

Privy Council Appeal No. 54 of 1913.

Chief Young Dede and another - - Appellants,

v.

The African Association, Limited - - Respondents.

FROM

THE SUPREME COURT OF SOUTHERN NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 27TH MARCH 1914.

Present at the Hearing :

LORD DUNEDIN.

LORD MERSEY.

LORD MOULTON.

[*Delivered by* LORD DUNEDIN.]

The claim in this action was for a declaration of title in favour of the plaintiffs suing on behalf of the tribal family entitled the House of Kulo, as regards certain beaches situate at Twon in Brass in Southern Nigeria, in the occupation of the defendants. It is admitted that the defendants and their predecessors have been in occupation for a period prior to 1879.

The original defence was based on the pleas of possession and the Statutes of Limitation. At the trial after evidence those pleas were held unavailing and a declaration was made as craved.

Upon appeal the Attorney-General intervened as *amicus curiæ*, and suggested that certain important official documents had been unknown to the parties, and intimated his willingness to produce them. The proceedings were then

opened up, new pleas allowed, and fresh evidence ordered to be taken. The nature of the new pleas will appear from what follows. The Court of Appeal after receiving the fresh evidence resumed consideration of the cause, and then repeated the declaration of property in favour of the plaintiffs, but with this *addendum*, "that a declaration " should be added to the effect that the " appellants (defendants) are entitled to remain " in occupation of the land without payment of " rent so long as they continue to trade " thereon."

The plaintiffs have appealed to His Majesty in Council against this additional declaration. The reason is obvious. Although the demand in this suit is limited to a simple declaration, it is but the prelude to a demand for ejectment and mesne profits as disclosed by the letters of the plaintiffs' attorney in 1906.

The history of the matter may be shortly stated.

In 1856 a treaty or code of commercial regulations was drawn up between certain kings and chiefs of the country of the Rio Bonto or Brass River and the British Consul for the Bight of Biafra. The material articles of this treaty are as follows :—

" Article 1.

" That the kings and chiefs of the countries connected in " trade with the Rio Bonto duly appreciating the benefit of " legitimate traffic, hereby guarantee that from this date " forward they shall not engage in or sanction the exporta- " tion of slaves from the country.

" Article 3.

" That the comey of vessels entering the river for the " purposes of trade be for vessels of two masts to pay two " puncheons worth of goods; vessels of three masts to pay " three puncheons worth of goods to each king (Kiya of " Obullambry and Arishma of Bassambry), that boats or " vessels coming here with cargo and bringing no produce " away are to be excepted, and that for each ship taken part " produce out of the river as tenderage to complete her " cargo elsewhere, the comey to be five bars for each cask.

“ Article 7.

“ That the comey and pilotage being paid no other tax
 “ or payment is to be demanded under any pretence
 “ whatever. Water is not to be refused in the pilots’
 “ town called Twaw, nor is any demand to be made for
 “ the privilege of watering. Ground for the erection of
 “ houses and for the storing of casks and goods is to be
 “ granted free of all charges, and it is considered, whilst
 “ in the occupation of any British subject, as British
 “ property, and the occupant for the time being is
 “ authorised to expel trespassers and to maintain his right
 “ of occupancy, and to defend himself and property against
 “ any unlawful aggression.

“ Article 19.

“ That a copy of this treaty be furnished to each chief
 “ receiving comey and a copy of that part referring to
 “ the pilotage to the chief pilot; the chiefs to produce
 “ it when receiving comey, and the pilot to show it to
 “ the masters upon any vessel entering the river, and
 “ that these articles be held to be the laws existing between
 “ the British supercargoes and the natives for the regula-
 “ tion of trade matters to be observed so long as they
 “ continue law by those who are not present at their
 “ enactment as by those who were.

This treaty was revised in 1879, but no material alteration was made. It will be enough to quote three articles.

“ Article 2.

“ That comey should be paid to the two kings at the
 “ rate of one piece of satin stripe between them for each
 “ puncheon hove, or arrangement may be made with the
 “ traders which shall stand good.

“ Article 3.

“ That the comey being paid, no other tax or payment
 “ is to be demanded under any pretence whatever and that
 “ kings shall give beaches for trading purposes and such
 “ beaches shall be considered inviolable British property
 “ and the occupant for the time being is authorised by
 “ the parties subscribing to expel trespassers and to main-
 “ tain his right of occupancy and to defend himself and
 “ property against unlawful aggression.

“ Article 10.

“ That a copy of this Treaty before furnished to the
 “ chiefs receiving comey and the chiefs to produce it when
 “ receiving comey and that these articles be held to be law

“ existing between the British traders and the natives for
 “ the regulation of trade. Matters to be observed so long
 “ as they continue law by those who are not present
 “ at their enactment as by those who were.”

Now up to this point the position seems clear. Comey is a payment by masters of vessels—at first according to size of vessel and goods exported—afterwards according to goods exported alone. If the comey be paid, no further payment whatever is on any pretence to be exacted from traders. On the other hand the native tribes bind themselves *inter alia* to allow traders to occupy trading stations or beaches and that occupation is guaranteed by them as a public right. It is admitted that the occupation of the beaches in question was originated in the persons of the defendants' predecessors under this state of arrangement.

In 1885 the country was formed into a Protectorate, and a local council was established.

In 1888 a change was made and was embodied in a document headed “ Regulations about payment of comey in the Brass District.” In form this document is unilateral, being promulgated by the British Consul. But it is not denied that it was *de facto* accepted by the chiefs as coming in place *pro tanto* of the former arrangements.

The clauses are as follows :—

“ 1. All persons whatsoever exporting produce from the
 “ Brass district except of that part which is administered
 “ by the Royal Niger Company Chartered and Limited,
 “ must pay comey.

“ 2. Comey will at present take the form of an export
 “ duty to be levied on all palm oil or plain kernals exported
 “ from the Brass district, and the amount of this tax is at
 “ present fixed at 1s. 3d. per ton of palm oil, and 6d. per
 “ ton of kernals. Palm nuts are purchased, they will be
 “ liable to the same duty as kernals, but five casks of nuts
 “ will be considered as equivalent to only one cask of
 “ kernals.

“ 3. The comey will be paid on the 1st of January, the
 “ 1st of April, the 1st of July, and the first of October in
 “ every year to His Majesty’s Consul or to whomever he
 “ may delegate for that purpose. It may be paid either in
 “ cash, cheques on an English bank, or bills of a reputable
 “ firm, but under certain circumstances the Consul may
 “ insist on a cash payment.

“ 4. The payment of comey is to be accompanied by a
 “ signed and sealed statement of accounts on the part of the
 “ payor. This statement will be addressed to His Majesty’s
 “ Consul at Old Calabar, and will be opened and examined
 “ only by him. If the Consul desires signed bills of lading,
 “ oil or produce books, or other documents necessary to
 “ verify the accounts of the comey, must be submitted to
 “ his inspection.

“ 5. The Consul or other person or persons whom he
 “ may depute will pay the comey to the kings and chiefs,
 “ and the Consul alone will be responsible for this pay-
 “ ment. Any payment of comey to any king or chief
 “ of Brass, except through the agency of His Majesty’s
 “ Consul or his delegate, will be null and void, and will not
 “ exempt the payor from his liability to pay the full extent
 “ of the comey over again.

“ 5. When the comey has been collected by the Consul
 “ or his delegate one-half of it will be paid to the King of
 “ Nimbi, and the other half will be paid to the Governing
 “ Council for expenditure in the interests of the country as
 “ stipulated in the Consul’s order for the constitution of
 “ that council.

“ 7. The present regulations respecting payment of
 “ comey in Brass will supersede all others previously
 “ issued.”

This obviously altered the entire situation. Comey, so far as the paying trader was concerned, was now due from every trader, whether ship-master or not, but was due not any longer to the chiefs, but in the form of an export duty to the Consul. By Article 5 a payment to a chief is distinctly declared to be null and void.

So far as the chiefs are concerned, they are to be satisfied with the handing over to them by the Consul of the half of the whole sums received.

So matters remained till 1891. In that year a proclamation was issued which established an import duty at a certain rate. Since then

import duty has been paid in terms of this proclamation. Since then payments to the chiefs have been made by the Government in form of subsidy.

The ground of the judgment of the Court of Appeal may be found in the following sentence :—

“ We are satisfied,” say they, “ upon the evidence, that
 “ in 1891 a new system was introduced with the consent of
 “ all necessary parties, under which the export duties which
 “ took the place of comey were abolished and replaced by
 “ the imposition of import duties, and the payment of
 “ personal subsidies to the chiefs, which still continues.”

Certain documents have been produced which show clearly enough that this was the intended policy of the new arrangement. There is no evidence, however, that these actual documents were communicated to the chiefs, and from their nature it is quite improbable that they were. The appellants accordingly say they must as evidence be disregarded. What cannot however be disregarded is that *de facto* from 1891 up to the present time, the Government has paid subsidies, and not comey in the old form, and that so far as the traders are concerned there is no real claim against them for occupation being made till the matter gets into the hands of a lawyer in 1906. There is evidence, vague as to date, given by some of the chiefs that rent was demanded. But it is certain that no rent ever has been paid by a trader established under the old *régime*, the only persons who did pay being the Telegraph Company, who were not a trading company and who made a special arrangement.

Viewing the matter as a whole their Lordships see nothing which will make them disturb the finding of the local court. But even without that finding there seems to be an insuperable difficulty in the claim or the appeal as laid. The effect of the arrangement of 1888 was, in their Lordships' judgment, at least so far as existing occupants of beaches were con-

cerned, to substitute the Government for the trader as the debtor of the chiefs, and to secure to the trader his rights under the original agreement, *i.e.*, the right of occupation so long as he, the trader, paid his dues to the Government. Now it is not averred that the trader here has failed to pay all that the Government ask.

If the true view, as the argument of the chiefs assume, is that the subsidies are judicial salaries—a most unlikely arrangement—then their course is to sue the Government for payment of sums due under the arrangement of 1888. But they have no action against the trader already established in occupation ; and no right as against him unless he, the trader, fails to pay the Government—a failure which is not alleged against him.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

CHIEF YOUNG DEDE AND ANOTHER

v.

THE AFRICAN ASSOCIATION, LIMITED.

DELIVERED BY LORD DUNEDIN.

LONDON :

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