399 **Amodu Tijani** Appellant; v. The Secretary, Southern Nigeria Respondent.

Privy Council

PC

Viscount Haldane, Lord Atkinson, and Lord Phillimore.

1921 July 11.

On Appeal from the Supreme Court of Nigeria (Southern Province).

Nigeria--Lagos--Native Tenure of Land--White Cap Chiefs--Communal Land-- Acquisition of Land by Government--Compensation--Public Lands Ordinance, 1903 (No. 5 of 1903, Lagos).

The radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is the head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.
Upon the land held by a White Cap Chief being acquired for public purposes under the Public Lands Ordinance, 1903, the compensation is payable on the footing that the chief is transferring the land in full ownership (except so far as it is unoccupied); the compensation is to be distributed among the members of the community of which he is Chief according to the procedure provided by the Ordinance.
Observations with regard to the native tenure of land in West Africa, and as to "stool" lands.
Judgment of the Supreme Court reversed.
APPEAL by special leave from a judgment of the Supreme Court of Nigeria, Southern Province (January 4, 1918), affirming the judgment of Speed C.J.
The appellant was one of the Idejo White Cap Chiefs of Lagos. By a notice dated November 12, 1913, certain lands situated at Apapa were acquired by the Government of the colony under the Public Lands Ordinance (No. 5 of 1903) for public purposes. The appellant as head chief of the Oluwa family claimed compensation on the basis of ownership of the lands. On a summons taken out by the appellant under the Ordinance above named Speed C.J. held that the appellant was entitled to compensation on the basis of his having merely a right of control and management, not on the basis of absolute ownership. That decision was affirmed by***400*** the full Court (Speed C.J. and Ross, Webber, and Pennington JJ.)
The material facts appear from the judgment of the Judicial Committee.
Special leave to appeal was granted on June 25, 1918, leave being reserved to the respondent to object at the hearing of the appeal that there was no jurisdiction to grant leave to appeal.
1921. June 6, 7, 9, 21. *Hon. Sir William Finlay K.C.* and *J. A. Johnston* for the appellant. *Upjohn K.C.* and *Vernon* for the respondent.
In the course of the argument reference was made to Attorney-General of Southern Nigeria v. Holt , both in the Supreme Court [FN1] and on appeal to the Board [FN2]; Oduntan Onisiwo v. Attorney-General of Southern Nigeria [FN3]; to the following unreported decisions in the colony, Callamand v. Vaughan (1878), Ajon v. Efunde(1892), Ohuntan's Case (1908), Taiwo v. Odunsi Sarumi (1913); and to Secretary of State v. Kamachee Boye Sahaba [FN4] and Durga Prashad Singh v. Tribeni Sinyh. [FN5]Also to the Public Lands Ordinance (No. 5 of 1903) and to earlier Ordinances - namely, No. 9 of 1863, No. 10 of 1864, No. 9 of 1865, and No. 9 of 1869 - and to Historical Notices of Lagos by Rev. J. B. Woods (1880), Report of Land Tenure in West Africa by Rayner C.J. (1898), Notes of Evidence taken by the West African Lands Committee (1912-1914), and

Irving's Titles to Lands in Nigeria (1916).

FN1 (1910) 2 Nig. L. R. 1.

FN2 [1915] A. C. 599.

FN3 (1912) 2 Nig. L. R. 77.

FN4 (1859) 7 Moo. I. A. 476.

FN5 (1918) L. R. 45 I. A. 275.

July 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE.

In this case the question raised is as to the basis for calculation of the compensation payable to the appellant, who claims for the taking by the Government of the colony of Southern Nigeria of certain land for public purposes. There was a preliminary point as to whether ***401** the terms of the Public Lands Ordinance of the colony do not make the decision of its Supreme Court on such a question final. As to this it is sufficient to say that the terms of the Ordinance did not preclude the exercise which has been made of the prerogative of the Crown to give special leave to bring this appeal.

The Public Lands Ordinance of 1903 of the colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorized by the Ordinance to sell and convey it. Where the land required is the property of a native community, the head chief of the community may sell and convey it in fee simple, any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court is to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance. Prima facie, the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the direction of the Court, but where any consideration or compensation is paid to a head chief in respect of any land, the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit in such proportions and manner as the Native Council of the District in which the land is situated, determines with the sanction of the Governor.

The land in question is at Apapa, on the mainland and within the colony. The appellant is the head chief of the Oluwa family or community, and is one of the Idejos or landowning White Cap Chiefs of Lagos and the land is occupied by persons some of whom pay rent or tribute to him. ***402** Apart from any family or private land which the chief may possess or may have allotted to members of his own family, he has in a representative or official capacity control by custom over the tracts within his chieftaincy, including, as Speed C.J. points out in his judgment in this case, power of allotment and of exacting a small tribute or rent in acknowledgment of his position as head chief. But when in the present proceedings he claimed for the whole value of the land in question, as being land which he was empowered by the Ordinance to sell, the Chief Justice of the Supreme Court held that, although he had a right which must be recognized and paid for, this right was: "merely a seigneurial right giving the holder the ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land." It does not appear clearly from the judgment of

the Chief Justice whether he thought that the members of the community had any independent right to compensation, or whether the Crown was entitled to appropriate the land without more.
The appellant, on the other hand, contended that, although his claim was, as appears from the statement of his advocate, restricted to one in a representative capacity, it extended to the full value of the family property and community land vested in him as chief, for the latter of which he claimed to be entitled to be dealt with under the terms of the Ordinance in the capacity of representing his community and its full title of occupation.
The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place, the real character of the native title to the land.
Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution *403 is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. [FN6] But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community *404 may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

FN6 See 14 App. Cas. 46 and [1920] 1 A. C. 401.

In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the

preservation of records of that existence.
In the instance of Lagos the character of the tenure of the land among the native communities is described by Rayner C.J. in the Report on Land Tenure in West Africa, which that learned judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority:
"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or*405* family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognized, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."
Consideration of the various documents, records and decisions, which have been brought before them in the course of the argument at the Bar, has led their Lordships to the conclusion that the view expressed by Rayner C.J. in the language just cited is substantially the true one. They therefore interpret para. 6 of the Public Lands Ordinance of 1903, which says that where lands required for public purposes are the property of a native community, "the Head Chief of such community may sell and convey the same for an estate in fee simple," as meaning that the chief may transfer the title of the community. It follows that it is for the whole of what he so transfers that compensation has to be made. This is borne out by paras. 25 and 26, which provide for distribution of such compensation under the direction of the Native Council of the District, with the sanction of the Governor.
The history of the relations of the chiefs to the British Crown in Lagos and the vicinity bears out this conclusion.*406* About the beginning of the eighteenth century the Island of Lagos was held by a chief called Olofin. He had parcelled out the island and part of the adjoining mainland among some sixteen subordinate chiefs, called "Whitecap" in recognition of their dominion over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative as ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements in the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period Lagos had become a centre of the slave trade, and this trade centre the British Government determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo. In 1861 he made a treaty of cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British Government, with the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate colony, and finally, in 1906, it became part of the

colony of Southern Nigeria.
In 1862 a debate took place in the House of Commons which is instructive as showing the interpretation by the British Government of the footing on which it had really entered. The slave trade was to be suppressed, but Docemo was not to be maltreated. He was to have a revenue settled on and secured to him. The real possessors of the land were considered to be, not the native kings, but the White Cap Chiefs. The apprehension of these chiefs that they were to be turned out had been set at rest, so it was stated. The object was to suppress the slave trade, and to introduce*407 orderly conditions. Such, in substance, was the announcement of policy to the House of Commons by the Under Secretary for Foreign Affairs, and the contemporary despatches and records confirm it and point to its having been carried out. The chiefs were stated, in a despatch from the then Consul, to have been satisfied that the cession would render their private property more valuable to them. No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. What has been stated appears to have been the view taken by the Judicial Committee in a recent case, Attorney-General of Southern Nigeria v. Holt [FN7], and their Lordships agree with that view. Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

FN7 [1915] A. C. 599.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of Oduntan Onisiwo v. Attorney-General of Southern Nigeria [FN8], decided by the Supreme Court of the colony in 1912, Osborne C.J. laid down as regards the effect of the cession of 1861, that he was of opinion that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown*408 grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

FN8 2 Nig. L. R. 77.

Their Lordships now turn to the judgments of Speed C.J. in the two Courts below. The reasons given in these judgments were in effect adopted by the full Court, and they are conveniently stated in what was said by the Chief Justice himself, in the Court of first instance. He defined the question raised to be "whether the Oluwa has any rights over or title to the land in question for which compensation is payable, and if so upon what basis

such compensation should be fixed." His answer was that the only right or title of the chief was a
"seigneurial right giving the holder the ordinary rights of control and management of the land, in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis and not on the basis of absolute ownership."
The reasons given by Speed C.J. for coming to this conclusion were as follows: According to the Benin law the King is the sovereign owner of the land, and as the territory was conquered by the Benins it follows that during the conquest the King of Benin was the*409* real owner, the control exercised by the chiefs under his "Eleko" or representative being exercised as part of the machinery of government and not in virtue of ownership. It might be that for a considerable period prior to 1850 the control of the King of Benin had been relaxed until it became little more than a formal and nominal overlordship, and that in this period there had been a tendency on the part of the minor chiefs to arrogate to themselves powers to which constitutionally they had no claim, including independent powers of control and management. But the effect of the cession of 1861 was that, even according to the then strict native law, all the rights over the land, including sovereign ownership, passed to the British Crown. He finds that what was recognized by the British Government was simply the title of the chiefs to exercise a kind of control over considerable bracts of land, including the right to allot such lands to members of their family and others for the purposes of cultivation, and to receive a nominal rent or tribute as an acknowledgment of "seigneurial" right. Strict native law would not have supported this claim, but it was made and acquiesced in, although there were certain Crown grants which appear to have ignored it. There was thus no title to absolute ownership in the chiefs, and, so far as the judgment in the Onisiwo Case(already referred to), was inconsistent with this view, it was based on a confusion between family and chieftaincy property. It was true that in yet another case in 1907, which came before the full Court, the Government had paid compensation on the basis of absolute ownership, but in that case the Government had not raised the question of title, and the decision consequently could not be regarded as authoritative.
Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary*410* occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court.
Nor do their Lordships think that there has been made out any distinction between "stool" and communal lands, which affects the principle to be applied in estimating the basis on which compensation must be made. The Crown is under no obligation to pay any one for unoccupied lands as defined. It will have to pay the chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it, and if the allottees have had valid titles conferred on them, they must also be compensated. Their Lordships doubt whether any

really definite distinction is connoted by the expression "stool lands." It probably means little more than lands which the chief holds in his representative or constitutional capacity, as distinguished from land which he and his own family hold individually. But in any event the point makes little difference for practical purposes. In the case of land belonging to the community, but as to which no rent or tribute is payable to the chief, it does not appear that the latter is entitled to be*411 compensated otherwise than in his representative capacity under the Ordinance of 1903. It is the members of his community who are in usufructuary occupation or in an equivalent position on whose behalf he is making the claim. The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are.
Their Lordships will accordingly humbly advise His Majesty that the judgment of the Courts below should be reversed, and that declarations should be made: (1.) That the appellant, for the purposes of the Public Lands Ordinance No. 5 of 1903 is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting in so far as such land is unoccupied, along with his own title to receive rent or tribute; (2.) That the consideration or compensation awarded is to be distributed, under the direction of the Native Council of the District with the sanction of the Governor, among the members of the community represented by the appellant as its head chief in such proportions and in such manner as such Council, with the sanction of the Governor, may determine. The case will go back to the Supreme Court of Nigeria (Southern Provinces) to secure that effect is given to these declarations. The appellant is entitled to his costs of this appeal and of the appeal to the full Court, and in any event to such costs of the original hearing as have been occasioned by the question raised by the respondent as to his title. The other costs will be dealt with by the Supreme Court in accordance with the provisions of the Ordinance.

Representation

Solicitor for appellant: E. F. Hunt.
Solicitors for respondent: Burchells.

[1921] 2 A.C. 399

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