 3 Ex.219). The plaintiff after cessation of her title would not be presumed to have continued in possession and therefore, in the absence of a subsequent entry by her, she would not have either actual or constructive possession of the land and consequently could not bring an action for trespass; but if there was no cessation of title, then, until actually dispossessed by a stranger, the Plaintiff-Respondent's legal possession originally established by the mere erection of the pillars, would continue.

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13. As section 2(1) of the Ordinance in question vested the land in dispute in the Government of the Gold Coast "free from all competing rights, titles, interests, trusts, claims, liens, demands and restrictions of all kinds whatsoever," it is quite clear, as already stated, that the Plaintiff-Appellant's title under the grant was divested and ceased, which would include all proprietary and possessory rights whatever. Upon this divesting two possible contingencies arise. (1) If the pillars were erected before 26th October, 1940 (the date of the coming into force of the Ordinance) then the possession thereby obtained ceased also (Brown v. Notley, supra), and the Plaintiff-Respondent ceased to be in a position to bring an action for trespass unless and until she again entered and took actual possession of the land in question. Actual possession means possession of such a nature as to amount in fact to the exclusion of other claimants, so that there were no other persons exercising rights of ownership or claiming possession adversely to the alleged possessor. (Revett v. Brown (1828) 5 Bing. 7; Coverdale v. Charlton (1878) 4 Q.B.D.118). In the present case there is no evidence that the Plaintiff-Respondent did anything which would give her exclusive possession of this kind. Had she done so, she would herself have been a trespasser but, by virtue of the possession so obtained, entitled to maintain trespass against a subsequent trespasser but not against an earlier trespasser in possession whom she had dispossessed by taking possession. In fact, that earlier trespasser could have brought an action of trespass against her for dispossessing him. However, if she did nothing after the cessation of her title, the present action for trespass against the Defendant-Appellant does not lie and should be dismissed. (2) If, however, the pillars were

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erected on or after the 26th October, 1940, the Plaintiff-Respondent would have had no title to do so and would have been liable to an action for trespass, not only at the suit of the Government, but also at the suit of any other trespasser who was then in actual possession of the land in dispute. Therefore, on either alternative, the present action for trespass against the Defendant-Appellant does not lie and should be dismissed.

- 10 14. On the 15th November, 1955, the Defendant-Appellant appealed to the West African Court of Appeal against the decision of the Land Court (Van Lare, J.) of the 2nd September, 1955. In his grounds of appeal the Defendant-Appellant, inter alia, complained that the learned trial Judge had misdirected himself in holding that the Plaintiff-Respondent had title to the land at the date of the issue of the writ, and in further holding that the equitable doctrine of Equity, "Equity regards that as done which ought to be done," was applicable in this case. These grounds were later expanded. p.51
- 20 15. On the 13th November, 1956, at the beginning of the Arguments of Counsel, the Counsel for the Plaintiff-Respondent drew the attention of the Court to the Divestment Order L.N.110 published in the Government Gazette Supplement of 5th May, 1956, which was obviously a divesting Order made, under section 2(2) of the Ordinance Cap.87, by the Government in respect of the land in dispute. p.52, 1.30
p.70, 1.45
p.74, 1.13
- 30 16. In the course of his argument the Counsel for the Defendant-Appellant submitted that, on the passing of the Ordinance, the Crown only was entitled to legal possession and could maintain an action against him; the possession of the Defendant-Appellant availed the latter; only a legal ownership could avail against him - all of which propositions succinctly sum up the arguments in paragraphs 11 to 13 of this Case. He cited the judgment of Cockburn, C.J., in Asher v. Whitlock, [1896] L.R. 1 Q.B.D.1 in support. He rightly stressed that there was no proof of the Plaintiff-Respondent's possession after the coming into force of the Ordinance in question, and he followed this up by a reference to the case of Brown v. Notley (1848) 3 Ex. 219. On other branches of the case he referred to In re Austin, Chetwynd v. Morgan, (1886) 31 Ch.D.596 at p.605; Emegware v. Nwaimo & Ors, 14 W.A.C.A. 347/348; De Beers v. British South Africa Co. [1912]
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A.C. 52 at pp.65-66; Banco de Bilbao v. Sancha, [1938] 2 K.B.176 at pp.193 to 194; Ingall v. Morgan, [1944] 1 K.B.160 at p.167; Moubarak v. Japour, 10 W.A.C.A.102. Counsel for the Plaintiff-Respondent, in addition to Asher v. Whitlock, (supra), cited Perry v. Chissold, [1907] A.C.73; Doe v. Dyball, 3 Car. & P. 610, and the Privy Council Case of Chief Kodilinye & Others v. Anatogu, [1955] 1 W.L.R.231. The Court reserved judgment.

pp.67-74

17. On the 29th November, 1956, the West African Court of Appeal (composed of Coussey, President; Korsah, C.J., and Verity, Acting Judge of Appeal) gave judgment dismissing the appeal with costs, though it set aside the judgment of the trial Judge in so far as the latter gave the Plaintiff-Respondent a declaration of her title to ownership in the present action. The main judgment was given by Acting Judge of Appeal Verity, the other two judges not giving any separate reasons for concurring in the former's judgment.

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p.68, 11.31-50

18. After setting out shortly the history of the litigation, the learned Judge of Appeal said as follows:-

"In relation to this aspect of the case the learned trial Judge after full consideration of the evidence accepted that of the plaintiff as to the oral grant to her in 1939, and rejected that of the defendants as to an oral grant to the 1st defendant in 1935. With this finding I am not disposed to disagree. It is a clear finding of fact based upon the credibility of witnesses whom he saw and heard and I see no reason to differ from the conclusion reached by the learned Judge. It was urged on behalf of the defendants that there is insufficient proof of the alleged grant to the plaintiff by native law and custom but in my view the oral testimony coupled with the recital in the deed of confirmation are in the circumstances of this case and in the absence of any serious challenge, either in pleading or at the trial, sufficient proof that the grant was made in accordance with law and custom."

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The Defendant-Appellant submits that in so far as the learned Judge of Appeal relied on a recital in the deed of confirmation, to which the Defendant-Appellant was not a party, the former misdirected

himself in point of law. Furthermore, in view of the fact that the defendants throughout their Statement of Defence impliedly, if not expressly, challenged the alleged title of the Plaintiff-Respondent, the learned Judge of Appeal misdirected himself in point of fact.

p.7

19. The learned Judge of Appeal then dealt with the interpretation of Cap.87 (the Accra Town Land Ordinance) and continued in the following terms:-

10 "By sections 4 to 9, however, it is apparent that the extinction of all such competing rights was to be limited in its operation in relation to rights in respect of which claims might be made within a prescribed period such claims being dealt with and disposed of by compensation or otherwise in accordance with the provisions of these sections. p.70, l.14 to p.71, l.35

20 "It is further to be observed that by section 5(4) it is provided that: 'No claim shall be entertained unless the same is made in accordance with the provisions of this section and any right title or interest in respect of which no claim has been made within three months of the date of the notice mentioned in section 4 shall be deemed to have determined.'

30 "It is contended on behalf of the defendants that by reason of this sub-section the plaintiff could have no title to ownership in respect of which the Court could properly make a declaration unless it could be shown that a claim had been made under section 5 and further that no such claim has been shown to have been made.

40 "On the other hand the plaintiff contends that by virtue of section 2(2) of the Ordinance the rights of the plaintiff would be restored upon the making of a divesting Order thereunder notwithstanding the provisions of section 5 and that the Government having undertaken to make such a divesting Order the plaintiff had an equitable interest in the land capable of declaration. It may be observed in passing that in point of fact such a divesting Order has been made since the determination of the suit.

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"The sub-section upon which this contention is based provides -

'When in the opinion of the Governor there is no longer any need for any particular part of such lands to remain so vested in the Chief Secretary the Governor may by Order published in the Gazette direct that any particular part of such lands shall cease to be so vested and thereupon such particular part of such lands shall be held and enjoyed as though the same had never been assured by indenture to the Governor of the Gold Coast or vested under the provisions of this Ordinance in the Chief Secretary for the time being in trust for Her Majesty.'

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"The first issue to be determined in relation to these contentions is whether or not any rights which the plaintiff may have had prior to the indenture of 24th September 1939 were extinguished by reason of the apparent failure of the plaintiff to make any claim in accordance with section 5(1) of the Ordinance. In construing sub-section (4) it is essential that the precise words thereof should be observed. It does not provide that in the given circumstances any right, title or interest 'shall be determined' but that it shall be deemed to have determined. The true construction of this provision requires that effect be given to this distinction.

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"In exparte Walton (17 Ch.D.746 Lord Justice James laid down the principles to be observed in construing words similar to those used in section 5(4) -

'When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.'

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The Defendant-Appellant submits that the case just cited differs from the present dispute, for there the Legislature had enacted that a trustee in bankruptcy might, by his unilateral act, disclaim any onerous lease vested in the bankrupt, and thereupon such lease should be deemed to have been

surrendered, though a surrender is not capable of being made by a unilateral act, as Lord Justice James pointed out, so that a legal fiction had been resorted to by the Legislature and consequently the Court was bound to ascertain for what purpose and between what parties such statutory fiction was to be resorted to. No statutory fiction is resorted to in the Ordinance, as it was competent for the Legislature to vest the land in the Chief Secretary free from all competing interests, and the Legislature did so. It was also competent for the Legislature to bar all claims in respect of transferred rights, if not made within the period limited, and this also the Legislature did.

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20. The learned Judge of Appeal then continued as follows :-

"By the application of that principle I can only conclude that the use of the words 'shall be deemed to have determined' expressed the intention of the legislature not that any such rights should be determined but that for the purposes of the Ordinance and as between the Chief Secretary and any claimant thereunder such rights should be deemed to have determined so that no person who had not made a claim in accordance with the section should be entitled after the expiration of the prescribed period to assert as against the Chief Secretary any such right whether by claim action or otherwise, for so long as the land was vested in him. Upon the making of a divesting Order under section 2(2) the purposes of the Ordinance in respect of land covered thereby would be exhausted, the Chief Secretary be no longer an interested party and the provisions of section 5(4) be no longer applicable.

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p.71, 1.36 to
p.72, 1.30

"It was submitted on behalf of the appellant that if the sub-section be so construed then it would be open to any person whose claims under section 5(1) had been disposed of to lay claim again to any pre-existing rights and hold and enjoy both. I do not think that this is so, for I am of the opinion that the principle enunciated by the Judicial Committee of the Privy Council in Kodilinye & Anor. v. Anatogu & Anor (14th February 1955) in relation to the construction of an analogous provision in the Niger Lands Transfer Ordinance (Cap.149, Laws

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of Nigeria 1948) may properly be extended to the determination of rights during the vesting period as well as to their acquisition or accrual.

"In my view, therefore, the rights of the plaintiff, acquired before the vesting period and not having been determined during such period either by the operation of the statute or by the disposal of any claim thereunder, would be revived upon the making of a divesting Order under section 2(2) and thereupon the plaintiff would be entitled to a declaration thereof." 10

With regard to the judgment of the Privy Council in Privy Council Appeal No.39 of 1951, Kodilinye v. Anatogu, now reported in [1955] 1 W.L.R.231, this appeal was concerned with a section of a Nigerian Ordinance which much resembles section 2(2) of the Accra Town (Lands) Ordinance (Cap.87). The Privy Council, at p.236 of the Report, said that in their opinion "this section only deals with the title to the ownership of the land and is not to be construed as compelling the Court to disregard all events which have happened in the period between 1882 and 1949 in so far as they may affect any rights of use and occupation in respect of such land as may have been acquired or have accrued by acquiescence or otherwise during those years." To apply this observation to the present case it seems for the period between 1882 and 1949 should be substituted the period between 24th September, 1939 (date of grant by Osu Stool to the Government) and 5th May, 1956 (date of divesting order). Their Lordships did not say more as no rights of use and occupation were in issue in that appeal in which their Lordships held that the only issue was "the ownership or radical title to the land between the plaintiffs and defendants, two tribes or families." The Defendant-Appellant submits that the judgment in Kodilinye's appeal has little relevance to the present dispute. 20 30 40

p.72, 11.31-50

21. The learned Judge of Appeal, however, came to the conclusion that at the date of the writ or judgment the Plaintiff-Respondent was not entitled to a declaration of "title to ownership," as at that time no such title was vested in her. He held that the real issue between the parties was which of them was entitled to possession at the time when the action was instituted, and said:-

10 "The facts as they appear from the evidence accepted by the learned trial Judge are that the plaintiff having been given an oral grant in 1939, confirmed by deed in 1945, entered into actual possession of the land by placing pillars thereon to demarcate her area of occupation. In 1948 the 1st defendant entered upon the land and dispossessed the plaintiff who brought this action to recover possession. The simple question is whether this action is maintainable. I think that it clearly is. At the date of the 1st defendant's entry the plaintiff had been in possession for three years even if it is to be assumed that she did not enter into possession until the deed of 1945. It is true that at any time during the period the Chief Secretary in whom was vested title to the land could have ejected her but otherwise as against all the world the plaintiff was entitled to maintain her possession and if dispossessed to evict the intruder. This principle has been long established but perhaps I may cite the words of Cockburn C.J. in Asher v. Whitlock (L.R. 1 Q.B.1.): '... I take it as clearly established that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine.' and again at p.6 '... if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession?'"

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In order to avoid prolixity, the Appellant will here merely refer to what has been said in paragraphs 10 to 13 of this Case, and again submits that the Plaintiff-Respondent was not in possession at the relevant dates and was, therefore, not entitled to sue in trespass.

40 22. The learned Judge of Appeal then continued his judgment in the following terms:-

p.73, l.30 to
p.74, l.8

"The question was also dealt with by the Judicial Committee of the Privy Council in Sundar v. Parbati (5 T.L.R.683) where in relation to persons whose possession was lawfully attained in the sense that it was not procured by force or fraud, no one interested opposing, their Lordships said: 'it did not

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admit of doubt that they were entitled to maintain their possession against all comers except the heirs ... one or other of whom ... was the only person who could plead a preferable title. But neither of these possible claimants was in the field and the widows had therefore each of them an estate or interest in respect of her possession which could not be impaired by the circumstance that they might have ascribed their possession to one or more other titles which did not belong to them.'

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"It is clear that the plaintiff attained her possession lawfully in the sense contemplated by their Lordships and that the only person interested, the Chief Secretary, did not interfere. It is equally clear that her possession so attained cannot be permitted to be disturbed at the "mere will" of the 1st defendant who had no lawful claim to title and that the circumstance that she ascribed her right to possession to a title which was not in law then vested in her does not impair her right to possession as against the 1st defendant."

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The Defendant-Appellant respectfully submits that the decision in Sundar v. Parbati (also reported in (1889) Law Reports 16 Indian Appeals, p.186) is not applicable to the facts in the present case, for there the widows were admittedly in physical possession of the estates and assets of the late Baldeo Sahai, whereas in the present case the Plaintiff-Respondent's possession (if any) had been absolutely determined on the 26th October, 1940, and there was no evidence whatever that she had resumed possession thereafter in any shape or form on or before the 10th April, 1948, when she issued her writ against the Defendant-Respondent.

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p.75, l.35
et seq.
p.76, l.44

23. On the 16th April, 1957, the Defendant-Appellant applied to the Ghana Court of Appeal for leave to appeal to the Privy Council, and on the 14th day of October, 1957, final leave to appeal was granted. The record in the said appeal was subsequently despatched to the Registrar of the Privy Council and is numbered as above, No.25 of 1960. The Co-Defendant did not appeal against the judgment of the West African Court of Appeal.

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24. The Appellant respectfully submits that the

judgment of the West African Court of Appeal should be reversed with costs, except where it is in his favour, for the following, among other,

R E A S O N S

- 10 1. BECAUSE, on the view which the Court took of the evidence, the West African Court of Appeal was in any case right in refusing to the Respondent a declaration of title to ownership but should have gone further, set aside the judgment of the Supreme Court and directed that judgment should be entered for the Defendant with costs.
2. BECAUSE the practice of the Privy Council as to concurrent findings of fact as to title has become irrelevant in the present appeal owing to the other issue as to possession, which the West African Court of Appeal rightly decided was the real issue between the parties.
- 20 3. BECAUSE the Respondent has not proved that immediately prior to the entry of the Appellant on the land in dispute she was in possession.
4. BECAUSE, in any case, the Respondent's alleged possession was extinguished completely on the 26th October, 1940, and there is no evidence and no presumption that in spite of such cessation her possession thereafter was being maintained.
- 30 5. BECAUSE, in the absence of a subsequent entry by the Respondent, which has not been proved, she would not have had actual or constructive possession of the land in dispute and consequently could not bring an action for trespass against Appellant.
- 40 6. BECAUSE, though the West African Court of Appeal did not expressly associate themselves with the reasoning of the learned trial Judge in regard to the Respondent's right to invoke the two maxims of Equity, if it could be held that they impliedly approved of such reasoning, it was unsound and ought not to be followed.
7. BECAUSE the decision of the West African Court

Record

of Appeal is erroneous and ought not to be affirmed.

GILBERT DOLD.

IN THE PRIVY COUNCIL

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

R. B. WUTA-OFEI Appellant

- v -

MABEL DANQUAH Respondent

CASE FOR THE APPELLANT

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the Appellant.