*Privy Council Appeal No.* 78 *of* 1915.

**Kobina Angu** - - - - - - *Appellant,*

*v*

**Cudjoe Attah** - - - - - - *Respondent,*

FROM

**THE SUPREME COURT OF THE GOLD COAST COLONY.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1916.

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*Present at the Hearing:*

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD SHAW.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

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This is an appeal from a judgment of a Full Court of the Supreme Court of the Gold Coast Colony in an action in which the present appellant was plaintiff and the present respondent was defendant, reversing a judgment which the appellant had obtained in his favour on a trial before a single Judge of the Supreme Court, sitting as a Divisional Court. The claim of the appellant was made as Manche, or Chief, of Mansu, or Mansuah, for a declaration that he was entitled to tribute from the respondent as holder of certain lands at Bortogyina.

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. In the Gold Coast Colony the principal customs as to the tenure of land have now reached the stage at which the Courts recognise them, and the law has become as it were crystallised. There is little statutory law relating to land. There is no land registry. There is an Ordinance (No. 1 of 1895) as to registration, but it only provides for a registry of "instruments," giving priority to

those which are duly registered. It has no real bearing on the present case, the only documents referred to, which could be registered, being registered.

It is part of the customary law so recognised that lands are (or were originally) attached to the stools or thrones of Chiefs, and that Chiefs are entitled to tribute from the occupants or users of land attached to these stools. There is some power of alienation by Chiefs which must be exercised in a customary matter with certain consents, so that lands once attached to a stool, may by the exercise of this power have become not so attached and may be free from tribute. There is also a class of lands known as family lands, as to which, however, no question appears to arise in the present case. The right to tribute arises from the ownership of the chief, and it is payable either in money or in produce, and is not defined in amount, but has to be settled somehow by agreement between the parties. It appears to be analogous to the arbitrary rents or exactions which in feudal times were levied in this country by lords upon their tenants, and which were known as "blackmail," as distinguished from "white rents," which were payable in silver. On the sale, however, of any interest in land, there seems some custom of dividing the purchase-money into three parts, the Chief taking part apparently as his tribute. Possession of land, rightful as well as wrongful, is therefore not inconsistent with liability to render tribute; on the contrary, it is a ground for the liability, if the lands are still attached to a stool. These are the customs material in the present case which are to be gathered from the record and from the statements of counsel in this case, and which appear to their Lordships to have been recognised by the Courts of the Colony as sufficiently proved. For the purposes of this case their Lordships assume them to be correct, but it must not be taken in future cases that the authority of the Judicial Committee has been given to this short statement as a full, or in every respect accurate, exposition of the customary law of the Colony as to tribute, for the record in this case is far from satisfactory, and their Lordships of course have no knowledge of their own as to what has been proved in the Courts of the Colony.

The appellant is the Manche of Mansu, and he claimed tribute in respect of the lands of Bortogyina as attached to his stool. The only plea pleaded at the trial to this claim was *res judicata*. The practice of the Supreme Court in the Gold Coast is governed by the Supreme Court Ordinance, 1876. This, as its date would indicate, is founded on the English Judicature Acts of 1873 and 1875, and substantially the then new English procedure is adopted, often in the same words, but there are variations to suit the colony. Pleadings may be ordered, but cases are commonly tried without pleadings, and where that is done the defendant's counsel is called upon at the close of the opening of the case by the plaintiff's counsel and before the evidence to state what his pleas are. That course was followed

in this case. The original rules in the schedule to the Supreme Court Ordinance, 1876, contained a rule (order xxvi, rule 1) as to amendment practically in the words of an English rule. The evidence called by the plaintiff consisted of his own evidence, that of the "linguist" of the paramount Chief of Lower Wassau, and of a Chieftainess called Princess Kiriwa, whose age is not stated, but who appears to have been an elderly woman, as she recollects three predecessors of the appellant in the chieftainship of Mansu—one was Qessi, whom no other witness recollects, who was succeeded by Baidoo, or Bedu, who is mentioned several times. Baidoo was succeeded by Bassain, and he by the appellant, Kobina Angu. The evidence of these three witnesses showed clearly a strong case that the appellant and his predecessors were by custom entitled to tribute out of the lands of Bortogyina. No dates are given for the matters stated in their evidence except by reference to the name of the Chief at the time; but as there appears to be in the Colony no statute of limitations applicable to tribute (if there is any, it was not at any stage of the case pleaded or referred to), it is not material at what date the matters occurred, unless alienation of the rights by any Chief can be proved. There is, however, some evidence as to the plaintiff himself receiving tribute. There is nothing in the notes of the evidence of the plaintiff's witnesses as to the defendant being in possession of any of the lands of Bortogyina, but this must have been admitted, as the defendant in support of his plea of *res judicata* relied on judgments to the effect that he was entitled to the possession. The cases relied on in support of this plea were Cudjoe Attah (the present respondent) *v.* Kwesi Pon and others (p. 10 of the record) and proceedings before Mr. Justice Watson on an application for a writ of possession (p. 65 of the record). The present appellant was not a party to either of these preceedings, nor was any one of his predecessors, but the "linguist" of his predecessor, Chief Bedu, was a witness in the case, and said that he attended as a witness by direction of Bedu. A "linguist" is stated to be a spokesman, not necessarily an interpreter, as he often speaks but one language. He represents and speaks for the Chief on ceremonial occasions, and has a somewhat extensive authority; but whatever his authority may be, it is obvious that his words and acts can have no greater effect than if the Chief had spoken or done the same himself. The "linguist" was a witness only, and if the Chief had himself given evidence it would not have made him a party or bound by the judgment. In order to establish a plea of *res judicata* two things are necessary: first, that the judgment relied on should be between the same parties or their privies; secondly, that the judgment should be on the same question or some of the same questions as are raised in the action. For the purpose of these two matters, the record must be looked at, and external evidence may be admissible and necessary. It is, of course, matter of evidence whether either of the parties to the older action were

predecessors of the parties to the second action in the title under which they claim or defend, so as to make the action one between privies. Under a precise system of pleading the evidence would not be set out on the record; but whether it is set out, as it is here, or is not, it can only be looked at for the purpose of seeing what was decided. Mr. Justice Lionel Hawtayne, by whom the case was tried, gave the following judgment (p. 9 of the record):—

"This is a claim by the plaintiff to establish his title to tribute against the defendant in respect of all that piece or parcel of land situate at Bortogyina and known as Bortogyina in Chamah district. Mr. Lance Miller for the defendant pleaded *res judicata*, and relied (1) on the case of Cudjoe Attah *v.* Kwesi Pon and others decided by the Full Court on appeal from the decision of Mr. Justice Gough of the 15th May, 1911; and (2) on decision of Mr. Justice Watson dated 29th October, 1912. I cannot agree with Mr. Lance Miller that the fact that Angu, or Ankura, being "linguist" to Ohin Bassain, and giving evidence, was sufficient to make that Chief a party to the suit. As to the motion before Mr. Justice Watson referred to, it does not appear that Kobina Angu was a party to that motion. Both of the cases referred to were for possession, whereas this case is one for tribute. I hold that the plea of *res judicata* fails. Judgment for the plaintiff with costs."

So far as regards the plea of *res judicata*, this judgment does not seem to have been seriously questioned, and seems clearly right. It was, however, appealed from to the Full Court, whose judgment was given as follows:—

"This Court being of opinion that the appellant (*i.e.*, the defendant now respondent) ought to be at liberty to traverse all the facts alleged by the respondent, doth allow the necessary amendment in the oral pleading of the appellant, and which was reduced into writing by the Judge in the Divisional Court; and this Court being of opinion that the respondent has failed to establish his rights to any tribute in respect of the lands on the record of appeal mentioned, and that the judgment of the Divisional Court is erroneous, doth allow the appeal." The plaintiff was further ordered to pay the costs, and the case was remitted to the Divisional Court for the purpose of the taxation of costs.

The reasons which their Lordships assume were given in the usual way for this judgment are not stated on the record, and they are not easy to gather from the documents which are set out. There are notes of the arguments of counsel both before the Judge of First Instance and before the Court of Appeal, but the references to authorities are difficult to trace, and the substance of the argument not clear enough to throw much light on the judgment. On these notes it does not appear that any application for an amendment was made by counsel for the defendant, nor that the plaintiff's counsel was

offered or had any opportunity of giving further evidence to meet the plea added by amendment. The only evidence before the Full Court besides the oral evidence for the plaintiff which has been referred to was documentary, and consisted of the records of the various actions, to none of which the plaintiff was a party, and the various exhibits put in evidence in these actions. The exhibits may be assumed, although it is not so stated, to have been treated as put in in this case. The records of the actions contained notes of the evidence given by the witnesses in those actions. As to this, when a witness has sworn to certain matters in one action, the record of what he has so sworn cannot be used in another action as evidence of the facts which he has sworn to. This is so even when the second action is between the same parties as the first and *à fortiori* where it is not. The use of evidence in a former action may of course be the subject of agreement between the parties to another action to save expense or the like. There is no suggestion of any such agreement in the present case, and in the absence of such an agreement such evidence could not be used. In cases, however, where the statement of a deceased person is admissible in evidence it would not be the less so because it had been sworn to in an action, but then it would be admissible, not because it was so sworn, but on other grounds. When public rights are in dispute evidence of reputation may be given, and judgments *inter alios*, when on the exact point in dispute, may be evidence of reputation, as may statements, including depositions, of deceased persons. The rights of a Chief to tribute may be, and their Lordships assume are treated by the Courts of the colony as being sufficiently of a public or general nature to admit evidence of reputation in support of them, but each statement or matter relied on as admissible on that ground would require careful examination. So far as appears, the witnesses who gave evidence in the former actions set out in this record are all alive, certainly one is, Cudjoe Attah, the respondent to the present appeal, and it would be the height of absurdity to suppose that his evidence in the former suits could be used as evidence in his favour in this suit, when he might have been but was not called as a witness, except, of course, that the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute. The materials which their Lordships have for ascertaining the grounds of the judgment appealed from, in addition to the scanty notes of the arguments of counsel already referred to, are the grounds of the appeal from the Divisional Court to the Full Court (set out on page 68 of the record), the printed cases of the parties to the appeal, and such statements as counsel were able to make from their instructions. In this case, their Lordships have not had the advantage of the attendance before them of any colonial counsel engaged in the case. The counsel for the appellant was, no doubt, well

acquainted with the law of the colony, where he was formerly a Judge, but, of course, he had not been engaged in any way in this case in the colony, and the counsel for the respondent was a member of the English Bar, from whom their Lordships had an able and clear argument, but who appeared to have been very imperfectly instructed as to what had taken place in the Full Court in the colony.

The grounds of appeal to the Full Court are on page 68 of the Record. Grounds 1, 2, and 3 are based mainly on *res judicata*, but they also appear rather to suggest that the facts of the previous cases may be evidence in this, and the fourth ground says that the plaintiff was in possession and had proved his "title to the land" by putting in documents. These grounds do not deal directly with the important point that rightful possession is not inconsistent with liability to tribute, but it may be meant that a title was proved free from tribute by reason of the Chief's right having been extinguished. It was suggested to their Lordships on the argument that the judgment of the Full Court proceeded on the view that there was evidence of such extinguishment If that were so, it might be thought that the plea, added by way of amendment, would have been a plea that the title to tribute had been extinguished. The title on which the present respondent succeeded in the previous action was derived through one Jobson, and the evidence as to his having got Jobson's title, whatever that was, was fairly satisfactory and need not be gone into. Jobson had bought under a Sheriff's sale, made in an action in which he had been plaintiff, and there is a copy of the certificate of this purchase at page 29 of the record, which is dated the 22nd October, 1903, and which is the root of the respondent's title. Kobina Baidoo, the predecessor of the present appellant, was a defendant in that action with others, but the proceedings and judgment in that action were not put in and there is no proof, and, in the absence of this record, there could be no proof, of what that action was about. Under the execution on the judgment the Sheriff sold, but the certificate states that the sale was of the "right title and interest" of six named defendants in the action, not including Kobina Baidoo. The certificate, therefore, fails to prove the only fact now important, viz., the acquirement of Baidoo's interest, and, indeed, it negatives that interest, having passed by the Sheriff's sale. It is, however, suggested that Baidoo had previously mortgaged his interest in the land to Jobson, and that Jobson had afterwards acquired the equity of redemption. The substance and merits of the present dispute seem to turn entirely on the question whether Baidoo did in fact mortgage his interest to Jobson, and thereby extinguish his right to tribute. The mortgage, if in writing, was not produced. It seems that a native mortgage may by custom be made by word of mouth, but must be accompanied by certain formalities. There is, however, no proof whatever in the action before the

Board of this mortgage by Baidoo. In a former action the story about it is told on p. 34 of the Record, but it is in evidence given by Cudjoe Attah, the present respondent, when called as a witness in certain interpleader proceedings. There are, at least, two fatal objections to this being evidence in this action of the fact of the mortgage: the first, that a mortgage gives an individual private right, and not a public or general right, such as can be proved by reputation or hearsay; and, secondly, that Cudjoe Attah is alive and should have been called as a witness in this action in which he was defendant, if he could have proved anything material.

In the same proceedings Jobson himself was a witness, and said that Baidoo mortgaged the property to him (p. 42). This is a little better, perhaps, than the evidence of Cudjoe Attah, but the same objections apply to it. His evidence in a former action is only reputation and hearsay, and inadmissible in support of a private right, and there is no proof or even suggestion that he is dead and could not have been called.

Thus the only point suggested to their Lordships as the ground for the decision of the Full Court which has any merits in it fails entirely of proof, and their Lordships are unable to find anything to justify the Full Court in setting aside the judgment of the Divisional Court.

Their Lordships feel that it is possible that the judgment of the Full Court really proceeded on some ground which has not been brought to their notice, but, if so, it is the fault of the respondent in not getting the true ground of the decision which he has to support put upon the record. Their Lordships presume that the Judges must have delivered their judgment orally, and that no note of it was taken, possibly because an appeal to the Privy Council was not anticipated. If applied to, no doubt the Judges would have given a short statement of their reasons to go into the record. Notes of judgments appealed from made from memory by the Judges after the delivery are occasionally found in the record of a case brought before this Board on appeal, and, although not so satisfactory as a written judgment or a contemporaneous note of an oral one, they generally answer the purpose. On the facts which are before the Board, this judgment of the Full Court cannot, in their Lordships' opinion, be justified, and they will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Divisional Court restored, and that the respondent should pay the costs of the appeal.

**KOBINA ANGU**

*v.*

**CUDJOE ATTAH.**

DELIVERED BY SIR A. CHANNELL.

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