Let the defendant recover against the third party Christian Pius Johnson the sum of £40 and so much of the said costs as the defendant may pay to the plaintiff, and the defendant's own costs of this action and of the third party proceedings against the third party Christian Pius Johnson, the defendant's cost of the action to be taxed as between solicitor and client.

Let the third party Lucy Josephine Johnson recover against the defendant her costs.

Order accordingly.

MACAULEY v. P.C. BONGAY and OTHERS

West African Court of Appeal (Tew, C.J. (Sierra Leone), Berkeley, J. (Nig.) and Michelin, J. (G.C.)): March 20th, 1930

[1] **Evidence — burden of proof — recovery of possession of land — plaintiff must succeed on strength of own title:** In an action for the recovery of possession of land of which the defendant has long been in undisturbed possession, the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's (page 183, lines 9—14).

[2] **Evidence — customary law — proved by evidence until notorious by frequent proof, then judicial notice:** Customary law should be proved in the first instance by calling witnesses acquainted with the customs until, by frequent proof, they have became so notorious that the courts will take judicial notice of them (page 184, lines 16—30).

[3] **Jurisprudence — customary law — proof of customary law – by evidence until notorious by frequent proof, then judicial notice:** See [2] above.

[4] **Land Law — recovery of possession — evidence — burden of proof — plaintiff seeking recovery after acquiescence in defendant's long undisturbed possession must succeed on strength of own title:** See [1] above.

The plaintiffs (now the respondents) brought an action against the defendant (now the appellant) in the Circuit Court for recovery of possession of land.

The plaintiff P.C. Bongay, suing on behalf of himself as Paramount Chief of the Big Bo Chiefdom and of the Tribal Authority of the Chiefdom, and two other plaintiffs described as "land owners," sought to recover possession of two areas of land from the defendant, a non-native settler to whom the land had been granted more than 30 years previously by the then Paramount Chief. The Circuit Court (Butler-Lloyd, J.) gave judgment for the

plaintiffs on the grounds that the defendant had failed to establish his title to the land and that a document by which a part of the land now in dispute had been granted to him was a forgery.

On appeal, the defendant contended that the decision of the court below was contrary to the weight of evidence since the plaintiffs had not proved their own title to the land; that apart from the document held to be a forgery there was sufficient evidence to establish his proprietary rights to land over which he had had undisputed possession for more than 30 years; and that the trial judge had been mistaken in deciding the case under the principles of the received law since this was a matter of customary law and had to be judged accordingly.

The court also considered whether a claim in a representative capacity could be joined in the same writ of summons with a claim in an individual capacity; and what significance should be given to the long possession of land by the defendant.

The court ordered a retrial.

Cases referred to:

(1) *Angu v. Attah* (1916), P.C. '74—'28 43, applied.

(2) *Martin v. Strachan* (1744), 6 Bro. Parl. Cas. 319; 2 E.R. 1106.

Barlatt for the defendant-appellant;
Kempson for the plaintiffs-respondents.

MICHELIN, J. (G.C.):

This is an appeal by the defendant from the judgment of the Circuit Judge of the Sierra Leone Protectorate (Butler-Lloyd, J.) dated November 2nd, 1927.

The plaintiff Kamanda Bongay, in his representative capacity as Paramount Chief of the Big Bo Chiefdom, and the plaintiffs Gboogba and Lassana in their individual capacity as owners, by their writ of summons dated February 9th, 1927 claimed from the defendant the recovery of the possession of two areas of land situate in the Big Bo Chiefdom of the Protectorate of Sierra Leone, which was in the possession of the defendant. The learned judge gave judgment in favour of the plaintiffs for the immediate possession of the land claimed with costs.

Five grounds of appeal were originally filed, and a further ground was by leave of the court added, when the appeal came on for hearing before this court. Grounds 1, 2, and 5 were subsequently abandoned, and the appeal was argued before us on the following grounds:

(a) The decision was contrary to the weight of evidence.

(b) Apart from the document which was put in evidence by the defendant and which was held by the court to be a forgery there was sufficient evidence to establish proprietary rights to the land in question in the defendant.

(c) The learned judge was mistaken in point of law in accepting evidence and deciding the issues of this case under the principles of English law.

This being an action of ejectment, and it having been found as a fact by the learned trial judge that the defendant had for a long time past been in possession of the lands claimed in the writ of summons, the onus was upon the plaintiffs to recover on the strength of their own title and not on the weakness of the defendant's title: see *Martin* v. *Strachan* (2). The learned judge however, in the course of his judgment does not appear to have considered the question as to whether the plaintiffs had adduced sufficient proof of ownership to justify him in entering a judgment in their favour, but the onus of proof was shifted by him upon the defendant. In the last paragraph of his judgment he stated as follows:

> "The defendant's case having thus broken down all along the line, I have no alternative but to give judgment for the plaintiffs for the immediate possession of the land claimed, with costs."

There being no pleadings, nor any record of the opening statements of counsel on each side, it is difficult also to see how a claim in a representative capacity could have been allowed to be joined in the same writ of summons with a claim in an individual capacity, the necessary proof in each case being different; and although no objection appears to have been taken at the trial on the ground of mis-joinder, it seems to me that this point should have been considered by the learned judge in the course of his judgment.

This decision of the learned judge appears to have been based entirely upon the following two grounds:

(a) The failure of the defendant to establish his title to the land in dispute under the Real Property Limitation Act, 1833.

(b) The fact that a document put in evidence by the defendant which purported to be an agreement dated March 9th, 1894, executed by Chief Otoguah and others in favour of the defendant, by which a part of the land now in dispute was granted to the defendant, was held by the court to be a forgery.

In addition, however, to the production of this document it was proved by the defendant and admitted by the plaintiffs' witnesses that the defendant had, for upwards of 30 years, been in undisputed possession of the land, erected building thereon, and exercised rights of ownership over such land and it was incumbent therefore on the court to consider the question of long possession not by prescription under an English statute which is clearly not in force in the Protectorate of Sierra Leone, but under the doctrine of acquiescence in equity.

The difference between the principles laid down by the Statutes of Limitation in force in England as to the recovery of real property, and the doctrine of long possession and acquiescence in equity as applicable to a colony in which these Statutes of Limitation are not in force, is very clearly explained in Mr. Redwar's well-known *Comments on Gold Coast Ordinances*, at 10—15 (1909). Apart from equity, in view of the fact that the plaintiffs claimed recovery of possession under native customary law, the onus of proof was upon them to prove such customary law, which was not done. In the judgment of the Privy Council in the case of *Angu* v. *Attah* (1), in an appeal from the Supreme Court of the Gold Coast Colony, their Lordships stated as follows:

> "The land law in the Gold Coast Colony is based on native customs. As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them."

Although this judgment had reference to the Gold Coast only, the principle laid down therein in my opinion applies equally to the system of land tenure in the Protectorate of Sierra Leone. In view of these circumstances I am of the opinion that there should be a rehearing of this action.

The action must therefore be remitted to the court below for re-hearing. The costs in the court below are to abide the result of such re-hearing.

In view of the fact that the various points to which I have referred were not raised in the court below there will be no order as to the costs of this appeal.

TEW, C.J. (Sierra Leone) and **BERKELEY, J. (Nig.)** concurred.

Retrial ordered.