MACAULEY v. P.C. BONGAY (FOR HIMSELF AND TRIBAL AUTHORITY) (No. 3)

West African Court of Appeal (Kingdon, C.J. (Nig.), Macquarrie, Ag. C.J. (Sierra Leone) and Berkeley, J. (Nig.)):
October 10th, 1932

[1] **Constitutional Law — chiefs — paramount chief — rights and duties — right of entry to customary land — Paramount Chief of Big Bo Chiefdom may enter non-native settler's land for good of community — public denial of right amounts to flouting Chief's authority:** It is a settled rule of the customary law in force in the Big Bo Chiefdom that the Paramount Chief has a right, in the interests of the community, to enter land granted to a non-native settler, and conduct constituting a public denial of the Chief's right to do so amounts to the flouting of the Chief's authority (page 330, line 41—page 331, line 4).

[2] **Constitutional Law — chiefs — paramount chief — rights and duties — right to expel from land in Big Bo Chiefdom — where Paramount Chief's authority flouted offending party may be expelled from land and chiefdom — physical expulsion possible, legal proceedings preferable:** Under the customary law in force in the Big Bo Chiefdom the Paramount Chief has the right to expel from the land he occupies and from the Chiefdom a non-native settler who has flouted his authority and has thus forfeited his title to the land he occupies, but such expulsion need not be physically carried out and the court will look with favour upon a party who seeks to avoid a breach of the peace by coming to the court for an order to enforce his claim (page 326, line 37—page 327, line 8; page 332, line 39—page 333, line 5).

[3] **Evidence — customary law — proved by evidence until notorious by frequent proof, then judicial notice:** When particular rules of customary law have become notorious by frequent proof in the courts, a court may take judicial notice of them (page 327, lines 18—22).

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

[5] **Land Law — right of entry — Paramount Chief of Big Bo Chiefdom may enter non-native settler's land for good of community — public denial of right amounts to flouting Chief's authority:** See [1] above.

[6] **Land Law — title — forfeiture — flouting authority of Paramount Chief of Big Bo Chiefdom — offending party forfeits title and may be expelled from land and chiefdom — physical expulsion possible, legal proceedings preferable;** See [2] above.

[7] **Land Law — title — forfeiture — title of forfeited land in Big Bo Chiefdom reverts to community and Paramount Chief as representative of community — may re-allot:** When land in the Big Bo Chiefdom is forfeited, under customary law it automatically reverts to the community and the Paramount Chief, as its representative, is entitled to resume possession and to re-allot it if desired (page 327, lines 13—25).

[8] **Succession — family provision — non-native settler's widow and children can only remain on land in Big Bo Chiefdom with Paramount Chief's consent:** Under the customary law in force in the Big Bo Chiefdom the widow and children of a non-native settler may only, after his death, remain on land granted to him with the Paramount Chief's consent (page 333, lines 28—32).

The respondent brought an action against the appellant in the Circuit Court for recovery of possession of land.

The respondent, suing on behalf of himself as Paramount Chief of the Big Bo Chiefdom and of the Tribal Authority of the Chiefdom, sought to recover possession of two areas of land from the appellant, a non-native settler to whom the land had been granted more than 30 years previously by the then Paramount Chief. There were two further plaintiffs described as "land owners," one of whom later died, whose names were struck out in subsequent proceedings in this case.

The appellant had married the daughter of the Paramount Chief and had been granted some land by him in 1892. Some of this land the appellant sub-let contrary to the terms of his grant and disputes arose between him and the Paramount Chief. In 1905 the then Governor wrote a letter to the appellant which contained terms agreed upon by both parties to settle their disputes, the relevant points of which were that (a) the land would remain the appellant's property so long as he observed the conditions as to its cultivation; (b) the appellant had no right to sub-let the land; and (c) as a result of the appellant's marriage with the daughter of the Paramount Chief, the Chiefs would recognise the right of any children of this marriage to succeed to the land.

There were no further significant disputes until, in 1926, the respondent became Paramount Chief. He wished to clear and widen a road running through the appellant's land for the convenience of the community. The appellant objected, declaring that the land was his personal property, and proceeded to plant young trees on the road in support of his claim and in defiance of the respondent. The respondent and two further plaintiffs thereupon brought a successful action in the Circuit Court (Butler-Lloyd, J.). The appellant's subsequent appeal to the West African Court of Appeal (reported at 1920—36 ALR S.L. 181) succeeded and the court ordered the case to be reheard in the Circuit Court.

The Circuit Court (Tew, C.J.), on the rehearing, again gave judgment in favour of the respondent on the ground that the

appellant had, by flouting the authority of the Chief, been guilty of conduct which under customary law rendered all his rights in the land liable to forfeiture. The judgment of the Circuit Court is reported at 1920—36 ALR S.L. 212.

On appeal, the appellant contended that, under customary law, the forfeiture of rights over land was only consequent upon expulsion from it by the proper native authority; that unless and until this had been done, the question of forfeiture did not arise; that the court below had by statutory amendment had its jurisdiction over land matters removed; and that under customary law the court only had power to make an order expelling the appellant from the Chiefdom and not an order for the possession of land. He also contended, *inter alia*, that the terms of his original grant gave his children the right to succeed to the land, thereby giving him an "estate of inheritances" which could not be forfeited; and he sought compensation from the respondent.

The respondent contended that the claim for possession was valid under the customary law then in force; that the customary law power to expel from the Chiefdom included the power to expel from the land within the Chiefdom; and that the Circuit Court had, by virtue of its enjoying the powers of the English High Court, power to make an order for possession.

The appeal was dismissed.

Cases referred to:

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

(2) *Eleko v. Officer Administering Government of Nigeria*, [1931] A.C. 662; (1931), 145 L.T. 297, considered.

Legislation construed:

Interpretation Ordinance (Laws of Sierra Leone, 1925, *cap.* 103), s. 10(2):

"Where an Ordinance repeals an Ordinance, the repeal shall not:-

. . .

(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Ordinance had not been passed."

Protectorate Courts Jurisdiction Ordinance (Laws of Sierra Leone, 1925, *cap.* 169), s. 38:

". . . the Circuit Court shall possess all the powers and authorities of

the Supreme Court of the Colony, and shall follow, as far as possible, the practice and procedure of the said Supreme Court. . . ."

Supreme Court Ordinance (Laws of Sierra Leone, 1925, *cap.* 205), s. 3: The relevant terms of this section are set out at page 332, lines 36—38.

Barlatt for the appellant;
Kempson for the respondent.

KINGDON, C.J. (Nig.):

This is an appeal from a judgment of the Circuit Court of the Sierra Leone Protectorate dated March 5th, 1931, making an order in the respondent's favour for possession of two areas of land situate near Bo in the Big Bo Chiefdom in the Central Province of the Protectorate.

The writ of summons is dated February 9th, 1927, and at that time the plaintiffs were "Kamanda Bongay, Paramount Chief of the Big Bo Chiefdom, for himself and on behalf of the Tribal Authority and Gbogba and Lassana, land owners." At the trial which ensued judgment was given in the plaintiffs' favour, but the Court of Appeal ordered a retrial which began on January 22nd, 1931. It is from the judgment in that re-trial that the appellant now appeals. At the outset of the re-trial the plaintiffs' (now the respondent's) counsel informed the court that the plaintiff Lassana was dead and asked that both second and third plaintiffs be struck out. There was no objection from the appellant's counsel and the court ordered accordingly. In the present action, therefore, Kamanda Bongay sues alone as "Paramount Chief of the Big Bo Chiefdom, for himself and on behalf of the Tribal Authority."

It is to be noted that the trial was a summary one and consequently there were no pleadings, but it is to be regretted that the points in issue between the parties were not more clearly ascertained, defined and recorded at the outset of the trial, for it seems that the points upon which the learned Chief Justice based his decision in the court below only emerged as the real points in issue at a fairly advanced stage of the hearing.

The basis of the decision is that —

"the defendant has, by flouting the authority of the Paramount Chief, both in the matter of his tenants and by his claim, expressed and implied, to the absolute ownership of the land, culminating with his interference with the road, been guilty of conduct which renders all his rights in the land liable to forfeiture."

But in the particulars of claim there is not a word to suggest that the claim to recover possession was founded upon allegations of misconduct by the appellant involving forfeiture of his rights. They read as follows:

"The plaintiff demands of you possession of two areas of land situate near Bo in the Big Bo Chiefdom, Central Province, Sierra Leone Protectorate, descriptions of which are hereunto annexed.

The plaintiffs are entitled to the said lands as forming part of the Big Bo Chiefdoms aforesaid.

The said lands are in the possession of the defendant."

Further, when the respondent's counsel opened his case, he failed to make it clear that the question of the propriety or otherwise of the appellant's conduct was a straight issue in the case. However, this emerged clearly as the case proceeded, and I do not think there has been any substantial miscarriage of justice as a result of the issues not being earlier defined.

It is admitted in the writ of summons that the appellant was in possession of the lands claimed. The history of the appellant's occupation of the lands is a long one and is fully set out in the judgment of the court below, so that it need not be recapitulated here. But the salient facts are that the appellant's occupation was in accordance generally with native law and custom, and at the same time was subject to some special and unusual features.

The terms of the occupation are set out in a letter Exhibit J dated January 11th, 1905 addressed to the appellant and signed by the Governor himself, which records "complete agreement" on the subject. It may be noted in passing that the letter speaks in para. 2 of "your property" and in para. 6 of "your land," and in para. 3 recognises the right of the appellant's children by his wife, the daughter of the Chief, to succeed to the land. The appellant's interest in the land was therefore something more than a mere life interest.

We have, then, the position that the appellant is in lawful possession of the land and is entitled to quiet enjoyment; the respondent, to succeed in his claim, must show that the appellant's right to possession has been lost. What are the findings of the court below upon which it bases its decision that the appellant has forfeited his rights? The basis of the decision is twofold, *viz.*: (*a*) The finding of fact that the appellant has flouted the authority of the Paramount Chief, and (*b*) the holding that by

native law and custom the appellant has by mere flouting forfeited his rights in the land.

As to the first, I think that some of the matters relied upon by the respondent should be given little or no importance. The first of these matters are the occurrences prior to the "complete agreement" arrived at in 1905 and evidenced by Exhibit J. I do not think it was proved that those occurrences included any misconduct on the part of the appellant. It is difficult now to ascertain what actually occurred, but whatever it was, any trouble was completely and finally settled at the interview from which Exhibit J resulted, and these long past events should not now be raked up against the appellant.

The second is the matter of the sub-letting by the appellant of part of the lands subsequent to the date of Exhibit J and before the succession to the chieftaincy of the respondent. In Exhibit J the appellant was expressly informed: "The native custom does not permit of your sub-letting the land and consequently you have no right to do so"; and he admits that he has sub-let in spite of this warning. At first sight this appears to tell against him — but, when the circumstances of the sub-letting are examined, not at all heavily. There can be no doubt that whatever the appellant did in the way of sub-letting was done with not only the knowledge and consent but also the active co-operation of the respondent's predecessor. The appellant's evidence showing this is:

> "I built more houses and let them, as the plantation was extending. I continued building houses. No Paramount Chief has ever questioned my right to build houses — they assisted me to build them — Bojamu, Bamba son of Otoguah, Pessima, Regent Lemor, Boima, assisted me by supplying labour.
>
> The Chiefs assisted me to build these six or seven houses — I did not pay the labourers — they cost me something — the labourers were supplied by the Chief. I gave the Chief friendly presents."

There is no evidence to contradict this and it must be accepted.

I cannot subscribe to the proposition that the Chief's authority is flouted by an act in which he is a cordial co-operator, and I cannot agree that the appellant's act of sub-letting amounted to misconduct.

But when we come to the occurrences subsequent to the respondent's succession to the chieftaincy, it is a different story.

It is evident that on his succession he set about seeing after the affairs of his chieftaincy with energy. He inquired into the matter of the land in the occupation of the appellant. He wanted to know about the settler's fee and the sub-letting of the houses. But he could get no satisfaction from the appellant and was merely met by the assertion that the land belonged to the appellant. I think it is clear that during this period the appellant failed to pay proper respect to the Paramount Chief and set up a claim in defiance of customary law. It may have been natural and almost excusable that the appellant should do so, for his long and unquestioned quiet enjoyment may well have led him to regard the land as his. But then came a more serious matter: the Chief started to widen a so-called road, which can really have been little more than a bush track, which passed through the land occupied by the appellant. In doing this the Chief was clearly within his rights by native custom. But he was met by active interference and defiance by the appellant who repeated with emphasis his claim to the land as his own, definitely disputed the Chief's right to work on the road, and publicly advertised his defiance of the Chief by planting young trees across the road that all might see and know that he meant to contest his claim.

This brought matters to a head: the customary law of the land was definitely challenged. The chief must either take action to uphold his own rights and those of the community, or he must suffer humiliation and betray his trust. He very properly chose the former course and brought this suit. The claims put forward by the appellant subsequently to the commencement of this action and at the trial itself cannot, of course, be used to found the present cause of action, but they may be legitimately used to show the significance of the claim he made previously.

I am of opinion that the attitude and actions of the appellant towards the respondent since the respondent's succession to the chieftaincy, culminating in the "road" incident, are such as to justify the appellant being held guilty of misconduct and so liable to be dealt with under native law and custom.

And this brings me to the second point forming the basis of the decision of the court below: How was the appellant liable to be dealt with under native law and custom, and is the decision that by native law and custom the appellant has forfeited his rights in the land correct?

This point presents some difficulty because all the evidence

given as to the custom tends to show that it consists in "driving away" the offending settler, and that such "driving away" may be not only from the land but from the chiefdom; and counsel for the appellant has submitted that the forfeiture of rights over land is only consequential upon such driving away. His contention is that only the proper native authority can take this action for expulsion, and that unless and until that has been done the question of forfeiture does not arise. It is not competent for the courts to whittle down a custom into something less than the custom itself. He relies upon the following *dictum* of the Judicial Committee of the Privy Council in the Nigerian case of *Eleko v. Officer Administering Government of Nigeria* ([1931] A.C. at 673; 145 L.T. at 301—302):

> "An interesting question arose at the hearing as to the modification of an original custom to kill into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous custom of earlier days may under the influences of civilization become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to 'natural justice, equity and good conscience.' It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate."

Counsel for the appellant points out that in the present case no native authority has in fact expelled the appellant either from the chiefdom or the land, and consequently he contends the custom has not been enforced and the appellant remains in lawful possession.

The argument is not without its points, but I have come to the conclusion that it is really splitting hairs. The right to expel from the chiefdom must include the right to expel from the land — a small part of the chiefdom. In this case the question of physical expulsion did not arise because the appellant was not actually living on the land. It might have strengthened the respondent's

position if prior to taking action he had formally notified the appellant that he was expelled. But the courts should look with favour upon a party who seeks to avoid a breach of the peace by coming to the courts for an order in preference to taking the law into his own hands. I think that the respondent has adopted reasonable and sensible means to enforce his claim, and that the finding of the court below that by native law and custom the appellant has forfeited his rights in the land is correct.

But as was pointed out by this court (differently constituted) when the appeal from the first trial was considered by it, the respondent must succeed by the strength of his own title and not by the weakness of the appellant's.

I think it is to be regretted that more specific evidence was not led on behalf of the respondent at the retrial to prove the custom that, when land in a chiefdom is forfeited, it automatically reverts to the community and the Chief, as representing the community, is entitled to resume possession and to re-allot if desired.

However, there seems to have been no question in the court below but that this was the custom, and the court seems to have treated it as one of those customs which in the words of the Privy Council in the Gold Coast case of *Angu v. Attah* (1) "have by frequent proof in Court become so notorious that the Courts take judicial notice of them." The absence of such evidence has not been made a ground of appeal, and I am not disposed to interfere with the decision of the court below on account of it.

Upon the other points which have been raised as grounds of appeal I am in agreement with the views which have been expressed by my learned brother, the Acting Chief Justice of Sierra Leone, in his judgment.

The further point raised by this court as to the failure of the appellant to register his title under s. 15 of the Protectorate Lands Ordinance, 1927 can also be dismissed since the appellant is plainly safeguarded by the terms of s. 10 (2) (*e*) of the Interpretation Ordinance (*cap.* 103).

I am of opinion that the appeal should be dismissed and the judgment of the court below affirmed with costs.

MACQUARRIE, Ag. C.J. (Sierra Leone):

This is an appeal against a judgment dated March 5th, 1931, of the Circuit Court of the Sierra Leone Protectorate presided over by the learned Chief Justice of the Colony, ordering the appellant to give up possession of certain lands in the Protectorate, possession of which was claimed by the respondent.

The appellant was and is still in possession of the lands in question situate at Bo — of a total area of about 37 acres — under a grant made by the Paramount Chief of Kakua (or Big Bo) Chiefdom in 1892, presumably in the ordinary way provided by native custom prevailing in the country.

In or about the year 1904 the Government required some land in that neighbourhood and the Governor himself inspected these lands, together with the Chief and the appellant. As a consequence the Governor wrote to the appellant under his own signature the letter dated January 11th, 1905, upon which the appellant now entirely relies and which is accepted by the respondent, who is a successor of the Chief of that time. The relevant part of that letter reads as follows:

> "I think it desirable that a record should be made of the result of the recent interview between the Regent and representative men at Bo and ourselves with reference to the land occupied by you at Bo, especially as a complete agreement on the subject was arrived at.
>
> 2. The land in question was granted to you by the Chief and representative men for the purpose of cultivation. It follows that the land will remain your property so long as you cultivate it in accordance with the conditions as to cultivation subject to which the land was granted.
>
> 3. At the time of the grant you contracted a marriage in accordance with native law with the daughter of the Chief, and as a result the Chiefs will on your death recognise the right of the children by this marriage to succeed to the land.
>
> 4. The native custom does not permit of your sub-letting the land and consequently you have no right to do so. With respect to the six or seven building lots which you have sub-let, it was arranged with the Regent that he would order the natives who were in occupation of some of the lots to quit them unless they paid you the agreed rent. With regard to the lot occupied by Sierra Leoneans, the matter must remain in abeyance pending the coming into operation of a law which is about to be submitted to the Legislative Council."

In the year 1926 the present respondent assumed the office of Chief. In his evidence he states:

> "When I became Paramount Chief I asked everybody for tribute. The defendant did not pay, some other people did not pay they said that the land belonged to the defendant.

About 14 or 16 houses were built on the defendant's land. I cannot remember now who refused to pay in 1906 [1926?]. I spoke to the defendant; he said the land had been given him by Governor Probyn and that I should not ask him for any tribute."

Again he says as follows:

"The defendant has sub-let the house to people in Bo, to one Huggins, some time between 1926 and 1927, another Smith by the Tikonko road. Smith is a Creole — living on land claimed by the defendant. Another man called Armstrong, a Creole, is also occupying another house on the defendant's land.

When I became Paramount Chief I asked the defendant about settlers' fees. He told me that the land belonged to him. When I asked him about the sub-letting of these houses he put me off and went to Freetown and remained a long time."

Later on in 1926 the respondent wanted to widen a road which ran through land claimed by the appellant. [The learned Acting Chief Justice set out the respondent's evidence about this in detail and continued:]

The respondent took action against the appellant in 1927. The court gave judgment in his favour, but the West African Court of Appeal in March 1930 referred the case back for retrial, and it is the judgment at that retrial which is the subject of this appeal.

In the summons the respondent simply claims possession without stating any grounds, except that he is entitled to the lands as part of the chiefdom. There are no pleadings, the procedure of the court being of a summary nature.

Counsel's opening, however, contains the following:

"The defendant continued occupying land and erected houses on land and sub-let to people. The newly elected Paramount Chief intended to build a road on land occupied by the defendant. The defendant denied the right of the plaintiff to cross his land and threatened to take action against him. This brought matters to a head."

The respondent alleges, and it is the main issue, that the appellant, by conduct inconsistent with the terms of his occupancy, has forfeited his right to it.

First, as to the terms of the appellant's occupancy: these are admittedly governed by native law and custom, and the letter of the Governor already referred to is relied upon by both parties. The appellant by his counsel argues, on the first and fourth

grounds of appeal, that that letter admits of sub-letting houses; and also that the use of the word "your property" and the promise that his children would succeed all show that ownership of the land was intended to be granted.

I agree with the learned judge's conclusions on this question. The Governor's letter is not intended to be exhaustive; as it states, it is a record of agreement arrived at (evidently there had been some disagreement) and it regards native custom throughout. It clearly prohibits "sub-letting" whether for cultivation or for houses, and the appellant's claim that he can "sub-let" houses was properly rejected by the court below.

The land was granted only for cultivation in accordance with the conditions as to cultivation subject to which it was granted, *i.e.*, according to native custom which amongst other things ordinarily requires the payment of annual tribute, and that permanent crops are not to be planted without the consent of the Paramount Chief (see the appellant's own statement: "The Governor ordered 300 gum copal trees to be supplied me at 3d. each. The Paramount Chief and Tribal Authority agreed that I should plant these trees on the land.")

There is no question that between 1905 and 1926 the appellant freely sub-let in spite of the agreement in the Governor's letter. No objection appears to have been taken by any of the respondent's predecessors, and in my opinion no complaint can properly be founded upon such conduct. The respondent, however, apparently does not approve of their inaction and now objects to the appellant's "sub-letting" after his accession and after being warned. It appears to me he has every right to do so. The appellant could not acquire a perpetual right to sub-let, and sub-letting without consent of the respondent is as much contrary to the terms of occupancy in 1926 as it was before that year. As shown by his evidence quoted above, the respondent warned the appellant about his then sub-letting, but the appellant said the land had been given to him by Governor Probyn, thus ignoring the real grantor of the land. He did not claim merely the right to sub-let itself. The respondent, however, does not rest his claim on that alone. He claims in addition that the appellant's conduct when he, the respondent, attempted to work on the road is so contrary to the conditions of his occupancy as to cause its forfeiture. I agree with the learned trial judge that it is.

The conduct amounts to a direct public denial of the Chief's undoubted right to go on to the land for the general good of the

community as a proved native custom and part of the conditions of tenure; and in addition it amounts to a claim to the land as his, in such terms as to convey a claim to absolute ownership, it being so regarded by both parties. The appellant said the Governor had given him the land and that whoever interfered with it would "get trouble," *i.e.*, if the Paramount Chief himself interfered he would meet with opposition, as he had already experienced.

This view of the appellant's attitude is confirmed by the evidence at the trial, when he said: "I think I could sell it .... I could let the houses on the land and will it to my children."

The learned judge in concluding says:

> "To sum up, I find that the appellant has, by flouting the authority of the Paramount Chief, both in the matter of his tenants and by his claim, expressed and implied, to the absolute ownership of the land, culminating with his interference with the road, been guilty of conduct which renders all his rights in the land liable to forfeiture."

With this finding I agree. The appellant, who was granted and holds no more than a usufructuary right for his lifetime but inalienable and defeasible upon conditions, is asserting and attempting to enjoy the incidents of absolute ownership which is a conception quite foreign to the respondent's ideas, particularly as against the community which he represents, and one which neither the grantors nor their successors ever for a moment contemplated.

This finding disposes of the first and fourth grounds of appeal in that it is clear that the obligations "for the continuance of his tenure" have not been "duly performed by him."

There remains to be considered the question of the enforcement of the forfeiture. The appellant argues that even if he has been guilty of such conduct, the court below had no jurisdiction, firstly, to hear the case, and, secondly, to make the order for possession.

As to the first contention, Mr. Barlatt for the appellant argues that s. 21 of the Protectorate Courts Jurisdiction (Amendment) Ordinance, 1925 to 1930 excludes suits as to land, because it repeals s. 39 of the Protectorate Courts Jurisdiction Ordinance (*cap.* 169) and particularly sub-s. (1) (*b*) thereof. I cannot agree in view of the provisions of s. 10 (2) (*e*) of the Interpretation Ordinance (*cap.* 103), which enacts in effect that a repeal shall not affect any legal proceeding, etc. in respect of any right, etc. under the repealed enactment; and that any such proceeding

may be continued as if the repealing Ordinance had not been passed. The repealing Ordinance came into force on October 1st, 1927, after the right acquired by the respondent and now being enforced had accrued, and clearly does not affect the jurisdiction in respect of any such proceeding.

As to the second contention, that the court had no jurisdiction to make the order for possession, counsel argued in its favour that the court has to administer native law and custom in this case; that the evidence shows that by that law the remedy for such conduct is banishment from the chiefdom in the case of a member of the chiefdom; in the case of others, which is the status of the appellant, expulsion from the chiefdom; and that that custom cannot be modified by the court and some other substituted for it unless sanctioned by proved native custom, on the authority of the judgment of the Privy Council in the case of *Eleko v. Officer Administering Government of Nigeria* ([1931] A.C. at 673; 145 L.T. at 301—302).

The argument then proceeds that the court has no jurisdiction to make any order other than an expulsion order, and that therefore the order for possession is without authority. This would seem to epitomise the arguments on parts of grounds 2, 3 and 6 of the grounds of appeal. In reply Mr. Kempson for the respondent argued that the power of expulsion from the Chiefdom in the case of the appellant includes the power to expel from the land; that in any case the *dictum* of the Privy Council in the case quoted is confined to custom as regulating "the relations of a native community *inter se*," and is not to be applied without modification where the relations between a native community and a non-native are in question; and finally (see 18 *Halsbury's Laws of England*, 1st ed., at 532 and 536 referred to by Mr. Kempson), on the analogy of a landlord and his tenant, that the court has jurisdiction to make such an order under s. 38 of the Protectorate Courts Jurisdiction Ordinance (*cap.* 169) which gives it "all the powers and authorities of the Supreme Court of the Colony" which, by s. 3 of the Supreme Court Ordinance (*cap.* 205), include "the jurisdiction, powers and authorities which are vested in, or capable of being exercised by, His Majesty's High Court of Justice in England . . . ."

On this point, I agree with the view put forward by the respondent. I think that the main effect and object of the native custom is to deprive the offending tenant of any right to the use

or occupation of land in the chiefdom, that an order to give up possession as applied to a non-native is a proper application of that remedy; and that, in any case, the Court would have jurisdiction to order possession having found that the appellant had forfeited all his rights to occupy the land.

It may be noted here that there is no record of such a point being raised by the appellant in the court below, but it was argued before us under grounds 2 and 3 of the grounds of appeal.

For these reasons, I am of opinion that the order for possession was one that could properly be made, the respondent representing himself and the Tribal Authority as representative of the community, being entitled to possession for the purpose of apportionment under the power which it is proved they possess. So far as the evidence goes, the land becomes vacant if given up by the appellant.

The fifth ground of appeal was abandoned.

The seventh was not pressed, nor is it clear what bearing it has upon the judgment.

On the eighth and ninth grounds, it was argued that the statement in para. 3 of the Governor's letter gave the appellant's "posterity" a reversionary right in the land. This is, I think, sufficiently dealt with in the finding on the nature of the appellant's rights in the land which cease at his death. Similarly as to the argument that, as the eighth ground expresses it, "the posterity of a stranger (husband) by his native wife can inherit lands granted to him." The finding of the court below on this point in my opinion correctly interprets the evidence given upon it. The witnesses are unanimous that the consent of the Chief is necessary to enable the widow and children to remain on the land. Such a nebulous "right" cannot be construed to give the appellant an "estate of inheritances" as was argued by counsel on these two grounds of appeal.

On the general question of evidence of custom, I cannot agree with the appellant's counsel that s. 41 of the Protectorate Courts Jurisdiction Ordinance (*cap.* 169) (marginal note "Consultation with chiefs in matters of native law and custom") excludes evidence by witness as was taken in this case. That section merely gives the court a means of acquiring knowledge of native law and custom additional as well as alternative to the usual one of taking evidence.

As regards the remaining — the tenth — ground as to compen-

sation, any such claim would arise only on the occasion of the appellant leaving the land without fault and, in view of the forfeiture for misconduct, I do not consider that native custom would recognise any such claim in this case.

In my opinion, therefore, the appeal should be dismissed with costs.

BERKELEY, J. (Nig.) concurred with the judgment of KINGDON, C.J. (Nig.).

Appeal dismissed.

YASKEY v. CITY COUNCIL OF FREETOWN (No. 2)

West African Court of Appeal (Kingdon, C.J. (Nig.), Macquarrie, Ag. C.J. (Sierra Leone) and Berkeley, J. (Nig.)):
October 10th 1932

[1] **Civil Procedure — appeals — appeal in forma pauperis — application to appeal in forma pauperis granted only where applicant's worth below £5 — pension to be included in assessing worth:** An application for leave to appeal to the West African Court of Appeal *in forma pauperis* can only be granted by that court on proof that the applicant is not worth £5, his wearing apparel and the subject-matter of the litigation excepted, but including any pension payable to him (page 336, line 33—page 337, line 14).

[2] **Courts — West African Court of Appeal — appeals — leave to appeal in forma pauperis — West African Court of Appeal may give leave if applicant's worth below £5 — pension to be included in assessing worth:** See [1] above.

The applicant brought an action against the defendants in the Supreme Court. The Supreme Court (Macquarrie, J.) gave judgment for the defendants, the City Council of Freetown, and the applicant applied unsuccessfully to the court for leave to appeal *in forma pauperis.*

The applicant applied to the West African Court of Appeal for (a) leave to appeal against the judgment of the Supreme Court; (b) such appeal to be *in forma pauperis;* and (c) an order exempting him from payment of court fees under the West African Court of Appeal Rules, 1929, r. 31, in the event of his application not being granted.

The court granted leave to appeal and made an order exempting the applicant from payment of court fees.