IN THE PRIVY COUNCIL No. 25 of 1959

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N :

KWAME MENSAH otherwise
NANA AKWAMUHENE (Defendant) Appellant

- and -

KOJO ABROKWA and
KWABENA AKROMAH
(Plaintiffs) Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from a judgment of the West African Court of Appeal dated the 9th April, 1956, dismissing an appeal of the above-named Appellant against a judgment of the Land Judge (Quashie-Idun, J.), dated the 15th July, 1955, which reversed a judgment of the Asantehene's "A2" Native Appeal Court, Kumasi, in the Appellant's favour, dated the 19th April, 1955, reversing a judgment of the Kumasi West District Court, dated the 10th September, 1954, given against the Defendant in a Suit in that Court in which the present Respondents were Plaintiffs and the Defendants were (1) Kwabena Frimpong (2) Akwasi Badu (3) the present Defendant-Appellant. The Kumasi West District Court gave judgment for the Plaintiffs with costs against the Defendants for the redemption of a farm, directing the Plaintiffs to pay £4.11.0d to 1st Defendant and 1st Defendant to refund £12.10.0d to 3rd Defendant as redemption of the farm.

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p.30
p.24
p.17
p.11
p.12, l.40

2. The litigation in the present appeal arises out of a document dated the 11th March, 1939 (Exhibit "E"), executed by the above-named Respondents in favour of the said Kwabena Frimpong, which is in the following terms:-

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"WHEREAS WE the undermarked Kojo Abrokwa and Kwabena Akromah all of Manfro in the Kumasi District have this 11th day of March, 1939 received the sum of Four___ eleven shilling (£4:11:0) from Kwabena Frimpong of Abrepo village as loan in consideration for which We Hereby pledge the undermentioned One (1) Cocoa Farm to the said Kwebena Frimpong as security against the said loan.

1. We do hereby faithfully promise to pay the said sum of four___ eleven shillings (£4:11:0) on or before the 30th day of November, 1939.

2. Provided always and it is hereby agreed and declared that in default or failure to pay the said sum aforesaid on or before the time specified above it shall be lawful for the said Kwabena Frimpong to forfeit or sell and dispose of the cocoa farm hereunder described and deposited as security either by Private or Public Auction after two (2) weeks Notice to us and if the amount realised at such sale shall not cover the said sum of four pounds eleven shillings (4:11:0) it shall be lawful for the said Kwabena Frimpong to call on us for whatever balance that may be found due (deducting all expenses attendant to the sale).

3. We further agree to have no claim against the said Kwabena Frimpong should he exercise the Power hereinbefore contained in paragraph (2) above mentioned.

4. Provided always and it is hereby agreed and declared that the Power of forfeiture and sale hereinbefore contained shall not be exercised unless and until default shall have been made in payment of the said sum of Four Pounds eleven shillings (£4:11:0) on or before the time above specified.

5. In case of failure to pay the above mentioned sum of Four pounds eleven shillings (£4:11:0) at the time specified, the said Kwabena Frimpong has the discretion to grant extension of time upon accepting any interest that may be due on the principal sum and upon payment of consideration.

Cocoa Farm referred to

1. One (1) Cocoa Farm at Manfo situate, being and lying on a land known as and called Suponggya

bounded on one side by Kwabena Nkrumah's cocoa farm; on one side by forest; on one side by Kwabena Apawu'a cocoa farm; and on one side by forest being property of both debtors herein.

I, Kweku Mensah of Kumasi hereby declare that the foregoing have been read over and interpreted by me to the said Kojo Abrokwa and Kwabena Akromah when they seemed perfectly to understand the same before making their marks hereto in the presence of:-

Kojo Abrokwa their x

Kwabena Akromah x marks

DEBTORS

LEFT THUMB PRINTS.

Kwabena Amoah his x mark
Kwasi for Debtors

W/W to marks
(Sgd) ? ? Mensah
Lic. No. 14639/39/K.,
Lic. Letter Writer
Kejetia Street Ksi.
Reward 1/-

Gold Coast
2d. Postage Stamp."

3. In their summons in the court of first instance, viz: the Kumasi West District Court, the Plaintiffs-Respondents above named claimed against all the Defendants a declaration of title and recovery of possession of the cocoa farm in dispute, and £50 damages for trespass alleged to have been committed by the Defendants, namely Kwabena Frimpong (the first defendant), Akwasi Badu (the second defendant) who bought from the first Defendant the farm in dispute in April, 1940 for £4.11.0d and resold it to Appellant (the third defendant) for £12.10.0d some months later. They also claimed an injunction against all the defendants restraining them from having anything to do with the property in dispute, and asking for the appointment of caretakers. When the application for an injunction came on for hearing by the Court on the 3rd September, 1954, the Court, on hearing that the Appellant had been in possession for fourteen years, held that the appli-

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p.3, l.17.

cation for an injunction was not reasonable and refused it. The hearing of the suit then proceeded.

4. The principal questions which were discussed in the Courts below were:-

(1) What is the character of the document of the 11th March 1939, and particularly to what extent it is governed by customary law or by English law or by both; and whether it is a pledge or, if not a pledge, an equitable mortgage as understood in English law;

(2) Whether the power of sale which it contains is, from the nature of the document, as a matter of law incapable of exercise, the West African Court of Appeal having held it so incapable.

(3) If the power of sale was capable of exercise, whether it was duly exercised.

(4) Whether in any event the Plaintiffs-Respondents were not, at the date of the summons, precluded by their conduct from requiring the 3rd Defendant, Appellant in this appeal, to restore the farm to them.

It is submitted that, for the reasons given below, the first three questions are subsidiary or irrelevant and that the main question in this appeal is that numbered (4). That the Plaintiffs were precluded by their conduct was supported in the Courts below mainly on the ground that they stood by for 14 years, seeing the Appellant improving the property. While this ground, it is submitted, might be relied upon and will be relied upon if necessary, it is submitted that the conduct of the Appellants at or immediately after the purported exercise of the power of sale when they gave possession to the purchaser renders it unnecessary to consider their subsequent standing by, except (if at all) as showing a complete acquiescence in the transfer of possession which they made to the purchaser and in the Purchaser's subsequent transfer of the property to the present Appellant.

5. In his evidence given on the 3rd September, 1954, the first Respondent, who alone gave evidence for the Plaintiffs, set up the case that the

p.3.

Licensed Letter Writer, who wrote the document set out in paragraph 2 hereof, had contravened his instructions which the first Respondent (in contradiction of the express terms of the document itself) alleged were that in default of repayment within a year, Frimpong (the pledgee and first Defendant) should apply to the Court to sell the disputed farm by Fi.Fa. It is obvious that none of the Courts concerned believed this uncorroborated story nor did the Plaintiffs rely upon it subsequently. He also stated that the farm was sold by the 1st Defendant without either notice to the Plaintiffs or an order of the Court.

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In continuation of his evidence the first Respondent stated:-

> "We contacted the first Defendant about the illegal sale of the farm and although he refused to give us satisfactory explanation, we could not sue him because we were uncertain that the sale was illegal. Later I learnt that 2nd Defendant had sold it to 3rd Defendant."

p.4, 11.3-8.

He then proceeded to cite and put in evidence a judgment of the 3rd Defendant in the Native Appeal Court on the 24th July 1954, which he alleged was similar in its facts and stated that this judgment had caused him to bring his suit, because the said judgment (Exhibit A - Owusu v. Frimpong & another) had held that the Defendant in that case was liable on the ground that the disputed farm had been sold without prior notice to the borrower.

p.4, 11.9-40.

p.39

In cross-examination the first Respondent admitted that -

> "the farm in dispute was sold by 1st Defendant to 2nd Defendant about 14 years ago", i.e. about 1940.

p.5, 11.12-13.

The first Respondent further stated:-

> "I have not travelled since the sale of the farm in dispute",

p.5, 11.19-21

so that for 14 years before action brought the first Respondent must have been aware of what was happening to the farm during those years and, as will hereafter appear in this Case, from the Appellant's

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p.8, l.22. evidence, which was unchallenged, the latter improved the farm during those years without any protest from the Respondents or any of them.

p.5, ll.28-37. The first Defendant further stated that up to the time of sale he was in possession of the farm, that he was to pluck the cocoa and use the proceeds to repay the debt and that up to the time of sale
p.6, ll.18-25. the 1st Defendant was not in control of the farm. That the Plaintiffs remained in occupation and control of the farm up to the time of sale is admitted.

p.7. 6. When giving evidence (upon none of which was he cross-examined by the Respondents) the Appellant put in a copy of a notice by the pledgee 1st Defendant (Kwabena Frimpong) to the above-named Respon-
p.35. dents dated 4th March, 1940 (Exhibit "B"), and stated that it was served by the Appellant himself on the first Respondent in the presence of the
p.7, l.21. second Respondent, calling upon the Respondents to repay the amount advanced, viz: £4.11.0d, within fourteen days, failing which the property would be sold, that two weeks later he conveyed an auctioneer to Manfo where a notice of auction was affixed in the presence of the 2nd Defendant on a tree in the street at Manfo by the auctioneer (this affixing
p.7, l.34. being referred to by the witness as "the attachment"), two weeks after which the property was sold by the Auctioneer, to Kwasi Badu, the second Defendant for the sum of £12.10.0d. This witness put in evidence documents showing that the sale had taken place on the 10th April 1940, that a receipt for the full purchase price had been given to the 2nd Defendant
Ex.C., p.36. on the 19th April 1940 (Exhibit "C"), and that on the 20th April 1940 the Licensed Auctioneer rendered a sworn account of the sale of the property in question showing the net proceeds as £5.4.6d (Exhibit
Ex.D., p.37. "D"). This is presumably the account required by S.15 of the Auction Sales Ordinance (Chapter 154 of the Laws of the Gold Coast, 1936 Revision).

p.8, l.10. Continuing his evidence (upon none of which, as already stated, was he cross-examined by the Respondents to this appeal), the Appellant stated that Kwasi Badu, the second defendant, resold the property to the Appellant. The Appellant produced his receipt dated 7th August 1940 for £15.0.0d, the
Ex.G., p.38. purchase price (Exhibit "G"), and a memorandum of the sale to him dated the 2nd September, 1940 signed
Ex.F., p.38. by the 2nd Defendant Badu (Exhibit "F") (which in

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his evidence, as recorded, is called "a deed of conveyance"). He further stated that he had been in possession of the disputed farm for fourteen years and had improved it, and that a forest, upon which he had planted cocoa, adjoining it had been sold to him by the first Respondent for £7 after he had bought the disputed farm, which sale and purchase was confirmed by his first witness, his brother Kojo Anane, who had been caretaker for the Appellant on the farm for 14 years. His second witness, Nana Kwasi Wiafe II, an Odikro (Village Chief) confirmed that Kojo Anane was the caretaker to help the Appellant weed the undergrowth of the disputed farm.

p.9, l.8.
p.9, l.20.
p.8, l.25.

7. On the 10th September, 1954, the Kumasi West District Court gave the said judgment in favour of the Respondents enabling them to redeem the disputed farm on payment of £4.11.0d to first Defendant, Kwabena Frimpong, and ordering the latter to refund £12.10.0d to the Appellant as redemption of the disputed farm.

p.12, l.46.

The principal reasoned judgment was given by the junior member of the Court, Mr. J. Ben Amuah, doubtless a literate. He found in favour of the document of the 11th March 1939 which he refers to as a "mortgage". He stated that the determination of the suit involved English law and that, under section 7 ss.(1) of Cap.80 (The Native Courts (Ashanti) Ordinance, Chapter 80), any issue involving English law was not within their jurisdiction unless the parties agreed, which the parties had. (Cap. 80 is the Native Courts (Ashanti) Ordinance which appears as Cap.80 in the Laws of the Gold Coast 1936 Revision but the reference in section 7 subsection (1) to non-customary law was added as a proviso by Ordinance No. 15 of 1943, section 2, the subsection, as revised, now being section 7 subsection (1) of Cap.99 (the Native Courts (Ashanti) Ordinance) in the Laws of the Gold Coast 1951 Revision). He held however that due service of notice before sale had not been properly proved. It is submitted that, from the wording he uses, he considered that in order to comply with the terms of the "mortgage" it was incumbent upon the lender both to serve the notice himself and himself to prove this, so that the proof thereof by the 3rd Defendant was therefore inadequate, and that he was not deciding that Exhibit B had not been served, as had been

p.11, l.14.
p.11, l.17
p.11, ll.25-33 and ll.36 & 37.

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deposed by the 3rd Defendant or at all.

p.11, l.33. He interpolated in this an observation - "no exhibit was tendered by the Defendants to prove that attachment notice was served on the Plaintiffs to comply with the Law of Auction Sale".

Attachment notices were in 1939 provided for by Rules 10 and 14 of Order 44 in Schedule 3 of the Courts Ordinance (Cap.4 Laws of the Gold Coast 1936 Revision, Vol.1, pp.136 and 137). There is no provision for any attachment notice in the Auction Sales Ordinance (Cap.154 Laws of Gold Coast 1936 Revision Vol. 2 p.1792) but section 14 (p.1795) required an auctioneer to give 14 days public notice of sale by auction of any land and on contravention he was guilty of an offence punishable on summary conviction by a fine not exceeding £100, payment of which was enforceable under sections 305 and 307 of the Criminal Procedure Ordinance (Cap.10 of same Laws Vol.1 pp.532 and 534) by distress and ultimately by imprisonment with or without hard labour.

Mr. Amuah did not state what inference he drew from the alleged omission to prove by exhibit an attachment notice, whatever he may have meant by that term, but it was evidently adverse to the Defendants. It is submitted as to section 14 of Cap. 154 that the maxim "omnia presumuntur rite esse acta" applied, particularly as the auctioneer was subject to criminal penalties and 14 years had elapsed since the sale. It is further submitted that section 14 does not adversely affect a purchaser at an auction sale or a subsequent purchaser, such as the Appellant, from the original purchaser.

p.11, l.37 to p.12, l.10. He proceeded to hold, in reliance upon the decision of the West African Court of Appeal in Adjei v. Chief Dabanka (1930) 1 W.A.C.A.63 in 66 & 67, that the document of the 11th March 1939 was an English and not a native mortgage therefore the property could not be sold "without an order of foreclosure from the Court" so that the same was unlawful. (The term "foreclosure" has been commonly used in Gold Coast parlance, and is here so used, to indicate any way by which an owner, who has given property as security, is deprived of it, whether by the lender acquiring it himself or selling it to a third party. For this use of the term see Sarbah. Fanti Customary Law 1st edition p.71, 2nd edition p.82/83).

Finally Mr. Amuah stated that "the defence was simply based upon the fact that the disputed farm had been in the hands of the 3rd Defendant for 14 years and therefore the Plaintiffs were barred to sue for it" and held that the lapse of 14 years could not make lawful the 1st Defendant's sale of the farm without "an order of foreclosure from the Court". He considered that payment should be as before stated. Record p.12, ll.10-16.

The second member of the Court agreed with Mr. Amuah on the ground that due service of the original of Exhibit B was not proved and that the farm should have been sold after an "order for foreclosure from the Court" of which order there was no proof. p.12.

The President, an illiterate, also agreed. He is recorded as giving as his reasons that, if all the pre-requisites of lawful sale had been fulfilled, the Odikro of the Village (Manfo) would have known it but the Defendants could not adduce his evidence to prove that a messenger had been to the village either from the 1st Defendant or from Court to attach the farm.

8. It is submitted that the judgment of the Native Court was (inter alia) erroneous:-

(1) In holding that the security document was an English mortgage (Amuah);

(2) In holding that the farm could not be sold without an order of Court (Amuah and Nana Awuah);

(3) In relying upon the decision of Adjei v. Chief Dabanka (1930) 1 W.A.C.A. 63 (Amuah), which was a decision as to leasehold land in the town of Kumasi exceptionally by statute held by English tenure and to which English law was applicable and so irrelevant to property subject to the customary law of Ashanti and concerned a document which contained no power of sale and in other respects was dissimilar;

(4) In holding that the security document required that the service of the notice of intended sale must be by the lender personally and that such service must be proved by him personally (Amuah); or, if that was meant, that it had not been served as had been deposed by the Appellant;

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(5) In holding that the evidence of the Odikro of Manfo was necessary to prove that all the prerequisites of a lawful sale had been fulfilled (Nana Forfie);

(6) In holding that a "notice of attachment" should have been proved and in drawing an inference unfavourable to the Defendants from the absence of such proof (Amuah);

(7) If by "notice of attachment" the Court had in mind the requirement in s.14 of the Auction Sales Ordinance (Cap.154) of public notice of sale, in not presuming that the section had been complied with;

(8) In giving any relief against the 3rd Defendant, the Appellant.

p.13. 9. On the 21st September, 1954, the Appellant and Kwasi Badu (the third and second defendants) appealed to the Asantehene's "A2" Native Appeal Court, Kumasi, who on the 19th April 1955 allowed the appeal unanimously. The main judgment was
p.17. delivered by Mr. Agyarko, who referred to the document of the 11th March 1939, not as a mortgage but, as it purported to be, a pledge; to the cocoa farm as the pledged property and to the loan as the pledge money. After referring to the onus on the
p.17, l.35. to p.18, l.23. Plaintiffs and to Exhibits "E", "C", "D" and "F", he said that the Plaintiffs based their claim solely upon irregularity in the sale in that 1st Defendant did not serve a notice as stipulated in the pledge document, yet they had called neither the auctioneer nor any evidence, oral or documentary, in support of this allegation but had relied upon the decision in Owusu v. Frimpong in the Native Appeal Court, which had been concurred in by the 3rd Defendant.

p.18, l.24. He proceeded to point out that the Plaintiffs alleged categorically that, after the sale, they had protested to the 1st Defendant that the sale was irregular but that nevertheless they had not taken any steps to set it aside.

He held that, if it were true that the Plaintiffs had taken the 1st Defendant to task as they alleged, it was imperative for them to bring witnesses that they had done so. In the absence of this vital evidence, their claim rested on mere allegations.

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He considered the lapse of 15 years was an estoppel to the claim and he supported this opinion by reference to the much shorter time limit laid down in the Rules of Court for taking objection to an irregular sale in execution. He also considered that this estoppel was conclusive against the Plaintiffs being entitled to possession against the 3rd Defendant, who was a purchaser for value without notice, who had been in possession for many years and who had not been connected with the auction sale. p.18, l.44. p.18, l.8.

With regard to the decision in Owusu v. Frimpong, it had not been approved by the Supreme Court as a test case (i.e. as a recognition of the law) nor were the circumstances similar. p.19, l.25.

As the Plaintiffs had not brought any acceptable evidence in support of their claim, the Defendants need not have been called upon to answer it. In fact Defendants had given straightforward and exhaustive details supported by oral and documentary evidence and the previous contention of the Plaintiffs that no notice was served upon them under the terms of the pledge had been disproved by the copy notice (Exhibit B) which had been accepted at the trial without challenge by either of the Plaintiffs. p.19, l.34.

As to the view of the trial Court that an order for "foreclosure" was required, the Plaintiffs had not based their claim on this (an opinion of Mr. Agyarko which the present Appellant will not seek to support in view of the Respondent's complaint that court order for foreclosure was necessary). In any case under para. 2 of the pledge (Exhibit E) no such order was required. p.20, l.6. p.5, l.30

He also held that the conduct of the Plaintiffs in transferring their interest in the adjoining forest to the 3rd Defendant after he had acquired the cocoa farm evidenced their approbation of the sale.

The Manwerehene, the 3rd member of the Court and the President, the Oyokohene, concurred in this judgment and accordingly the appeal was allowed with costs, the 3rd Defendant being recognised as the lawful owner of the property in dispute.

10. It is respectfully submitted:-

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(1) that the Native Appeal Court were right in treating the security document not as a mortgage but as a document of pledge;

(2) that their statement that the customary law required the Plaintiffs if they complained of the sale to call the 1st Defendant to task before witnesses and to call witnesses to prove that they had so called the 1st Defendant to task so that the absence of this evidence destroyed the foundation of the Plaintiffs claim, was a statement of the customary law binding on the Supreme Court and the West African Court of Appeal;

(3) that their finding that the grant of their adjoining forest by the Plaintiffs to the 3rd Defendant was a ratification of his acquisition of their former farm was a statement of the evidential value of such grant in customary law which was binding upon the Supreme Court and the West African Court of Appeal;

(4) that the Native Appeal Court were correct as to the due service of notice of sale, as to the effect of the inaction of the Plaintiffs and the lapse of time and as to no order for sale by any Court being requisite.

11. The present Respondents appealed to the Supreme Court of the Gold Coast, (Land Court), Ashanti Judicial Division.

p.24. The Land Court was the first Court in which legal practitioners could act and both parties
p.23. appeared by Counsel. Grounds of appeal signed by the Plaintiffs' Counsel had been filed which contended that the document of the 11th March 1959 was a mere promissory note which conveyed no legal estate, that the Native Appeal Court had misdirected itself in holding that a pledge (? pledgee) of land can dispose of the legal estate in the land without first getting an order of Court to sell and that the Native Appeal Court was wrong in setting aside findings of fact made by the trial Court.

There is no record of which of the grounds of appeal (if any) were argued, the Record appearing to show that the Respondents were called upon first
p.24, l.14. and the then Respondents' Counsel is recorded as

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agreeing that the document was not a (deed of) mortgage and as having made a submission which is recorded as "that the documents give possession by sale". He also submitted that the Plaintiff had stood by and, finally, that, if the Plaintiff had any claim at all, it was only for damages against the 1st Defendant. The then Appellants' Counsel is intermediately recorded as submitting that laches can only appear where there is knowledge of the right and the Plaintiff sits by. p.24, l.25

12. On the 15th day of July, 1955, S.O. Quashie-Idun, J. gave judgment allowing the appeal with costs. p.24.

In his reasons the learned Judge held that the document set out in paragraph 2 hereof was an equitable mortgage and that though the document contained a power of sale, the power could only be exercised after the 1st Defendant had obtained an order of the Court, relying on the case of Moses Asafu Adjei v. Chief Yaw Dabanka (1930) 1 W.A.C.A.63 (a case clearly concerned with leasehold property subject to English law).

The learned Judge also purported to deal with the argument of the then Respondents that the Plaintiffs were guilty of laches. He disagreed by merely - it is respectfully submitted - repeating his conclusion that an equitable mortgagee cannot sell the property without first obtaining an order of the court, and did not deal with the argument of laches at all. He cited the decision of the West African Court of Appeal in Delor v. Foli (9th April 1952) (reported 14 W.A.C.A. 54) which related to a power to seize a chattel on non-payment of a loan and not to a pledge of any kind. p.25, l.7.

13. The 2nd and 3rd Defendants thereupon appealed to the West African Court of Appeal. The grounds of appeal were in effect - pp.26-28.

(1) that the Plaintiffs had approbated the sale because, having been in possession, they themselves gave up possession to the 2nd Defendant when the farm was sold;

(2) that the Plaintiffs had further approbated the sale when, after the 2nd Defendant had to their knowledge transferred to the 3rd Defendant,

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they sold a portion of adjoining forest land to the 3rd Defendant to enable him to extend his farm;

(3) that the Plaintiffs were guilty of laches in that for 14 years they stood by and watched the 3rd Defendant spend money to improve the value of the farm, so were estopped from claiming the farm;

(4) that the judgment of the Supreme Court was against the weight of the evidence;

(5) that, if the transaction (as an equitable mortgage) was governed by English law and not customary law the Native Court had no jurisdiction under the said Native Courts (Ashanti) Ordinance having regard to section 7(1) of that Ordinance.

p.29, ll.1-31. The last ground of appeal was taken as a preliminary point but the Court of Appeal rejected it on the grounds that the Native Court had jurisdiction to determine the claim for declaration of title and, in any event, the objection of want of jurisdiction had been waived by not having been taken at first instance nor previously on appeal, and further there was nothing at first instance from which it appeared that the parties expressly or by implication agreed that they should be regulated by some law other than customary law. In view of the Record stating that the parties had agreed to the exercise of jurisdiction by the NativeCourt, it is not now submitted that the Native Court had not jurisdiction.

14. The West African Court of Appeal (Gold Coast Session) on the 9th April 1956 dismissed the appeal.

p.30 In the course of their joint judgment the Court said:-

"The Plaintiff pledged his land and the transaction was evidenced by a document which the Defendants-Appellants contend was an equitable mortgage"

The Court of Appeal continued:-

"We are satisfied that it was not an equitable mortgage, there being no deposit of title deed, and it was not a legal mortgage. It follows that the property was not vested in the pledgee

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so that he could exercise a power of sale, and transfer title ultimately to the 3rd Respondent without an order of the Court for sale or on judgment which admittedly was not obtained."

It is submitted that there being no deposit of title deed did not by itself exclude the possibility of the document being an equitable mortgage as known to English law.

It would appear that from the Court of Appeal's remark that it followed, from the document not being a legal mortgage, that the property was not vested in the pledgee, that they considered that the document was a pledge but it does not appear whether they considered it a pledge governed by customary law or governed by English law.

It is submitted that the reasons given by the Courtof Appeal for their opinion that the power of sale given by the document could not be exercised are insufficient.

The West African Court of Appeal continued as follows:-

"In the circumstances, the doctrine of acquiescence is irrelevant to the issue. The Native trial Court was therefore right in decreeing that the Plaintiffs-Respondents should redeem the pledge for the sums decreed." p.31, 1.6.

The Appellant respectfully submits that the West African Court of Appeal misdirected themselves, as the doctrine of acquiescence is a doctrine which bars a plaintiff from relief where he has stood by without protest and with full knowledge of his rights, when another party has purported to dispose of the former's rights of property, and without taking any steps, as in this case, to retrieve his property for fourteen years.

The West African Court of Appeal concluded as follows:-

"It is alleged that the 1st Respondent has purchased from the Plaintiff forest land adjoining the area pledged. This has not been proved, but if it is correct as to which we make no pronouncement we desire to make it clear that p.31, 1.11.

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the judgment of the Native trial court relates only to the property in the Writ of summons described."

The Appellant respectfully submits that the West African Court of Appeal have misdirected themselves on the facts as there is abundant uncontradicted evidence that he bought the adjoining forest land, vide the Appellant's own evidence; and Kono Anane's evidence; moreover, the Court misdirected themselves in law, for though the Summons only claimed a declaration as to the disputed farm it would in law assist the Appellant in supporting the plea of acquiescence by reason of his purchase of other property of the Respondents for the purpose of enlarging the disputed farm, and the West African Court of Appeal should have accepted the opinion as to the evidential value of the sale of forest which the Asantehene's 'A' Court had expressed.

p.8, l.23.
p.9, ll.7-9.
p.16, l.42.

15. As to the character of the document of the 11th March 1939, it is submitted that, as this transaction was between persons all of whom were Ashantis, it is to be presumed that they intended the transaction to be in accordance with their customary law or at least not discordant to it. It must be shown that no customary law governs the matter before English law can be applied in suits between Africans, natives of Ashanti.

Pledge is well known to customary law, while mortgage, in the English sense of the transfer of the title to a thing as a security for a debt, with or without transfer of possession of the thing, is unknown nor is the distinction known between legal and equitable rights and remedies.

Pledge in the customary law in its simplest form is a transaction of loan in which the lender is given possession of the property of the borrower as security for the loan and takes for his own use the fruits of the property until repayment at any distance of time by the borrower or his successors to the lender or his successors of the amount agreed.

To this simplest form there may be added an agreement to repay and a power to sell upon failure to do so upon the lender giving reasonable notice of intention to sell unless repayment is made.

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It is submitted that there is nothing in the present case to prove that the parties, when executing the security document Exhibit E intended that their obligations should be regulated by English law and that the Trial Court, the Land Court and the West African Court of Appeal were wholly wrong in applying the English law of mortgage.

16. It is submitted that the matters, relevant for the decision of this appeal, can be summarised as follows.

The security created or evidenced by Exhibit E dated 11th March 1939 was intended to be under the customary law and to be by way of pledge with a power of sale upon default of repayment of the loan by the 30th November 1939 as set out in paragraphs 2 and 4.

It is common ground the loan was not repaid by the 30th November 1939, or at all and that the farm was sold on or about the 10th April 1940.

Paragraph 4 of Exhibit E does not require a written notice or a notice to be given by the lender personally, the contract only requiring actual notice of intention to exercise the power of sale two weeks later.

If the Trial Court held that the contract required notice of intended sale to be given to the borrowers by the lender personally in order to comply with Exhibit E or that the lender must personally prove the service, they were wrong, such conditions being no part of the contract. If however the Trial Court can be taken to have held that the original of Exhibit B was not served at all, it is submitted that such finding was perverse and that the Asantehene's A Court properly treated the Plaintiffs' contention as frivolous. It is further submitted that, considering the lapse of 14 years between the sale of the farm and the hearing of the suit, the proof of service ought to have been accepted.

p.11, 11.25-31.
p.12, 1.22 and 1.31.
p.19, 1.46.

It is common ground that the lender did not take personal possession of the farm but that the Plaintiffs were in control of it until the sale.

p.5, 1.28.

The security by way of pledge was therefore not complete but it is submitted that, under the

Record

contract of pledge Exhibit E, the lender was entitled to delivery of the farm to him, if not at, or at any time after, the date of the contract (as it is submitted that he was), at least upon the default in payment.

The pledge was not of land but of a farm. The distinction between "the land" and "the farm" is well recognised in Akan customary law.

In Akan customary law a farm is the right to occupy land for the purpose of cropping it, in former times when cash crops were unknown for subsistence, but now either for subsistence or for profit or both. It is common ground that in this case the farm was a cocoa farm. Such right to occupy and use is always subject to the condition that the title of the owner of the land to the land is not disputed and is otherwise on customary terms but subject to the observance of such terms the right is perpetual unless and until abandoned.

There is no indication in the Record of who, in the present case, was the landowner or upon what terms the farm was held.

It is submitted that to such a customary right of occupation and use (which is not an "estate") the English doctrines concerning legal and equitable estates are wholly inapplicable.

In such a case it is submitted that, as there is no legal or equitable estate to be considered, all that has to be considered is the actual transfer of possession.

The lender up to the time of sale being out of possession could not give possession upon a sale unilaterally, as he could have done if the pledge had been perfected in the usual manner by his taking possession on or shortly after making the loan. In that case the strict performance of the conditions limiting the power of sale would have been essential, (if reliance had to be placed upon the power of sale) unless waived before, at, or after the giving of such unilateral possession by the borrower. But where the borrower is in control, it is submitted that the position is entirely different, for the transfer of possession unilaterally is impossible and the exercise of the power of sale resolves

itself into a transfer by the lender (who is not in possession) to the purchaser with the concurrence of the borrower who is in possession and who transfers the actual possession to such purchaser, as he, in consequence of his own default in paying the lender, would (it is submitted) be bound to do. It is submitted that, in such circumstances, no question of the due performance of the conditions limiting the lender's power of sale can arise, and certainly not between the borrower and the purchaser, when the borrower has himself transferred the possession (which was in him and not in the lender) to the purchaser. Still less, it is submitted, can it arise between the borrower and a purchaser from the original purchaser.

While there is no direct evidence of precisely how or when the Plaintiffs gave up the possession of the farm to the purchaser, the 2nd Defendant, it is clear that they did so at some time at orafter the date of sale and before the 2nd Defendant in his turn sold and transferred possession to the 3rd Defendant, the Appellant.

It is submitted that this concludes the matter in favour of the Appellant.

17. If however it should be necessary to deal with the case on the footing on which it was dealt with by the Court of Appeal the following submissions are made:-

The Court of Appeal held that Exhibit E was a pledge of land and was neither an equitable mortgage (though the reason they gave for it not being an equitable mortgage does not show that it was not) and was not a legal mortgage, from which they held that it followed that the property was not vested in the pledgee so that he could exercise the power of sale and transfer title ultimately to the 3rd Defendant without an order of the Court for sale "or on Judgment", so that in the circumstances the doctrine of acquiescence was irrelevant. (It is not known to what kind of judgment the Court of Appeal intended to refer as alternative to an order of the Court for sale but possibly the Court intended a judgment for foreclosure in the proper sense.)

It seems that the Court of Appeal considered that English law was applicable, from the general

Record

tenor of their judgment and their reference to an order of the Court, "the Court" being the Supreme Court of the Gold Coast.

It is respectfully submitted that, assuming that English law applied, the same considerations, arising out of the Plaintiffs having themselves transferred possession to the purchaser, are applicable and that consequently no question of any unilateral exercise of the power of sale arose nor was there any necessity to obtain any order of any Court for the exercise of the power of sale or for the transfer of the title upon sale, as the Plaintiffs had themselves transferred possession, and with it title, to the purchaser so that it was irrelevant that the property was not vested in the pledgee.

18. Leave to appeal to Her Majesty in Council was finally granted on the 19th November, 1956, and the Appellant respectfully submits that his said appeal should be allowed and the judgment of the Asantehene's "A2" Native Appeal Court, Kumasi, restored with costs throughout, for the following, among other

R E A S O N S

1. BECAUSE the Respondents had themselves transferred possession to the 2nd Defendant, who had transferred possession to the Appellant, and are not entitled to any relief against the Appellant.

2. BECAUSE the Respondents, having admittedly stood by without protest of any kind and with full knowledge of the Appellant's improvement of the property in the belief that he was the owner thereof and of their alleged rights for fourteen years, are now estopped by acquiescence from asserting such alleged rights.

3. ALTERNATIVELY, because the Respondents by their conduct are barred by laches.

4. BECAUSE, in any case, the decisions of the Trial Court, the Land Court and the West African Court of Appeal were against the weight of the evidence.

5. BECAUSE the judgment of the Asantehene's "A2" Native Appeal Court setting aside the judgment of the Court below is otherwise right and ought to be restored with costs throughout.

GILBERT DOLD.

No. 25 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N:

KWAME MENSAH otherwise
NANA AKWAMUHENE
(Defendant) Appellant

- and -

KOJO ABROKWA and
KWABENA AKROMAH
(Plaintiffs) Respondents

CASE FOR THE APPELLANT

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Solicitors and Agents for Appellant.