

Techimanhene - - - - - Appellant

v.

Wenchihene - - - - - Respondent

FROM

WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 9TH JULY, 1956

Present at the Hearing:

LORD MORTON OF HENRYTON
LORD RADCLIFFE
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD MORTON OF HENRYTON]

In this case the respondent (plaintiff) represents the Stool of Wenchihene and the appellant (defendant) represents the Stool of Techiman. The first question which arises is whether or not a judgment delivered by Quashie-Idun, J., in the Supreme Court of the Gold Coast, Ashanti, Land Court, did or did not come within the provisions of section 3 (3) of the Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance, Cap. 120. Section 3 of that Ordinance is as follows:—

“3.—(1) Any executive decision in a dispute or matter relating to the ownership or boundaries of any land or to tribute or fishery rights in Ashanti given, confirmed, or approved by the Chief Commissioner prior to the commencement of this Ordinance, and officially recorded in a Boundary Book is hereby validated and invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved.

(2) If in any case such confirmation or approval was given to a decision subject to any specified variations or modifications, such executive decision is hereby validated and invested with full and definite legal force and effect as so varied or modified.

(3) If in any case relating to the boundary of any land any doubt or question shall arise as to the correct interpretation or application of any such executive decision as aforesaid, the Court (which expression does not include a Native Court) may cause the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable. Where a boundary is, either as of first instance or on appeal, so fixed by the Supreme Court, no appeal shall lie from the Court's judgment with respect to such fixing.”

In order to determine the question already stated it is necessary to consider in some detail the course of the action and the pleadings of both parties. The proceedings began in the Asantehene's Court “A”, and it will

be convenient to refer to the respondent as the plaintiff and to the appellant as the defendant. The plaintiff's claim, as set out in his Summons, was "for declaration of title to that portion of land lying and situate West of a straight line drawn from Wenchi Bonso (The "Wenchi Hole") southwards to meet the river Tano, such that it crosses Road A.38 at a point 14.3 miles from the Techiman cross-roads." The Statement of Claim was as follows:—

"1. The Plaintiff herein is suing for and on behalf of and with the authority of the Stool of Wenchi and the Defendant herein is sued as the representative of the Stool of Techiman.

2. By an Executive Decision dated the 5th February 1899 and approved by Sir Donald Stewart on the 19th December 1904 and further approved by Sir F. C. Fuller Chief Commissioner of Ashanti on the 12th August 1905 and recorded in Volume 1 of the Boundary Book at page 2 the boundary line between the lands of the Plaintiff Stool and the Defendant Stool were therein defined as being:

'On the East commencing at the junction of the new boundary Wanki and Wam with the Tano River to a point where a straight line drawn from the funnel shaped hole where the Wankis are stated to have come from to its junction with the Tano River from this point follows the straight line to the Hole and from there to the head of the River Ayasu. The Ayasu River to its junction with the Subin River. This boundary to leave the hill on which the above hole is situated on the Wenchi side of the boundary.'

3. The said decision was validated by the provisions of the Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance Chapter 120.

4. The Defendant Stool has committed acts of trespass on the Plaintiff Stool's land by its subjects farming thereon.

5. The Plaintiff claims for and on behalf of the Stool of Wenchi to establish title to the land situate and being to the West of the boundary line as described in paragraph 2 hereof and for the said boundary to be fixed in accordance with the provisions of Section 3 (3) of the said Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance Chapter 120."

It should be added that the Executive Decision set out in paragraph 2 included a marginal note "in a S.S.E. direction on a compass line of 195 degrees". This note would appear to relate to the "straight line drawn from the funnel shaped hole".

It will be observed that by paragraph 5 the plaintiff added a claim, which did not appear in the Summons, for the boundary between the respective Stools of the plaintiff and the defendant to be fixed in accordance with the provisions of the section already set out.

The defence, as amended, was as follows:—

"1. Defendant pleads to the Jurisdiction of this Honourable Court to entertain this Suit it being one relating to the ownership, possession or occupation of land held under Native tenure.

2. Defendant denies paragraphs 2 and 3 of the Statement of Claim herein and avers that in respect to the land subject of dispute herein there is in existence a prior Executive Decision given in his favour which will be produced at the trial.

3. Defendant denies the trespass alleged in paragraph 4 of the Statement of Claim filed herein.

4. Defendant avers that plaintiff is not entitled to the Relief he seeks from this Honourable Court, i.e. a declaration of title and the fixing of boundary as indicated in paragraph 5 of the Statement of Claim herein.

5. The defendant denies paragraphs 2 and 3 of the plaintiff's Statement of Claim herein and avers that the boundary stated therein was not finally demarcated and is inconclusive.

6. That the defendant according to the findings of Mr. Hull Travelling Commissioner to the Colonial Secretary made in February 1897 Wankyi with its villages was adjudged to be the subjects of Tekyiman and the lands attached to the Stool of Tekyiman occupied by the defendant."

Before Quashie-Idun, J., evidence was called on behalf of both parties. The plaintiff's principal witness was a licensed surveyor, Mr. Anoff. He produced a plan marked "B" which he stated he had prepared in order to show the boundary between Wenchu and Techiman and stated "The boundary runs from the source of the Ayasu stream southwardly on a straight line until it reaches the river Tano. Northwardly the boundary follows the Ayasu stream up to the confluence of the Subin River. I took into account the note on the copy of the Executive Decision as to the direction of the compass. The plan is the correct interpretation of the Executive Decision. Owing to the movement of the earth there is a slight variation eastwardly in magnetic bearings. I took into account the magnetic variation since 1895 up to the time of the survey. The calculations were checked by the provincial surveyor, the funnel shaped hole is shown on the plan. The respective lands are marked on the plan." The cross-examination by Counsel for the defendant was recorded by the learned Judge as follows:—"Note. Witness is shown a document and is asked whether the description stated therein is in accordance with the plan. Witness answers that the descriptions are in accordance with the plan."

The defendant also called a licensed surveyor, Mr. Simpson. He produced another plan, Exhibit "C", but his evidence in no way conflicted with the evidence given on behalf of the plaintiff and he made no criticisms of the plan "B." By his judgment, the learned Judge, after referring to the statement of claim and to the Executive Decision of 1899, continued as follows:—

"It appears from the evidence that after the demarcation of the boundary, a dispute arose between the respective chiefs and the matter was drastically dealt with by the Authorities and the same recorded in the Boundary Book a copy of which is Exhibit 3 tendered by the Defendant. The Plaintiff's claim is to have the boundary line as demarcated in the Executive Decision fixed by the Court in accordance with the provisions of Cap. 120.

The Plaintiff has caused a plan to be made which has been accepted in evidence as Exhibit "B." The Surveyor who made the plan has given evidence before me and I am satisfied that the plan conforms with the Executive Decision relied upon by the Plaintiff. It is contended on behalf of the Defendant that the Executive Decision is not conclusive as a quarrel arose over the boundary. According to Exhibit 3, to which I have already referred, it appears that the Wenchis while cutting the boundary by virtue of the Executive Decision went off the line of demarcation and a serious riot would have taken place. This in my view can neither nullify or modify the legal effect of the Executive Decision. A licensed Surveyor who was called as a witness by the Defendant has testified before me that the particulars of the boundary in Exhibit "1" which is a copy of the Executive Decision and signed by Sir John Maxwell, Chief Commissioner of Ashanti, agree with the Topographical Sheet on which the Plaintiff's Surveyor has shown the boundary between the parties.

I am satisfied that the boundary demarcated in 1899 and validated in 1904 and 1905 has not been altered, and that the Plaintiff has proved his case and is therefore entitled to judgment.

I order the boundary between the parties to be fixed and to conform with the boundary as indicated in the Plan Exhibit "B" as follows:—

From the source of the Ayasu Stream southwestly on to a straight line until it reaches the River Tano. Northeastly the boundary follows the Ayasu Stream up to the confluence of the Subin River."

The defendant lodged a Notice of Appeal in which the grounds of appeal were as follows:—

"(1) Because the judgment is against the weight of the evidence before the Court.

(2) Because the boundary relied upon by the plaintiff in his statement of claim before the Court is not a final one and consequently inconclusive.

(3) Because the Court wrongly construed the effect of executive decision and other evidence tendered at the trial which clearly prove that the executive decision relied upon by plaintiff-respondent is not final nor conclusive.

(4) Because the Court wrongly construed the effect of the plans tendered in evidence at the trial."

Later he added four further grounds of appeal which were as follows:—

"1. Because the Plans 'B' and 'C' tendered in evidence do not conform with the Boundary as laid down in Exhibits 'A' and '1', and the Court was wrong in deciding that they did.

2. Because the Plans Exhibits 'B' and 'C' were wrongly admitted in evidence, seeing that they were originally ordered by a Court which had no jurisdiction in the matter.

3. Because the Plan 'B' on which the learned trial Judge placed great reliance was one-sided.

4. Because the trial was unsatisfactory.

5. Because the Plan Exhibit 'B' does not show the true state of affairs, as the Surveyor on the ground did not clear and survey the whole line from the Funnel Shape Hole to the Tano River."

In the Court of Appeal Counsel for the plaintiff took the preliminary objection that the decision appealed against was given under section 3 (3) of cap. 120, and no appeal lay therefrom. This submission was upheld by the Court of Appeal whose Judgment was as follows:—

"This appears to us to be an attempt to call in question the boundary fixed by the Court below under Section 3 (3) of Chapter 120—which expressly provides that there shall be no appeal from any such decision. If on the other hand the appellant's complaint is that no Judgment for a declaration of title has been given in favour of the plaintiff/respondent, as to which we express no opinion, this affords him no ground of appeal."

Their Lordships now return to the sub-section relied upon by the plaintiff. The questions which arise upon it are as follows:—

(1) Is the present case one which relates to the boundary of any land?

(2) Has any doubt or question arisen as to the correct interpretation or application of the Executive Decision of 1899?

(3) Has the Court caused the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable?

If these questions are all answered in the affirmative, it is clear that the decision of the Court of Appeal was correct.

It is obvious, from the history of the case, as already set out, that the case relates to the boundary of land. It is equally obvious, their Lordships think, that the claim of the plaintiff for the boundary to be fixed, in reliance upon the Executive Decision of 5th February, 1899, raised a question as to the correct interpretation of the language of that decision and as to the practical application of that decision to the existing physical features of the land. The learned trial Judge had to consider whether Mr. Anoff, in preparing the plan "B", had correctly interpreted and applied the Executive Decision and he held that "the plan conforms with the Executive Decision".

So far the case comes exactly within the terms of section 3 (3) of the Ordinance Cap. 120, and there is no doubt that the learned Judge "caused the boundary concerned to be fixed". It was contended, however, by Mr. Quass for the defendant that the boundary as so fixed is clearly at variance with the Executive Decision. He pointed out that the decision provides that the "straight line" therein mentioned is to go from the Tano River to the Wenchi Hole, and "from there to the head of the River Ayasu" and thence the boundary is the River Ayasu to its junction with the Subin River; whereas the boundary as fixed by the learned Judge goes straight from the Tano River to the source of the Ayasu River, missing out the Wenchi Hole. Thereby, he said, the Judge placed a long strip of land, some hundreds of yards wide, on the wrong side of the boundary, to the benefit of the plaintiff. Mr. Quass went on to submit that it was outside the powers of the Supreme Court to fix a boundary at variance with the Executive Decision which the Court purported to be applying, and if the Court did so fix a boundary an appeal was not shut out by section 3 (3) of the Ordinance.

If it were shown that the Court had not addressed its mind to the issues raised and covered by the subsection, it may well be that its decision could be set aside on appeal or by other procedure. In the present case, however, their Lordships see no reason to believe that the learned Judge did not address his mind to the issues and fix the boundary "to the best of his ability."

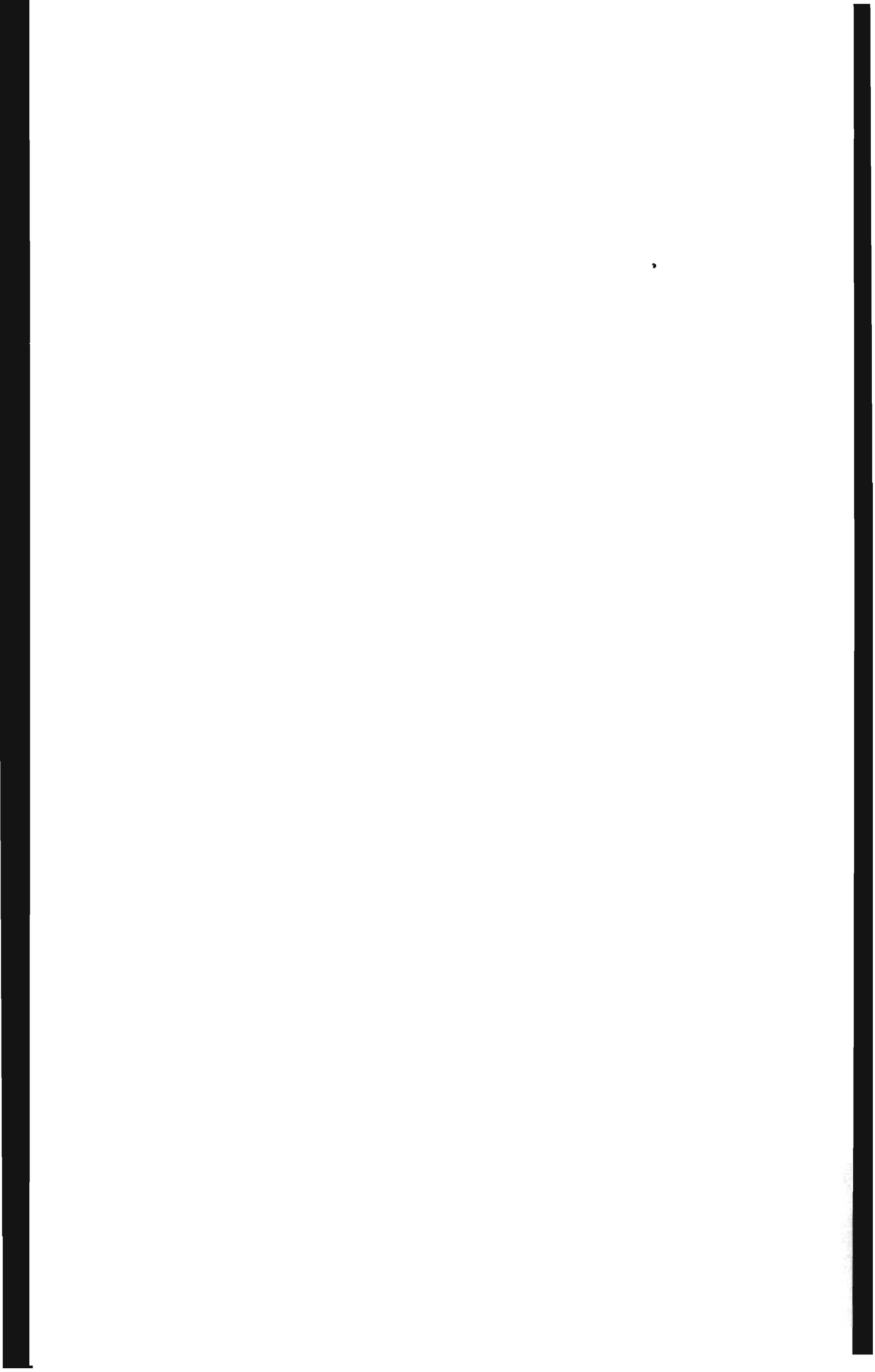
If the point now taken had been taken before the learned Judge, and he had deliberately disregarded it for no good reason, the defendant would have been in a stronger position. But the point was not taken. The Judge had before him the evidence of Mr. Anoff already quoted, and the error which is now said to be so obvious was not put to that witness in cross-examination, nor was it mentioned by the licensed surveyor who was called by counsel for the defendant. Nor does it appear to have been mentioned by counsel for the defendant in his closing speech. Further, the alleged error was not mentioned in the original Notice of Appeal, although when additional grounds of appeal were delivered nearly two years later, additional ground 1, would no doubt cover the point.

These facts show that the error in plan "B", if indeed there was an error, was not apparent to anyone in Court, and the existence of the error (if any) affords no evidence that the learned Judge did not fix the boundary to the best of his ability, or that he did not follow, to the best of his ability, the principle mentioned in section 3 (3) of the Ordinance.

It follows that in their Lordships' opinion any appeal in the present case was precluded by section 3 (3) of the Ordinance Cap. 120. The question whether Mr. Anoff in preparing Plan "B", and the learned Judge in accepting it, did or did not fall into error does not arise for decision, but their Lordships think it right to add that they are not satisfied that the alleged error exists. It is true that the first sentence of the Executive Decision seems to lay it down that the boundary is to run to the Wenchi Hole and thence to the source of the River Ayasu; but the last sentence throws the matter into considerable doubt. If the boundary is to "leave the hill on which the above hole is situated on

the Wenchi side of the boundary", it is difficult to see how the boundary can run through the hole itself. It may well be that Mr. Anoff felt he had to choose between two directions which could not be reconciled, and chose to carry out the very definite direction contained in the last sentence.

Their Lordships entirely agree with the judgment of the Court of Appeal. They will humbly advise Her Majesty that this appeal should be dismissed with costs.



In the Privy Council

TECHIMANHENE

1.

WENCHIHENE

DELIVERED BY LORD MORTON OF
HENRYTON

Printed by Her Majesty's Stationery Office Press,
Drury Lane, W.C.2.
1956