Privy Council Appeal No. 16 of 1926.

Omanhene Kweku Dua III ... ... Appellant

v.

Omanhene Kwamin Tandoh ... ... Respondent

From

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, delivered the 15th NOVEMBER, 1927.

Present at the Hearing:

Lord Buckmaster.

Lord Atkinson.

Lord Carson.

Lord Darling.

Lord Warrington of Clyffe.

[Delivered by LORD BUCKMASTER.]

In territory, alleged to have once formed part of the realm of the King of Ashanti, there are certain lands containing about 105 square miles, whose western and eastern boundaries are respectively the Subure and the Kyiara streams.

For many years past these lands have been occupied by members of the Sefwhi-Bekwai tribe, whose chieftain Omanhene Kweku Dua III, is, as representative of his people, the plaintiff in this action and the appellant in this appeal.

It appears that these lands are chiefly forests, whose value lay in the big game and edible snails which they supported and the rubber they produced. Upon them the Bekwais have established villages and maintained themselves without any extensive agricultural operations until about 1916, when, in response to the representations of the Government, they proceeded to plant and cultivate cocoa trees. These trees take some four or five years to become productive, and in 1920 or thereabouts, as the trees began to bear, the respondent, who is the head of the Sefwi-Wioso tribe living

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on the west side of the Subure, sent messengers to collect tribute in respect of the cocoa, claiming that the land belonged to his people. This claim the appellant refused to recognise and instituted these proceedings, claiming damages for trespass and an injunction. He succeeded before the Judge of first instance but failed in the Full Court, and hence this appeal.

Their Lordships are clearly of opinion that the facts proved and admitted establish that the Bekwai people are in possession of the disputed land, and this fact throws upon the respondent the burden of proving his title. The trial did not proceed strictly upon this line, but the plaintiff in the first instance called evidence to support the right of the Bekwais, and the defendant answered; this is, however, immaterial. The real question is, Did the evidence rebut the prima facie title of the Bekwais shown by possession? The learned Judge who tried the case thought that it did not, and relied upon the evidence of one Yaw Atwidei, the chief linguist sent by the chief of the Bantuma tribe, who are in the position of overlords over both the plaintiff and defendant. This evidence was traditional, handed down by one chief linguist to another, and as a tradition there is no reason to think it was not fairly given. But tradition, though of great value when supported by action and facts, becomes of lessened consequence when brought into collision with a series of definite incidents inexplicable if the traditio be regarded as accurate. In the present case their Lordships think that the learned Judge who tried the case has failed to give due weight to this consideration and has not sufficiently regarded the importance of the opposing facts which their Lordships will proceed to examine.

There is evidence on both sides to show that "if tribute is claimed, it indicates that the people living on the land do not own it." These words are taken from the evidence of Kobina Ackah, the next man to the Omanhene of Bekwai, and the first witness for the plaintiff. It is, indeed, denied by Kwesi Buachi, another of the plaintiff's witnesses, though he seems to admit it in cross-examination; but it is supported by Kwamin Aidoo and Kweku Minta, defendant's witnesses, the last of whom says:-

"If a Wioso man settled on the disputed territory, he would not have to pay tribute to defendant, but Bekwai people, being

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subjects of another chief must pay tribute."

This evidence is in accordance with the reason of the matter, and their Lordships accept is as a true statement, indeed, it is not challenged on the judgment of any of the Judges.

If, therefore, it is proved that tribute has in fact been constantly paid to the defendant by the Bekwai people who live upon this land, the plaintiff's case must fail.

Now the evidence in support of this payment being made is very strong.

Up to the planting of the cocoa trees, rubber and snails and portions of wild beasts appear to have been the only subjects on which tribute was levied, but in respect of these it is stated to have been constantly collected. Kweku Duku, who is a Bekwai, and whose evidence the learned Trial Judge thought might have been biassed by ill-feeling, states the payment distinctly. He says:-

> "I know Enchi Wury, Buku Rubber is made there, and tribute sent to defendant. Kwesi Mansah succeeded Attah on this land. He, too, paid tribute to defendant. I succeeded Kweski Mensah. I pay tribute to defendant."

Did this evidence stand alone, the fact that it was not accepted at the trial would have the greatest weight against its acceptance now, but it is corroborated by several witnesses, by Kwamim Aidoo, by Kwesi Nkua and Kofi Nkua and Kweku Minta. These last two witnesses are of great importance, as they speak to the actual collection of the tribute by themselves, and in the case of the former he identifies as present at the trial one Kwesi Egyaku, a son of Essel, a Bekwai man, and the head man of the district of Sorano, as the man who carried the snails collected as tribute from Sorano, one of the villages in dispute, and neither Essel nor his son is called in contradiction.

With the exception of Kweku Duku, the learned Judge nowhere definitely discredits this evidence, though the appellant strongly urges that the fact that the plaintiff's case was accepted involves this conclusion.

The Board are, however, unable to find that the learned Judge ever considered in detail the evidence as to tribute, and certainly nowhere

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decides in terms that it was false.

The evidence of ownership of the lands by the defendant which is thus afforded is strengthened in certain respects. Some witnesses speak of the payment of definite sums of £1, 2s. by Bekwai families for permission to settle, and there is further evidence of one Andoh Konto, who asserts he obtained from the defendant and worked a gold concession in Sorano. This fact, though disputed, is apparently accepted at the trial, though comment is rightly made on the circumstance that no concession is produced. This omission robs the evidence of its full value, and the Board do not therefore treat it as doing more than showing the exercise of an obvious act of ownership by the defendant.

There is, finally, the evidence as to collection of sums for the Red Cross. In a most praiseworthy effort to testify their loyalty to the Empire in times of great difficulty, sums of money were subscribed by, among others, the Bekwai people living on this territory for the Red Cross, and were paid by them to Nofe Nkua, a sub-chief of the Wioso chief. Their Lordships regard this as a matter of interest rather than evidence, for strictly it is inadmissible and has no value in this dispute.

Their Lordships think, however, that the other matters already mentioned establish acts of ownership which, if the evidence be accepted, is conclusive in defendant's favour. They much regret that, regarding this point, they have not the advantage of a definite finding of the learned Judge, who, in their opinion, confined himself too closely to the evidence of history and tradition, but in the absence of this guidance they are of opinion it must be accepted and the appeal must fail.

This opinion, therefore, confirms the judgment of the Full Court, but for different reasons. They appear to have been greatly impressed by the evidence of District Commissioner Ross, who, in 1915, enquired into the whole question of this boundary. His statement is contained in a letter dated 13th February, 1915, made evidence by his answers to interrogations administered in the course of further investigation.. which the Full Court directed.

Their Lordships think that too much importance may have been attached to this letter. The investigation Mr. Ross made was not in the exercise

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of any judicial functions he possessed, nor does there appear any evidence of agreement between the parties to submit the dispute to his determination. Such agreement was inferred and not proved, but it does contain an admission - by the then Omanhene of the Bekwais - that the boundary is as the defendant asserts, but such admission was not made in judicial proceedings and does not go far. Their Lordships have not overlooked the facts that one of the chief places of worship of the Bekwais is on the ground in question, nor the argument based on the inability of the Wioso chief to cross a stream, but arguments based on these considerations are insufficient against the evidence above mentioned. It is on the grounds afforded by this evidence that their Lordships think this appeal must fail and be dismissed with costs, and they will advise His Majesty to that effect.

They desire to add that this decision does not touch the question of whether tribute is in fact leviable on cocoa trees, nor if it be leviable, what is its true measure. Though the claim to this tribute was the cause of the action, these questions have never been the subject of inquiry; this action asked for title to land, and that action has failed.