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INSTITUTE OF ADVANCED
LEGAL STUDIES

03800

IN THE PRIVY COUNCIL No.47 of 1959

ON APPEAL FROM
THE WEST AFRICAN COURT OF APPEAL
(GOLD COAST SESSION)

IN THE MATTER of the proposed Kabo River Forest Reserve

B E T W E E N:

NANA KATABOA II, Ohene of Apesokubi
(Claimant) Appellant

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- and -

NANA OSEI BONSU, Ohene of Asatu
(Claimant) Respondent

A N D

IN THE PRIVY COUNCIL No.24 of 1960

ON APPEAL FROM
THE WEST AFRICAN COURT OF APPEAL
(GOLD COAST SESSION)

B E T W E E N:

SUB-CHIEF KATABOA of Apesokubi as representing the Stool and people of Apesokubi (substituted for Nana Kwasi Adu deceased)
(Defendant) Appellant

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- and -

SUB-CHIEF OSEI BONSU III of Asato as representing the Stool and people of Asato
(Plaintiff) Respondent

(Consolidated Appeals)

CASE FOR THE APPELLANT

1. These connected appeals, which were first consolidated in the Privy Council, are from judgments of the West African Court of Appeal dated, in the

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first appeal, the 20th February, 1956, and, in the second appeal, the 13th February, 1956. The first appeal is entirely dependent upon the second appeal.

2. In tracing the history of each appeal, it is desirable that, for the time being, the two appeals should be treated separately, and it is proposed to begin with the history of the main appeal, the above-mentioned

PRIVY COUNCIL APPEAL No. 24 of 1960

Record

p.64. 3. On the 3rd March, 1931, the Omanhene's Native Tribunal of Borada in a case between Sub-chief Osei Bonsu of Asatu (hereinafter called Asatu) and Sub-chief Kwasi Adu of Apesokubi (the predecessor-in-interest of the Appellant above-named Kataboa hereinafter called Apesokubi) in regard to certain land which the plaintiff Asatu described as follows:- 10

p.64, ll.30-38. "The Chief of Asatu in his statement shows his boundary from Worawora and Guaman boundaries on the top of Oprana mountain and that from a heapbeing road cleaning limit Asatu-Apesso road straight to a stream by name Mutabe from where the stream is the boundary to the top of the Oprana Mountain to the end of the mountain in Asuokoko river to the end of the mountain the place known as a Owukukuaba," 20

declared in its judgment of 3rd March, 1931 that -

p.65, ll.34-39. "the land property belongs to Asatu. The proper boundary fixed in this judgment is the top of Oprana Hill from river Asuikoko southward stream Mutabe and down the stream to an "Ntombe tree", and the road cleaning heap Asatu-Apesokubi road." 30

p.17, ll.41-45. In the present proceedings a witness for the Plaintiff, Asatu, tendered in evidence a Plan covering the disputed area of the land, which defined the boundaries as entered in the Omanhene's judgment of 3rd March, 1931. The Plan was prepared by a Licensed Surveyor Mr. E.S. Anoff of Nsawan dated 15th June, 1932. It was accepted by all parties and marked Exhibit "N" in the present proceedings. The boundary claimed by Apesokubi is marked yellow thereon; that claimed by Asatu is marked pink thereon. There is also shown upon it the boundary fixed by the 40

judgment of the 3rd March, 1931, which thereby appears to have awarded to Asatu by far the greater part of the area claimed by Asatu but conceded Apesokubi's claim to some extent and also the boundary decided by a subsequent judgment of the Provincial Commissioner's Court varying the boundary fixed by the Omanhene's judgment of 3rd March, 1931. The Provincial Commissioner's Court greatly increased the area adjudged to be Apesokubi's, so that the whole area was divided more or less equally between the litigants.

Record

p.77, ll.23-29.

4. The defendant Apesokubi had appealed against the said judgment of 3rd March, 1931 but these appeal proceedings were withdrawn on 28th July, 1933. At the same time fresh leave to appeal to the Provincial Commissioner's Court was obtained. The West African Court of Appeal on the 20th April, 1937, decided that this second appeal proceedings to the Provincial Commissioner's Court were misconceived as that Court had ceased to have jurisdiction to hear the appeal and that its judgment was a nullity. The judgment of the Borada Native Tribunal of 3rd March, 1931 was for that reason restored.

p.66, l.30.

p.67, ll.8-10.

5. On the 26th May, 1937, Apesokubi was granted by the Buem State Council leave to appeal out of time to them against the said judgment of the Native Tribunal.

p.69, l.25.

6. On the 12th July, 1939, Apesokubi and Asatu entered into the following Terms of Settlement:-

pp.71-72.

APESOKUBI AND ASATO LAND BOUNDARY DISPUTE

Term of Settlement arrived at on Wednesday the 12th day of July, 1939.

Whereas there is dispute between the Sub-Division of Apesokubi and the Sub-Division of Asato in the Buem District, British Togoland, as the boundary between them.

And whereas this dispute has been in the Omanhene's Court, in the District Commissioner's Court of Kpandu, in the Court of the Commissioner of the Eastern Province, in the West African Court of Appeal and back to the Court of Buem State Council.

Record

And whereas it is desirable to effect an amicable settlement between the two said parties so that peace and prosperity may result to the mutual benefit of both parties and their subjects.

Now it is agreed as follows:-

1. The Ohene of Apesokubi and the Ohene of Asato agreed to discontinue the land dispute, and each party should bear his own costs during the 30 years controversy. 10

2. The Ohene of Apesokubi and the Ohene of Asato acting each and on behalf of his respect Elders and Councillors agree to abide by the decision of the Councillors Worawora, Tapa, Apesokubi and Asato that the boundary should remain as traditionally known.

3. The Committee as appointed by the both parties will carry out the preliminary investigation as to the extension of the traditional boundary right cross the forest if any. 20

This document was executed by the Chiefs of Apesokubi, Asatu and by witnesses representing Apesokubi and Asatu respectively, and also by representatives of Worawora and Tapa, all being marksmen.

pp.70-71.

7. On the same day, to wit, the 12th July, 1939, both parties signed by marks a Notice of Discontinuance in the following terms:- 30

"APESOKUBI vs. ASATO LAND BOUNDARY DISPUTE.

IT IS AGREED together by the above-mentioned parties, viz; Nana Kwasi Adu of Apesokubi and Nana Osei Bonsu of Asato with our undersigned Elders upon the valuable advice of our Nkwantahene and the youngmen of our respective towns Apesokubi and Asatu to discontinue the abovenamed suit pending in your Court."

p.79, ll.18-21. The Notice of Discontinuance was received by the State Council the same day. 40

Record

The effect of these two documents is one of the main points in Privy Council Appeal No. 24 of 1960 between the same parties or in the case of Apesokubi, his predecessor-in-interest.

It is submitted that the effect was to put an end to the litigation between Apesokubi and Asato and to extinguish the judgment of the Borada Tribunal of the 3rd March 1931 which was superseded by the terms of settlement dated 12th July 1939.

10 8. Nothing more appears on the Record before the Minutes of a meeting of the Benkum Divisional Council held on the 24th July, 1942, in the presence of the District Commissioner. The Benkum division is one of the main Divisions of the Buem State and included the sub-divisions of Apesokubi and Asato (see Laws of Gold Coast 1936 Revision Vol. III page 475). The agenda of this meeting included the item "2 Land Boundary Dispute between Asato and Apesokubi" and the Minutes record an agreement that a boundary 20 should be cut by 3 Chiefs who were members of the Council "without prejudice". These arrangements however fell through, as appears from a letter from the District Commissioner to Asatu dated 20th August, 1943, stating (inter alia) as follows:- p.75, 11.39-44.

> "I am informed that the attempt of the Benkumhene and his Sub-divisional chiefs of Kadjebi and Nsuta to demarcate a boundary between Asatu and Apesokubi has failed owing to objections raised by both parties to the line which 30 the arbitrators decided to cut."

The appellant submits that it is apparent from these unsuccessful attempts to reach a settlement in 1942 and 1943 that the judgment of the Omanhene dated 3rd March 1931 was no longer regarded by the parties as binding on them.

9. Thereafter Asatu, on a date not to be found in the Record, applied for a writ of possession to be issued by the Magistrate of Kpandu, as the Native Tribunal had no authority to issue such a writ, and 40 the Magistrate, after a reference to the judgment in Asatu's favour of the 3rd March, 1931, made an order on the 5th October, 1945, directing the writ of possession to issue. p.77. p.78, 1.14.

10. Apesokubi thereupon appealed to the Court of p.78, 1.35.

Record

the Provincial Commissioner, who on the 10th September, 1946, delivered judgment allowing the appeal and who said, inter alia, as follows:-

p.79, 1.10 to p.80, 1.2.

"The Defendant then, owing to the enactment of new legislation, attempted to appeal to the Buem State Council but after several adjournments both parties to the dispute agreed to withdraw the action from the State Council and submit it for settlement by arbitration. This agreement was reduced to writing in a document dated 12th May, 1939 and was signed by both parties in the presence of witnesses. The same day the Buem State Council was informed of the withdrawal, and this was acknowledged by a letter from the State Secretary dated 15th July, 1939 - On this witndrawal the appeal, of course, ceased to exist and in my opinion the intention of the parties to the agreement was that all litigation between them on the land under dispute should also cease (vide paragraph 1 of the Agreement).

Whether or not the arbitrators ever carried out the duties imposed upon them in this case is immaterial to the point at issue, the fact remains that both the Plaintiff the sub-chief Osei Bonsu and the defendant Sub-Chief Kwasi Adu had taken their dispute by mutual consent away from the Courts and relied on the Judgment of the arbitrators.

On the 5th day of October, 1945, the Magistrate at Kpandu stated in his judgment:

"The final judgment as stated above was given by the W.A.C.A. in April, 1937 and is in favour of the Plaintiffs. I am satisfied that the Defendant would not abide by the judgment of the W.A.C.A. and allow the Plaintiff free access to the land awarded to the Plaintiff."

As far as that goes the Magistrate was apparently correct, but as the case had by that time been withdrawn by the parties to the dispute from the Courts, the Magistrate had, in my opinion, no right to uphold the judgment of the Borada Tribunal which had been rendered null and void by the act of discontinuance

(P.43) which closed the appeal to the Buem State Council, on this issue."

Record

He accordingly ordered the writ of possession to be cancelled. The Appellant submits that the Provincial Commissioner's judgment dated 10th September, 1946 is correct, and that the Respondent is in any event precluded thereby from contending that the judgment of the Omanhene dated 3rd March, 1931 was not rendered null and void by the settlement arrived at on 12th July, 1939.

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11. On the 13th May, 1948, the Borada Native Tribunal (the Omanhene's Tribunal) gave judgment in a suit instituted by Apesokubi against certain arbitrators, viz: 1. Nana Yao Nyako II, Ohene of Worawora; 2. Nana Ampem Dako of Tapa-Amanya, Representative of the Amayahene; 3. Jonas Kwabena Odampa of Worawora; 4. Kwaku Beng of Asato; 5. Amankrado Kwame Tia of Worawora; and 6. J.E. Otu of Tapa, in which Apesokubi sought for an order of the Tribunal to set aside the Award delivered by the arbitrators on the 20th June, 1947. Apesokubi complained that the Award had taken place in his absence. The Tribunal decided that the arbitrators should have laid the boundary in the presence of the two contending parties, but that the Plaintiff Apesokubi had no right to sue the arbitrators since he could abide by the Award or reject it under section 63 of the Native Administration Ordinance (Togoland under British Mandate) cap. 90 (1936 Revision of the Laws of the Gold Coast).

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The Tribunal decided that the delivery of the Award and the institution of the action were both frivolous, dismissed the suit and declared also that the Award had no binding effect on Apesokubi.

12. Apesokubi appealed against the foregoing judgment to the Lands Division of the Supreme Court of the Gold Coast and his Appeal was numbered "Land Appeal No. 42/1950." Judgment dismissing his Appeal was delivered by Sir Mark Wilson, Chief Justice of the Gold Coast, on the 20th November, 1950. In the course of his judgment the learned Chief Justice said:-

pp.82-84.

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"It is not at all certain that the Defendants (i.e. the arbitrators) had in fact been appointed to do the actual demarcation of the boundary.

p.83, 1.1 to p.84, 1.2.

Record
pp.71/72.

"The document of the 12th July, 1939, seems to me to be primarily an agreement to discontinue the pending litigation on terms that each party should bear its own costs (paragraph 1) and the reason for this agreement is to be found in the succeeding paragraphs 2 and 3 which state that the parties had accepted the ruling of a sort of conciliation board called a "Society", formed by local elders, that the boundary between them should be "the traditional boundary" which was to be the subject of "preliminary investigation" by the Committee as appointed by both parties. It is not clear whether this Committee was composed of the same persons as had formed the conciliation board referred to above and its members are not specifically named in the document, but it would seem that certain persons, including at least some of the present Defendants, were appointed; but the work of demarcation was not immediately carried out. A different demarcation body seem to have been appointed in 1942 or 1943 on the advice of the District Commissioner and it actually got to work with the assistance of a surveyor. But disputes arose and the work of demarcation by this body was discontinued. The present Defendants apparently resumed their functions in 1947, after further litigation, though on what authority and at whose request is not clear. They appointed substitutes (without consulting the parties) for certain of their number who had died since 1939 and they actually demarcated a boundary, the one to which the Plaintiff-Appellant is objecting in the present suit.

"This is a very tangled skein indeed. But I think the course which this Court must pursue is clear. It is to dismiss the appeal against the judgment of the trial Court, because that judgment in its essential features is one to which no exception can properly be taken. It set out that the so-called award of the 20th June, 1947, is null and void. Null and void it undoubtedly is, if only for the reason that its personnel had not been agreed to in its entirety by the two parties; but apart from that its authority is extremely doubtful in view of the events that had intervened since its appointment in 1939-40. The trial Court's

judgment also sets out that the Plaintiff had no cause of action against the Defendants. I consider that also to be a correct finding."

Record

13. On the 25th November, 1950, Nana Yaw Nyako II, the Ohene of Worawora, who signed the Terms of Settlement of 12th July, 1939 (Exhibit "D") on behalf of his Stool, wrote to both Asatu and Apesokubi a letter in the following terms:-

p.85, 11.11-24.

"I am directed by the Omanyofekuw to inform you that the above boundary demarcation case heard and determined by us under the terms of an agreement made by parties herein before us on the 12th July, 1939, which after our award had been given resulted (in) an action against us by the Defendant herein the case had been ended at Land Court, Accra, and as the settlement proved failure, you are at liberty to proceed with your case in Court."

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14. There appears to have been no appeal against the Judgment of the Provincial Commissioner's Court of the 10th November, 1946, cancelling the Writ of Possession (referred to in paragraph 10 above), yet on the 28th day of April, 1951, the President of the Native Court of Omanhene of Buem State, Borada, Eastern Province, commanded the Sheriff to give possession of the land in dispute to Asatu.

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p.86.

15. On the 10th day of July, 1951, Apesokubi applied to the Supreme Court of the Gold Coast for the issue of a Writ of Prohibition directed to Asatu and to the President of the Native Court of the Buem State, Borada, prohibiting them from executing a Writ of Possession for the land in dispute. This application was heard on the 26th February, 1952, when Counsel for Apesokubi appears to have contended that the judgment of the 3rd March, 1931, had been abrogated by the agreement of the 12th July, 1939, and that further the judgment of the 3rd March, 1931 was not for possession. While Counsel for Asatu appears to have contended that Asatu was entitled to enforce the said judgment if the arbitration failed and that prohibition did not lie as there was no usurpation of jurisdiction, the Native Court having jurisdiction to issue writs of possession.

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pp.88-90.

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16. On the 29th February, 1952, Acolatse, Ag.J. dismissed the application for a writ of prohibition.

pp.91-93.

Record

In the course of his judgment the learned Judge said:-

p.92, ll.8-21.

"An agreement for settlement was drawn up on 12.7.39 with a view to discontinue the dispute upon certain terms contained in the document. Notice of discontinuance was sent to the President of the Council with the agreement. The parties however were unable to carry out or execute the terms of the agreement on 12.7.39 owing to obstruction by one side or the other. It appeared that the settlement had reached a hopeless deadlock at this stage in the absence of any real desire by the parties of executing the method mentioned in the agreement of settling the dispute. The parties have now reached a deadlock as to the demarcation of the boundary between them." 10

and further on the learned Judge continued as follows:-

p.92, ll.35-45.

"This application for Prohibition is the sequel to test the validity of the issue of the writ of Possession by the Native Court of Buem State. Counsel on both sides admitted before me that the Native Court in question has jurisdiction in all civil causes and Land causes and has the power to issue writ of possession to enforce its decree of judgment by virtue of the Ordinance No. 8 of 1949. I think by section 63 of the said Ordinance District Commissioners have no powers of exercise in respect of land causes." 20 30

Acolatse, Ag.J. continued his judgment as follows:-

p.92, l.46 to p.93, l.21.

"The question for me to decide is whether Prohibition lies in this matter to restrain the Native Court from executing the writ of Possession upon the Defendant in respect of the judgment in Native Court? Has the agreement of 12.7.39 stopped the Native Court of its jurisdiction in land cases and the issue of an order to enforce its judgment? 40

"Upon hearing the arguments of Counsel at great length and on the review of the authorities cited I cannot but repeat that Prohibition goes to the root of jurisdiction and questions

which are the proper subject of appeal cannot be dealt with by Prohibition unless "something has been done contrary to the laws of the land" or "so vicious as to violate some fundamental principles of Justice". It follows that if the application does not involve jurisdiction then the remedy is by appeal and that mere irregularities in procedure are no ground for Prohibition. "A mistaken exercise of the jurisdiction by the inferior Court is no reason for the order.""

Record

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17. On the 16th March, 1952, Apesokubi appealed to the West African Court of Appeal and his three grounds of appeal were in the following terms:-

(1) The Native Court that issued the Writ of Possession had no jurisdiction to do so in-as-much as the judgment sought to be executed by that Writ did not grant possession of land to the Respondent;

p.94, 11.11-29.

(2) The Native Court that issued the Writ was not seised of any suit between the parties herein and the Native Court had therefore no jurisdiction to issue a Writ of Execution.

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(3) Having regard to the fact that the parties to the suit had by Agreement in writing agreed to withdraw the dispute from the Courts and to submit their differences to Arbitration the Native Court had no further jurisdiction in the matter and the issue of Writ of Execution by that Court was wrong in law.

18. On the 13th March, 1953, the West African Court (Foster-Sutton, P., Coussey, J.A., and Windsor Aubrey, J.) delivered judgment allowing Apesokubi's appeal with costs. The judgment of the Court was that of the last-named, the other Judges concurring. This judgment allowed the appeal upon ground (1) and did not advert to or reject grounds (2) and (3).

p.95.

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19. On the 15th April 1953 Asato instituted the Suit (viz: No. 49 of 1953 on the file of the Court, to which Privy Council Appeal No. 24 of 1960 relates) against Apesokubi in the Akan Native Court "B" of Kadjebi, Southern Section of Togoland under British Mandate, for all that piece or parcel of land previously surveyed and shown edged in pink colour on the Plan dated the 15th June 1932 and signed by E.S. Anoff, Licensed Surveyor of Nsawam. This is the

pp. 1-2.

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Record		
p.64.	same Plan which has already been described in paragraph 3 of this Case. The Plaintiff relied on the Judgment of the 3rd March, 1931 in his favour (Exhibit "M") referred to in paragraph 3 of this Case, and pleaded that after that judgment Apesokubi and his subjects unlawfully entered upon the said parcel of land, cultivating and making farms upon portions of the said land with full knowledge of the judgment, and he therefore claimed recovery of possession of all portions of the land occupied by Apesokubi or any of his subjects.	10
pp. 4-6. Ex. "A", p.78. Ex. "B", p.69. pp.70-72. pp.75-76. pp.80-82.	20. On the 24th May, 1953, Apesokubi applied to the Native Akan Court "B" to dismiss the suit. In his affidavit in support he exhibited the judgment of the Provincial Commissioner dated 10th September, 1946, in which the learned Provincial Commissioner allowed an appeal against a refusal by the Kpandu Magistrate ordering a writ of possession to issue (see paragraph 10 of this case). He also exhibited a copy of the proceedings relating to an extension of time for appealing to the Buem State Council against the judgment of the Native Tribunal of Borada (see paragraph 5 of this case); a copy of the notice to the Buem State Council, whereby the parties agreed to withdraw the appeal for settlement and the Terms of Settlement both dated 12th July, 1939 (see paragraphs 6 and 7 of this case); also a copy of the proceedings of the meeting of the Benkum Divisional Council on the 24th July, 1942 (see paragraph 8 of this case); and he alleged that two letters dated 20th August, 1943 and 4th September, 1943 (Exhibits "F" and "G") showed how Asatu had done his best to frustrate all efforts at implementing the Agreement for settlement by arbitration. In paragraph 7 of his affidavit Apesokubi alleged that in 1947 Asatu and his people caused a boundary to be demarcated between the parties which resulted in his action to set aside the said boundary and he exhibits Exhibits "H" and "J" referred to in paragraph 11 of this case. In paragraph 8 of his affidavit he reiterated the argument that the judgment of the 3rd April, 1931, was then of no effect and could not be relied upon by Asatu in the prosecution of any rights which that judgment had conferred upon him. He concluded by saying that the dispute having been submitted to arbitration the only thing was to take appropriate action to implement that arbitration agreement or if that were possible to get the appeal reinstated and heard.	20 30 40

		Record
	21. On the 23rd June, 1953, the Motion to dismiss came before the Akan Native Court "B" held at Kadjebi, but was adjourned to 30th June, 1953, to enable the Plaintiff to reply and thereafter to the 28th July, 1953, thereafter to the 4th August, 1953, when for the first time Apesokubi's affidavit in support of his application to dismiss Asatu's suit and the copies of his Exhibits were read and interpreted to the Court, as well as an affidavit by	p.6. p.7. p.8. p.9.
10	Asatu in opposition filed on the 24th July, 1953, but there no trace of the opposing affidavitnon the Record.	p.9, 1.5.
	22. Immediately after the affidavit had been read, Apesokubi as the Mover was asked by the Tribunal, without being sworn, whether he had anything to say in addition to his affidavit.	p.9.
	He thereupon made reference to parts of the previous litigations concluding with a quotation from the end of the judgment of Wilson C.J. in Land	p.9, 11.12-48.
20	Appeal No. 42/1950 in which the Learned Chief Justice gave as his opinion that either resort must be had to further litigation in the appropriate tribunal or that the parties might even then agree to abide by the decision of persons appointed by them to demarcate a boundary. This quotation was evidently in support of Apesokubi's grounds for dismissal of the suit as specified in the conclusion of Apesokubi's affidavit; he is however, in the translation on the Record, recorded as saying that because of this he	
30	was pleading for the action "to be dismissed on a question res judicata".	
	23. Apesokubi was then questioned at length (a questioning which continued on the 15th August 1953) concerning the previous litigations and the course of the arbitration in which he made it plain that he relied upon the withdrawal of the suit by the agreement to arbitrate and that he had been and still was willing for the arbitration to proceed. He also indicated that he might have been willing	pp.10-13. p.10, 11.28-37. p.11, 11.1-16. p.11, 11.37-45. p.13, 11.30-39.
40	to concur with Asatu in restoring the appeal to the State Council. It is clear that he was not relying upon any kind of "Res judicata" but was contending that the judgment of the 3rd March, 1931 had been obviated by the agreement of the 12th July, 1939 and the discontinuance of that date so that the prior determination on the issue of title to the land by that judgment in favour of Plaintiff was no longer	

Record

available and that what he was seeking was to have the action dismissed upon a preliminary point that its own foundation, namely the judgment of the 3rd March, 1931 had gone, and with it the res judicata alleged by the Plaintiff.

p.13, 1.40.

24. Asatu as the Opposer was, in his turn, on the 15th August, 1953, without being sworn, asked whether he had anything to say in addition to his affidavit.

p.14.

He thereupon contended that there was nothing in the affidavit of Apesokubi to prove that the judgment of the 3rd March, 1931 had been nullified by any Court but that it had been confirmed by the West African Court of Appeal and was a proper basis for a claim to the boundary there defined. He also was questioned by the Court as to previous proceedings in the course of which he put in evidence the letter of the 25th November, 1950 which is set out in paragraph 13 of this Case. In reviewing some previous litigation, he re-iterated the submission that the judgment of the 3rd March, 1931 stood and submitted that the action should continue. All this was in opposition to Apesokubi's motion to dismiss the suit.

pp.14-16.

p.15, 1.40.

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p.16, 1.32.

25. On the 2nd September, 1953 the proceedings having been adjourned from the 15th August, 1953 Asatu continued his address as Opposer and then the Akan Native Court "B" recorded the following note:-

p.17, 11.4-8.

"Note:-
After having studied Mover's and Opposer's Motion and Affidavits the Court orders that parties to give statement under Regulation 17 of Regulation No. 23 of 1949 to enable it to give a fair judgment."

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pp.17-18.

Thereupon the representative of Asatu, after being sworn, is recorded as having made "Statement of Plaintiff". He first put in the judgment of the Omanhene's Tribunal of the 3rd March, 1931 as Exhibit "M" and followed this with the judgment of the West African Court of Appeal of the 20th April, 1937 which he relied upon as confirming the judgment of the 3rd March, 1931. He also referred to Apesokubi's affidavit in support of the application to dismiss the suit and to the exhibited grant (dated 26th May, 1937) by the Buem State Council of leave to appeal to them out of time.

p.17, 1.12.

p.17, 1.19.

p.17, 1.31.

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Record

In conclusion he tendered Anoff's plan as defining the boundaries prescribed by the judgment of the 3rd March, 1931, remarking that the boundaries shown on that plan by Apesokubi would mean that Asatu had no land at all, but that this contention had been rejected by the Omanhene's Court, upon the strength of which he brought that action for possession, because Apesokubi and his people had trespassed on the land. He asserted that he had not claimed possession in the Omanhene's Tribunal in 1931 because the Native Administration Ordinance (Chapter 90, Laws of the Gold Coast, 1936 Revision) did not permit grants of possession but the then current Ordinance did. Consequently his claim for possession had never been adjudicated upon and that Apesokubi was not in a position to convince the Court that it was a question of res judicata.

p.17, 1.41.
p.18, 1.1.
p.18, 1.8.
p.18, 1.11.
p.18, 1.17.
p.18, 1.21.
p.18, 1.30.

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He made no reference whatever to the terms of Settlement and discontinuance of litigation of the 12th July, 1939 or to the subsequent events - and he was not questioned either by Apesokubi or the Court on this Statement.

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27. Apesokubi, on the close of Asatu's statement, made the following statement:-

p.18, 11.39-41.

"I have nothing to say again in regard to making a statement apart from the explanation given in support of my motion".

At this stage the members of the Akan Native Court "B" retired for consultation and on returning delivered judgment.

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In the course of their judgment the Court stated that, after the West African Court of Appeal had restored the judgment of the Omanhene's Tribunal, Apesokubi had applied to the State Council for leave to appeal from it out of time but, while no decision had been given to the application (in fact it had been decided in Apesokubi's favour) the parties had agreed to have the matter settled by a body which classified itslef as a Committee. They referred also to the ex parte decision of the Committee and to its having been set aside. They expressed no opinion as to the result of this.

p.21, 11.3-20.

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They found that the judgment of the Omanhene's Tribunal of the 3rd March, 1931 had not been nullified

p.22, 1.10.

Record	
	by any Court. In view of this they gave judgment for Asatu with costs and ordered that, by virtue of the said judgment of the 3rd March, 1931 confirmed by the West African Court of Appeal on the 20th April, 1937, Asatu had been declared the Decree-Holder of the area in dispute and was therefore entitled by virtue of their Order to possession thereof.
p.22, 1.30.	28. Apesokubi, on the 18th September, 1953, appealed against the foregoing judgment in favour of Asatu, and advanced two "preliminary" grounds of appeal, viz: (1) that the judgment was inequitable and the Order made thereunder was irregular; (2) that the judgment was baseless, against law and interfered with the justice which the case deserved. On the 17th October, 1953, Apesokubi filed four additional grounds of appeal, viz:
p.23, 1.30 to p.24, 1.21.	(3) The Trial Native Court was wrong in giving judgment on the merits of the Plaintiff's claim when what was before them was an application by Motion for an Order to dismiss the Plaintiff's claim upon grounds set out in the Appellant's affidavit in support of the application aforesaid.

(4) The Trial Native Court was wrong in giving judgment on the merits of the Plaintiff's claim when there was no hearing of the Plaintiff's claim as provided by Sections 20, 21 and 22 of the Native Courts (Southern Section of Togoland under British Mandate) Procedure Regulations, 1949.

(5) As the Trial Native Court by its judgment did not give a decision on the application before the Court the case should be sent back for it to deal with the Appellant's Application.

(6) In so far as the Judgment of the Native Trial Court may be taken to mean a decision on the Appellant's Application by Motion for an Order to dismiss the Plaintiff's action, the same was wrong because:-

(a) It was against the weight of evidence.

(b) It was wrong in law in that, by reason of the facts disclosed in the Appellant's Affidavit, the judgment of the Omanhene of Buem's Tribunal dated 3rd March, 1931, had ceased to regulate the rights of the parties in respect of the land in dispute.

		Record
	29. Asatu filed a reply opposing Apesokubi's grounds of appeal. Asatu alleged, inter alia, that Apesokubi's motion for dismissal and Asatu's claim were both before the Court below. Asatu submitted that Apesokubi had made his plea under Regulation No. 17 of the Procedure Regulations of 1949 and that when the Court found that Apesokubi's plea had not been made out as specified in Regulation 18, the hearing of Asatu's claim continued by order of the Court. Regarding Apesokubi's fifth ground of appeal Asatu submitted that the Court correctly decided the issues before it under Regulation 18 without any technical error, and therefore this ground of appeal should not be countenanced. Regarding ground 6(a) and (b) Asatu submitted that they were frivolous, as the judgment of the Omanhene's Tribunal was never set aside by any Court and upon which the Court below based its judgment it was the only weighty evidence in the case.	p.24. p.25, 1.10. p.25, 1.28. p.25, 1.32.
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20	30. On the 5th November, 1953, the Native Appeal Court Borada, allowed Apesokubi's Appeal and said, <u>inter alia</u>, as follows:-	p.30, 11.10-42.

> "After careful scrutiny of the contentions of both parties herein, this Court has observed that unfortunately the proceedings of the Lower Court are badly recorded in that it is irregular and in many cases against the Court's proceedings, because, the hearing of the Motions in respect of this case, and the hearing of the real case of the above claim were mixed up by the Lower Court in the proceedings before this Court. That the decisions of the Motions and the Judgment of the real case were not given by the Lower Court separately.
>
> "That in the proceedings from the Lower Court it was also observed by this Court that the Representative of the Respondent was sworn to before he gave his statements but the Appellant was not sworn to before he gave his short statements. That in accordance with Regulation 15 of Regulations No. 23 of 1949, no plea was even recorded by the Lower Court in its proceedings of the Case.
>
> "In view of these irregularities, this Court hereby declare the whole proceedings in this case a nullity and hereby ordered that in order

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Record

that the Appellant and the Respondent may be justly treated by this Court, this case is hereby remitted to the Akan Native Court "B" Kadjebi for rehearing de novo, and that the said Akan Native Court "B" shall

(a) Hear and determine the Motion in respect of this case separately;

(b) Hear and determine the real case of the above claim in accordance with the Courts Procedure separately." 10

31. Without in any way derogating from the soundness of the Native Appeal Court's decision, Apesokubi will, in confirmation or elaboration thereof, submit that when on the 24th May, 1953, he applied to dismiss the action of Asatu upon the grounds already stated in his affidavit in support (see paragraph 20 of this Case) that was, in effect, an agreement to continue the arbitration or, if that aborted, to reinstate the original appeal which was then pending before the Buem State Council 20 on the 12th July, 1939. It is conceded that it would have been more proper to apply for a stay of proceedings, but it is submitted that this would have been a highly technical objection without any merit in it. In either case this was an interlocutory application under Part VI of the Procedure Regulations No. 23 of 1949 (Annual Volume of the Laws of the Gold Coast, 1949, Rules 34 to 39 on page 191 thereof) and had nothing to do with Part IV (Proceedings at the hearing) and in particular with 30 Regulation No. 17, which has been so much canvassed. At the time when it was issued the hearing had been adjourned to the 23rd June, 1953, and the return day for the application was made the same. On that day the Motion only was brought forward and adjourned to the 30th June, 1953, but the hearing was not dealt with at all. What happened appears to amount to an adjournment of it sine die until such time as might be convenient without naming a date or otherwise providing for the hearing to begin, an irregul- 40 arity not contemplated, it is submitted, by Regulation 24.

pp.70-72.

p.3, 1.24.
p.4, 1.4.

32. After two further adjournments the proceedings were resumed on the 4th August, 1953, by the Motion only being taken, which was fully argued on that day and on the 15th August, 1953, when there was an

p.8.
p.16.

Record

adjournment to the 2nd September, 1953, when Asatu, the opposer of the Motion, had more to say. When he had done so, the Court, it is respectfully submitted, misdirected itself by bringing in Regulation 17, which was entirely inapplicable to what was going on, namely, the hearing of an interlocutory application under that Regulation. None of the preliminaries necessary to its operation prescribed by Regulation 15 had been performed. The subject
10 matter of the claim had not been read out by the Registrar to Apesokubi, so the hearing of the suit had not commenced, nor had Apesokubi been asked how he answered the claim, i.e. to plead to it. It is submitted that Regulation 15 is mandatory. Never having been asked to plead, he obviously could not have made any plea such as is provided for by Regulation 17. If it had been made, it would have been the duty of the Court to consider whether the plea was made out and to record its decision under Regula-
20 tion 18, and if the plea not made out, to proceed with the hearing. It is submitted that the hearing of the suit was never begun according to law and that, therefore, Apesokubi was entitled to have the judgment in the suit set aside and declared a nullity *ex debito justitiae*, for the hearing was never begun.

The relevant Parts and Sections of the Procedure Regulations No. 23 of 1949 will be found set out in an Appendix to this Case.

33. On the 25th November, 1953, Asatu appealed to the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court, Accra. In his grounds of appeal Asatu, inter alia, first submitted that there were no irregularities about the trial of the suit in the first Court, but, if there were, they were not sufficiently grave or fatal so as to vitiate or render null and void the trial and judgment of that Court. In his second reason Asatu challenged the criticism of the Native Appeal Court that the hearing of the motion by Apesokubi and the hearing of
40 the real case were mixed up by the first Court, on the ground that Apesokubi's Motion to dismiss the suit in effect put forward Apesokubi's defence to Asatu's substantive claim; that in the circumstances the latter and the Motion were so inseparable, that both had necessarily to be dealt with together and at the same time. In his third reason Asatu submitted that Apesokubi's filing of his Motion to

p.31.

Record

dismiss the suit dispensed with any necessity to enter a plea of Not Liable under Regulation 15 of the said Regulations, because that plea was apparent on the face of the Motion paper and supporting affidavit filed in Court. In his fourth reason Asatu relied on Apesokubi's statement set out in paragraph 27 of this case, viz: "I have nothing to say again in regard to making a statement apart from the explanation given in support of my motion", and submitted that as Apesokubi had declined to give evidence, he actually could not be sworn. 10

pp.39-48.

34. After hearing arguments from Counsel on both sides, the Land Court (Sir Mark Wilson, C.J.) gave judgment allowing the appeal and restoring the judgment of the trial Court.

In the course of his judgment, the learned Chief Justice, after setting out the history of the litigation, said as follows:-

p.42, 11.15-33.

"There is no justification in the Native Court (Southern Togoland) Procedure Regulations, 1949 (No.23 of 1949) for the procedure which the Defendant adopted. The correct procedure is laid down in Regulation 17 i.e., that after he had been asked to plead under Regulation 15 the Defendant may raise a plea to the jurisdiction, etc., for that reason I am of opinion that the Defendant having himself side tracked the Regulations, cannot be heard to deny that he was asked to plead under Regulation 15. In effect his filing of the Motion as mentioned was obviously taken by the Court as a denial of liability. It could mean nothing else and it stated very fully why the Defendant denied the Plaintiff's right to a decree for possession. It cannot in those circumstances be said that anybody was in doubt when the hearing began on 4th August, 1953, as to what the Defendant's answer to the claim was". 20 30

The learned Chief Justice then continued as follows:- 40

p.42, 11.34-49.

"The hearing proceeded on that basis and the Court proceeded, in the words of Regulation 18, to consider whether the plea made by the Defendant had been made out. It heard the statements of both parties in great detail.

Record

(It is to be noted that there is nothing in the Regulations to require the parties to be sworn at this stage and they were not.) The Court then noted that it had studied the mover's and opposer's motion and affidavits and decided to order that the parties should "give statement under Regulation 17 of Regulations No. 23 of 1949 to enable it (the Court) to give a fair judgment."

10 "The reference to Regulation 17 in the above passage is meaningless, for the making of a statement is not referred to in Regulation 17 at all".

Apesokubi submits that the Land Court in holding Apesokubi had side-tracked the Regulations was mistaken for he had properly proceeded to make an interlocutory application under Part 6 of the Regulations but the parties were wrongly asked to make a statement under Regulation 17 before the mandatory provision of Regulation 15 had been complied with by the Court. The preliminary objection raised under Part 6 was not one which Apesokubi could have rightly raised under Regulation 17 in Part 4 for it was not a plea that the Native Court had no jurisdiction or that the Claim did not disclose any cause of action (but avoided the alleged cause of action) or that the claim had already been adjudicated upon. The Land Court itself held this view rightly. Nor was any such plea written in the Record Book as required by Rule 17 if any such plea had been made.

p.16.

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p.44, 1.33 to p.45, 1.3.

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It is respectfully submitted that the learned Chief Justice omitted to note that Apesokubi was an illiterate person, who actually executed the two documents of the 12th July, 1939, by his mark, and that to attribute an ability to an illiterate to distinguish, by the irregular procedure employed, the difference between the course of Asatu's suit and Apesokubi's motion for stay of proceedings, has resulted in the learned Chief Justice misdirecting himself.

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35. On the following page the learned Chief Justice said as follows:-

"Having regard to the nature of the Plaintiff's suit, I cannot see what was left for argument once the Trial Court had decided that

p.43, 1.47 et seq

Record

the judgment of 3rd March, 1931, still stood effective and had not been nullified by any Superior Court".

Apesokubi will submit that the trial Native Court did not consider the points raised by him in his motion to dismiss the suit of Asatu, which were, inter alia, that the matters in dispute between the parties had been the subject of an agreement between them, which precluded Asatu from basing his rights on the judgment of 1931, even though that judgment had not been nullified by any Court. 10

p.45, 1.15.

36. The learned Chief Justice, after criticizing the view that the proceedings in the Trial Court could be said to have been brought under Regulation 17, proceeded to consider whether the agreement of 12th July, 1939, to arbitrate was still in force and ought to be implemented, and doubted whether Apesokubi had based himself on that agreement. It is clear from paragraph 9 of Apesokubi's affidavit that this was exactly what the latter said, and the learned Chief Justice has misdirected himself in fact on this vital matter. The learned Chief Justice then came to the conclusion:- 20

p.5, 1.44 et seq

p.45, 11.39-47.

> "It is abundantly clear that as far as arbitration is concerned the parties were never willing to abide by the result unless it favour them. Indeed the terms of the agreements suggest strongly that their agreement to arbitrate was conditional on the arbitration being done in a particular way. It seems highly doubtful therefore that any solution of the problem in this way is or ever was possible". 30

Apesokubi respectfully submits that the learned Chief Justice appears to have misdirected himself for the objections to the award were (a) that the boundary was demarcated in the absence of Apesokubi and (b) that "the Committee" contained certain substitutes which the parties had not appointed.

Whether this was a correct finding or not when Asatu launched his present suit, paragraph 9 of the affidavit by Apesokubi sworn on the 26th May, 1953 was tantamount to a renewed offer to bring the submission to arbitration to a hearing, failing which to revive his appeal against the judgment of 3rd March, 1931, to the Buem State Council, to neither 40

p.5, 1.44.

alternative of which Asatu made any response.

Record

37. The learned Chief Justice then dealt with the question as to the effect on the judgment of the 3rd March, 1931, of the agreement to arbitrate:-

p.45, 1.48 to p.46, 1.13.

"There remains the original judgment of 3rd March, 1931, which, as the trial Court found, was never abrogated or set aside by any competent Court. Nor does it seem to me that the rights accruing under it were extinguished by
10 the terms of the agreement of the 12th July 1939, which was in my opinion an agreement only to discontinue the appeal then pending before the Buem State Council. Even if it were held to be an agreement not to enforce the judgment (which in any event only gave the Plaintiff a declaration of title to the land in dispute without an Order for possession) in consideration of an attempt to settle the matter by arbitration, the Plaintiff could not possibly
20 be bound indefinitely by that agreement if and when arbitration proved abortive."

Apesokubi respectfully submits that once the parties had agreed to submit the matters in dispute in the litigation between them, the effect of such an agreement was to extinguish any decree in favour of any of the parties to that litigation, and that consequently the learned Chief Justice erred in law when he stated that the rights accruing under the judgment of 3rd March, 1931, were not extinguished
30 by the agreement of 12th July, 1939. But even if the agreement was merely to discontinue the pending appeal nothing being said as to what was to happen if the arbitration proved abortive, it is submitted that there must be implied an agreement that in that event the appeal should be restored. But in fact the agreement was in terms to discontinue the land dispute, i.e. the whole litigation, each party bearing their own costs.

38. On the 27th April, 1954, Apesokubi noted an
40 appeal to the West African Court of Appeal. On the 18th January, 1956, Counsel for Apesokubi commenced his arguments, and after referring to the cases of Woolley v. Kelly, (1822) 107 E.R. 27, and Harries v. Thomas, (1836) 150 E.R. 656, he continued his arguments on the following day. On the 19th January, 1956, Apesokubi's Counsel referred to the case

p.48, 1.30.
p.51.
p.53.
p.53.

Record	
p.54, l.31. p.56.	of Kuturka Yardom v. K. Mintah, Full Court, Gold Coast 1926-1929, 76, and the case of Asong Kwasi v. Larbi (1953) A.C. 164, after which Asatu's Counsel was heard, and Apesokubi's Counsel was also heard in reply.
p.56.	39. On the 13th February, 1956, the West African Court of Appeal, Gold Coast Session (Coussey, P., Korsah, J.A. and Jibowu, Ag.J.A.) delivered judgment dismissing Apesokubi's appeal with costs. The judgment was delivered by the learned President, Sir Henley Coussey, the other two judges gave no separate reasons for concurring in the judgment pronounced.
p.59, ll.30-45.	After setting out the long history of the litigation between the parties, the learned President said as follows:-

> "But paragraph 2 of the settlement clearly implies that the Councillors of Worawora, Tapa and of the two contesting stools had already decided that the boundary should remain as traditionally known and the Ohenes of Apesokubi and Asato by the written document signified their agreement to be bound by that decision of the Councillors. I am unable to read into paragraph 2 of the settlement any further submission to arbitration involving an award as to a fresh boundary. The boundary traditionally known can only in my opinion refer to the boundary proved by the Respondent and declared in his favour by the Omanhene's tribunal for the Appellant did not in the course of the litigation before the written settlement allege or set up any other boundary."

Apesokubi respectfully submits that the learned President misdirected himself in law in his construction of paragraph 2 of the said settlement, inasmuch as at its date the judgment of the Omanhene's Court was wholly under appeal to the Buem State Council and the whole object of the agreement of 12th July, 1939, and of the notice of discontinuance of the same date, was to clear the ground of all previous litigation so that the arbitration Committee might decide upon the position of the traditional boundary across the forest unhampered by the judgment of the 3rd March, 1931.

40. On the next page the learned President said as follows:-

Record

"The contention of Mr. Akufo Addo, Counsel for the Defendant-Appellant, is that on failure of one set of arbitration demarcators, referees or whatever they may be called, the parties were bound to continue to appoint new persons until a body was found finally able to carry out the work.

p.60, ll.29-37.

10 "I am as unable to accept this proposition, as was the learned Judge of Appeal."

Apesokubi respectfully submits that the learned President misdirected himself in law; that Apesokubi's objection against a particular panel, some being substituted to whom he had not agreed, for having acted in his absence, was well founded, and that as long as it was possible to find arbitrators from the Councillors in question it could not be said that it was impossible to carry out the
20 arbitration.

41. The learned President, in dealing with irregularities of procedure in the trial Court, said as follows:-

"As to the second question, the learned Chief Justice on appeal held that there were no irregularities in the procedure adopted by the Native Court of which the Appellant could legitimately complain as amounting to a failure of justice - with this conclusion I respect-
30 fully agree. It would be superfluous to review again the relevant procedural regulations under the Native Courts Ordinance but it should be borne in mind that section 23 recognises the existence of a code of procedure in accordance with native customary law.

p.61, ll.7-35.

"The Defendant-Appellant's motion in the Native Court which was expressed to be an application to dismiss the action was in effect an application to stay the proceedings on the
40 ground that the 1931 judgment, upon which the Plaintiff's action for recovery of possession was based, was of no effect by reason of an agreement to go to arbitration. It was a contention that the jurisdiction of the Native

Record

Court was ousted by agreement.

"After the mover and opposer had been fully heard on the motion the Court ordered the parties to make their statements. The Plaintiff-Respondent upon whom was the burden to prove his claim was then sworn and gave evidence. The Defendant-Appellant declined to cross-examine him and he declined to make a statement and rested upon the explanations he had given in support of his application to dismiss the action." 10

Apesokubi respectfully submits that the learned President misdirected himself in law and, with a view to avoid prolixity, he (Apesokubi) would refer to paragraphs 31 and 32 of this Case.

p.62. p.63.

42. On the 3rd July, 1956, Apesokubi applied to the West African Court of Appeal for leave to appeal to Her Majesty in Council, and on the 8th October, 1956, final leave was granted. The record has now been received by the Registrar of the Privy Council and is numbered as above, viz: No. 24 of 1960. 20

PRIVY COUNCIL APPEAL No. 47 of 1959

p.1. p.10.

43. This appeal arises out of an Enquiry under the Forestry Ordinance in the matter of the proposed Kabo River Forest Reserve, the Oprana Section of which comprises in whole or part the area of land which is the subject of Privy Council Appeal No. 24 of 1960 and the result of it will wholly depend on the result of that appeal. The Enquiry opened on the 16th December, 1930 and in view mainly of the dispute between Apesokubi and Asatu was adjourned from time to time, being eventually resumed by Mr. A.P. Pullen on the 9th February, 1954. 30

44. On 3rd May, 1954, the Reserve Settlement Commissioner gave his judgment in which he said (inter alia) as follows:-

p.19, ll.14-22.

"I therefore accept the decision of the Borada Native Tribunal dated March 1931 and record that the physical boundary between the stools of Apesokubi and Asatu is as follows:- 40 'The proper boundary fixed in this judgment is the top of Oprana Hill from river Asuokoko

southward to the stream Mutabe and down the stream to an Ntombe tree and to the road cleaning heap Asatu-Apesokubi road'".

Record

This he did pursuant to Section 9 (6) of the Forestry Ordinance.

45. On the 20th May, 1954, Apesokubi appealed against the above decision of the Reserve Settlement Commissioner to the West African Court of Appeal (Gold Coast Session). His two grounds of appeal were that the issue relating to the boundary aforesaid was still sub judice, and the decision regarding the boundary was wrong because it was not based on any evidence before the Reserve Settlement Commissioner.

p.21.

p.22, ll.7-16.

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46. On 20th February, 1956, after both Counsel had agreed, the West African Court of Appeal stated that they felt bound by the judgment of the 13th February, 1956 (referred to in paragraph 39 of this Case), and dismissed Apesokubi's said appeal with costs.

pp.23, 24.

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51. On 8th October 1956, the West African Court of Appeal granted Apesokubi final leave to appeal to Her Majesty in Council against the judgment of the West African Court of Appeal dated 20th February, 1956, and the Record has now been received by the Registrar of the Privy Council and is numbered as above, viz: No. 47 of 1959.

p.24,

The Appellant respectfully submits that both judgments of the West African Court of Appeal are wrong and should be reversed with costs for the following, among other

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R E A S O N S

1. BECAUSE once the parties had agreed to settle their dispute in accordance with the terms of settlement dated 12th July, 1939, and to discontinue the suit, the effect was to extinguish any decree in favour of any of the parties to that litigation, and that consequently the learned Chief Justice and the West African Court of Appeal erred in law in deciding that the rights accruing under the judgment of the 3rd March, 1931, were not extinguished by the agreement of the 12th July, 1939.

40

2. ALTERNATIVELY, if the judgment of the 3rd March, 1931, was not completely extinguished by the agreement of the 12th July, 1939, the Appellant (Apesokubi) should have been given an opportunity of applying to the Buem State Council to restore his appeal to that Court for hearing of his appeal against the judgment of the 3rd March, 1931, and, in the absence of any such restoration or the possibility of any such restoration, the various judgments below should ex debito justitiae not have held that the judgment of the 3rd March, 1931, was still in force. 10

3. BECAUSE after 12th July, 1939 the parties acted for several years upon the basis that the judgment dated 3rd March, 1931 had ceased to have any legal effect.

4. BECAUSE the Provincial Commissioner's judgment dated 10th September, 1946 operates as res judicata between the parties as to the validity of the said judgment dated 3rd March, 1931. 20

5. BECAUSE the learned Chief Justice of the Gold Coast in his judgment of 22nd April, 1954, misdirected himself in stating that the agreement of the parties to arbitrate was conditional on the arbitration being done in a particular way and that it seemed highly doubtful therefore that any solution of the problem in this way was ever possible, whereas the Appellant's (Apesokubi's) objections to the award were (a) that the boundary was demarcated in his absence and (b) that the "Committee" contained certain substitutes whom the parties had not appointed. The West African Court of Appeal in their judgment appealed from in the present proceedings have not dissociated themselves from this misdirection, but have upheld his judgment in this and other respects. 30

6. BECAUSE the learned Chief Justice of the Gold Coast in his judgment of 22nd April, 1954, misdirected himself in law in finding that the irregularities set out in paragraphs 31 and 32 of this Case were not fatal to the judgment of the Akan Native Court and did not amount to a denial of justice to the Appellant (Apesokubi) in the Native Akan Court "B" in the present 40

proceedings, and the West African Court of Appeal have associated themselves with this view.

7. BECAUSE the judgment of the Akan Native Court "B" of the 2nd September, 1953 was void on the ground that it was not pronounced after a trial conducted in accordance with law but conducted in such a manner as to cause grave and substantial injustice to the Appellant.

10 8. BECAUSE the judgment and order of the Native Appeal Court of the 10th November, 1953, declaring the proceedings before the Akan Native Court "B" a nullity and remitting the suit for rehearing de novo was right and should be restored.

9. BECAUSE the said judgment of the Akan Native Court "B" was in any event erroneous in law on the ground that the judgment of the Omanhene of Buem's Tribunal dated the 3rd March,
20 1931 had ceased to regulate the rights of the parties in respect of the land in dispute.

10. BECAUSE, whatever legal remedies may have been available to the Respondent after the settlement of the boundary dispute by arbitration became impracticable, the Respondent was not entitled to claim relief against the Appellant on the basis that the judgment of the Native Tribunal of the Omanhene dated 3rd March, 1931 had not been rendered null and void by
30 the settlement arrived at on 12th July, 1939 between the parties.

11. BECAUSE the judgments of the West African Court of Appeal of the 13th and 20th February, 1956, are otherwise erroneous and ought to be reversed.

E.F.N. GRATIAEN.

GILBERT DOLD.

A P P E N D I X

being Extracts of relevant Regulations made under Section 70 of the Native Courts (Southern Section of Togoland under British Mandate) Ordinance.

PART 4. - PROCEEDINGS AT THE HEARING

Regulation 15. The subject matter of the claim or the charge shall be read out by the Registrar to the Defendant or the accused person who shall be asked how he answers to the claim or charge. 10

Regulation 16. (Not applicable).

Regulation 17. Where a defendant or accused person wishes to plead that the Native Court has no jurisdiction or that the claim or charge does not disclose any cause of action or offence or that the subject matter of the claim has already been adjudicated upon, or that (if it is a criminal cause) he has been previously convicted or acquitted of the same offence, the Defendant or accused person shall make such plea at any time after he is asked what he has to say in 20 answer to the charge or claim, and his plea shall be written in the Record Book.

Regulation 18. The Native Court shall consider whether a plea made under Regulation 17 is made out and give its decision which shall be written in the Record Book. If the Native Court is satisfied that the plea has been made out, the suit must be dismissed or the accused discharged, as the case may be. If the Native Court is not satisfied that the plea has been made out, it shall order the Defendant 30 or the accused (as the case may be) to plead in the ordinary way under Regulation 15, or that the hearing shall continue.

Regulation 19. When the Defendant or accused admits the liability or offence, the Native Court shall hear the statements of the parties, and then make its order.

Regulation 20. When the Defendant or accused does not admit the liability or offence the Plaintiff or prosecutor as the case may be shall open his case 40 and produce his evidence.

Regulation 21. At the end of the evidence for the plaintiff or prosecutor, the Native Court shall consider whether any case has been made out for defendant or accused to answer. If no case has been made out the accused person shall be discharged or in a civil cause judgment shall be entered for the Defendant.

Regulation 22. If there is a case for the defendant or accused to answer, the Native Court shall call upon him to make his defence. He may give evidence and call witnesses. He shall be entitled to address the Native Court at the conclusion of the evidence for the defence.

Regulation 23. When the case on both sides is closed, the Native Court shall consider the whole matter and give its decision which shall be put into the form of an order in accordance with Part 7 of these Regulations.

PART 6. - INTERLOCUTORY APPLICATIONS

Regulation 34. Interlocutory applications may be made by motion at any stage of proceedings in a cause.

Regulation 35. No motion shall be entertained by a Native Court until the person moving has filed a motion paper, or made verbal application to the Registrar, distinctly stating the terms of the Order sought.

Regulation 36. Affidavits upon which the mover intends to rely shall be attached to the motion paper.

Regulation 37. Motions shall be heard only after notice of motion has been served on the other parties likely to be affected.

Regulation 38. Together with the notice of motion there shall be served a copy of any affidavit upon which the mover intends to rely at the hearing of the motion.

Regulation 39. A Native Court hearing a motion may receive oral evidence in support of or in opposition to the motion.

No. 47 of 1959
No. 24 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION)

(CONSOLIDATED APPEALS)

B E T W E E N :

NANA KATABOA II, Ohene of Apesokubi — Appellant

- and -

NANA OSEI BONSU, Ohene of Asato — Respondent

CASE FOR THE APPELLANT

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.
Solicitors for the Appellant.