GHI-C 13/1961

IN THE PRIVY COUNCIL No.24 of 1958

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION - ACCRA)

(1) BETWEEN:

NANA ADJEI III, Ohene of Okadjakrom for and on behalf of the Stool and people of Okadjakrom (Plaintiff) Appellant

- and -

NANA ADJEDU II, Ohene of Atonkor for and on behalf of the Stool and people of Atonkor (Defendant)

1. ADDO KWASI,
2. KWAKU YIRENKYI,
3. MENSAH NKANSAH,
4. YAW MPEW DARKO,
5. G.K. ADDO and
6. KOFI ASARE (Co-Defendants) Respondents

- AND -

(2) BETWEEN:

NANA ADJEI III, Ohene of Okadjakrom (Defendant) Appellant

- and -

ASOFOATSE KWADJO NKANSAH of Atonkor (Plaintiff) Respondent

(Consolidated Appeals)

CASE FOR THE RESPONDENTS,

NANA ADJEDU II (Defendant-Respondent in the first Appeal) ADDO KWASI, KWAKU YIRENKYI, MENSAH NKANSAH, YAW MPEW DARKO, G.K. ADDO and KOFI ASARE (Co-Defendants -Respondents in the first Appeal), ASOFOATSE KWADJO NKANSAH (Plaintiff-Respondent in the second Appeal, being the same person as the Co-Defendant Mensah Nkansah).

Record

1. These are consolidated appeals by Nana Adjei III, Ohene of Okadjakrom, for and on behalf of the

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p.50 Stool and people of Okadjakrom, against a judgment of the West African Court of Appeal dated the 25th February 1956, reversing a judgment of Sir K. A. Korsah, Acting Chief Justice of the Gold Coast (sitting in the Land Court) in favour of the said

p.40 Nana Adjei III, dated the 16th July, 1954.

p.42 l.47 2. By its judgment the Land Court held that the Defendant Nana Adjedu II, and by implication the Co-defendants, were estopped from denying the title of the Plaintiff Nana Adjei III to the land claimed in the first suit because of a judgment for the

p.82 l.3 Defendant Nana Adjei III pronounced by the Court of the Buem State Council in Suit No.6/40 on the 2nd July 1940, in which suit Nana Adjedu II had been Plaintiff and Nana Adjei III Defendant, and the Land Court further held that Asafoatse Kwadjo Nkansah, as the subject of Nana Adjedu II, was also bound by that judgment in Suit 6/40. The West African Court of Appeal however held that they were not so bound. This is the question to be decided in the present appeal.

3. The land in dispute is shown upon Exhibit J and lies between and approximately equidistant from the villages of Okadjakrom and Atonkor, of which the Plaintiff and Defendant in the first suit are the respective Chiefs. Both Chiefs are subjects of the Omanhene or Paramount Chief of the State of Buem in the Territory known formerly as Togoland under British Mandate but at the time of the suit as Togoland under United Kingdom Trusteeship, which up to the world war of 1914-1918 had been German Territory.

p.18 l.11 to p.19 l.7 The Co-Defendants claim that their respective families own old established farms upon the land, which farms, being made upon communal lands of Atonkor, by reason of first cultivation by their respective ancestors, have become the family property of the successors of the first cultivators.

4. The circumstances which led up to suit No. 6 of 1940 appear from the proceedings in Suit 6 of

pp.60,79,80, 82,84. 1940. (Exhibits A, B, C, D and E).

The following summary of the antecedent circumstances is extracted from the evidence in that

pp.69-73 suit of Christian George Adjei who represented in that suit Nana Adjei III, the present Appellant,

pp.75- and of Nana Brantuo II, who was witness for both

parties. Where the witnesses vary in details the evidence of Brantuo has been preferably taken. Brantuo was the Chief of Jasikan, a town or large village near Okadjakrom, which latter at that period was called Jasikan Akuraa. Brantuo himself was Adontenhene of the Buem State and therefore one of the most important Chiefs under the Paramount Chief. Such matter in paragraphs 5, 6 and 7 as does not appear in the evidence of these two witnesses has been placed in square brackets. Record p.75 l.26

5. This evidence shows that a land dispute arose between one Akosomo of Atonkor and a man of Okadjakrom concerning land which was situate on the old road from the town of Jasikan to Atonkor. [Kosome otherwise Akosomo was the then Head of the Family to which the Co-Defendants Nkansah, Adoo and Asare belonged.] Captain Lilly, the District Commissioner, accordingly came to Jasikan to deal with it (on the 23rd January 1922). [As District Commissioner he was both an Administrative Officer and a Judicial Officer holding a Court. It does not appear whether this dispute came before him in his Administrative capacity or his Judicial capacity or in both] Capt. Lilly ascertained from Brantuo that he could point out the "road junction" between Jasikan and Atonkor and took him with a retinue to Okadjakrom where some elders from Borada [the Omanhene's town, capital of Buem State] were waiting and where Capt. Lilly took 4 men from each of Atonkor and Okadjakrom. These men (representing all parties interested, namely, the Paramount Chief and the Chiefs of Jasikan, Okadjakrom and Atonkor) had been collected in order to cut and demarcate a boundary between Atonkor and Okadjakrom. The party proceeded to the "road boundary" where Brantuo pointed out the road junction between Jasikan and Atonkor, that is to say the point on the road between those two places where the land of Jasikan and Atonkor met and up to which Okadjakrom kept the road clear and from which Atonkor did so. This spot was called by Brantuo Obribriwase [marked on Exhibit J as Abibriwase].

p.75 l.20 p.18 p.83 l.7 p.75 l.26 p.71 ll.30-41 p.75 l.34 to p.76 l.6

6. Capt. Lilly, having ascertained from Brantuo and the others present that there was no other road clearing boundary between Atonkor and Okadjakrom on that road but that there was one on the main motor road directed some of the elders (including men from both Okadjakrom and Atonkor) to go from that

p.76 ll.12-24

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p.78 ll.1-5
p.77 l.31-39
p.76 l.24

spot through the bush to the main road, cutting a path as they went in order to make a boundary between the disputants. Capt. Lilly gave no specific direction as to the line, except that it was to go to the motor road, and he himself proceeded with the rest of the party, including Brantuo, back to Okadjakrom by the road he had come and thence along the motor road towards Atonkor, having ordered the party that had gone through the bush to wait for him on the motor road. This party was met at the roadside by Capt.Lilly and his party at a point before the other road boundary had been reached. Capt. Lilly halted there and marked the spot by stones, /identified upon Exhibit J/ making that place the new boundary, directing another path to be made from that spot to the west, and instructing one Agbo, an elder of the Omanhene, and Brantuo himself to cut that path as far as to the end of the lands of Okadjakrom and Atonkor.

p.69 ll.37-47
p.76 ll.40-43

p.69 ll.26-39
p.76 l.43

The witness Adjei states that the old road clearing boundary on the motor road, said by him to be marked by an Otokutaka tree /identified upon Exhibit J/ was shown to Capt. Ellis before he met the party which had come through the bush, and consequently before he decided to make the latter spot the boundary. This having been done and the order given by Capt. Ellis to continue the boundary westwards, the party broke up and went their respective ways.

p.76 l.45 to p.77 l.25
p.70 ll.21-29

7. About 2 months later, upon the orders of the Paramount Chief, Brantuo and the Elder Agbo began to cut the path westward but, on the 2nd day, when near the River Ona, the Paramount Chief's linguist proposed to curve the line a little to the Atonkor side, to which Kosomo and his party objected, so work was stopped, and was never resumed, though the Okadjakrom people "tormented" the Omanhene to finish the cutting of this boundary path and paid money towards it.

p.70 ll.30-35

It was not until their efforts to have the new boundary cut and properly made had failed that, according to Adjei, the Okadjakrom people notified the Omanhene and the Atonkor people, through the present Respondent, that they had decided still to recognise what they claimed was the old boundary and after this started cultivation upon the disputed land.

SUIT NO.6 OF 1940 — Record

8. Following this irruption of Okadjakrom farmers, the present Respondent, as Ohene of Atonkor and so representing his subjects, issued on the 16th April 1940 in the Tribunal of the Buem State Council, a Civil Summons against the present Appellant, Ohene of Okadjakrom and so representing his subjects, claiming damages for trespass and a declaration that the boundary demarcated with the consent of both parties by the District Commissioner (i.e. Captain Lilly) from a heap of stones at Obribriwase to the heap of stones on the lorry road was the territorial boundary between the lands of the then Plaintiff and then Defendant. — p.60

9. Proceedings in Native Tribunals are summary and the issues are therefore not defined by pleadings and the then Defendant, on the suit coming up for hearing on the 3rd June 1940 before the Paramount Chief and two other Chiefs, merely pleaded "Not Liable" without then stating facts or reasons. — p.61 l.28

The Tribunal however in their judgment stated the issues as follows:-

> "The question at issue therefore is whether there exists an established boundary between the landed properties of both Plaintiff and Defendant, and secondly whether it is true Defendant has trespassed over that established boundary". — p.81 l.3

The established boundary so referred to was that directed by Capt. Lilly and none other and it was to that boundary and its demarcation by Capt. Lilly that both parties directed their evidence.

10. The Plaintiff, the present Respondent, himself gave evidence of the making of the boundary by Captain Lilly, that the customary ceremonies were performed to establish it and that since then it had been the boundary and had been recognised as such in the Omanhene's Court and by Okadjakrom people and that it was 16 or 17 years after the boundary had been fixed before the Defendant had trespassed. — pp.61-65; p.65 l.6

He admitted however that neither side had since its making asked the other to help clear the boundary path or plant boundary trees to mark it, that it was overgrown, but alleged that it could be determined by the stones (i.e. at Obribriwase and on the motor road). — p.65 ll.35-37; p.65 ll.30-35; p.65 ll.38-40

Record

pp.66-68

11. The only other witness for Plaintiff was Osafohene (Captain of warriors) Adabra, who had, he said, been deputed with 3 other named persons from Borada (the Omanhene's capital) and a named elder from Jasikan to cut the boundary, and that in fact they had cut it as directed by Captain Lilly but put nothing to mark it, directing the parties to plant Ntome trees (the usual trees planted on boundaries) and that subsequently custom was performed. This witness stated that he could trace the path if the stones had not been removed but evidently had not done so before giving his evidence and did not accompany the Court when it subsequently viewed the locus.

12. The Defendant, the present Appellant, did not himself give evidence, being represented as if personally present (in accordance with custom) by the said Christian George Adjei.

This witness gave evidence of the visit and operations of Capt. Lilly, and the subsequent cutting of the path on the left of the motor road, substantially the same as was given by the said Nana Brantuo but he denied that custom had been performed. It is not clear whether this witness was present on these occasions, owing to his deputising at the hearing for his Chief and largely if not entirely (in accordance with custom) giving his evidence as if the Chief in person. (See Record 73 ll.3-6)

He stated that the Chief did not accompany

p.69 ll.8-11

Capt.Lilly but deputed 3 named Okadjakrom men to do so,two of whom were named Adjei but he does not identify himself as either of these, though some parts of his evidence may indicate that he was with the party (See Record p.71 l.30), perhaps unofficially, and did not accompany the party that cut the boundary from Obribriwase to the motor road but accompanied Capt.Lilly back to Okadjakrom. He stated however that the deputation from Okadja-

p.71 ll.33-41

krom were ordered when they got to Obribriwase to cut a new land boundary between Atonkor and Okadjakrom, that the people from the Omanhene had the

p.73 l.9 & l.23
pp.73-74

same orders and appears to admit that the boundary path from Obribriwase to the motor road was in fact cut.

Two other witnesses were called for Ojadjakrom but their evidence was of no or little value.

p.75

13. The said Nana Brantuo II was the final witness

as witness for both parties. The effect of his Evidence has been stated in paragraphs 5, 6 & 7 of this Case. Record

14. After hearing the witnesses, the Court, accompanied by the parties and two others from each side, viewed the disputed land on the 1st July 1940. The then Plaintiff (the present Respondent) showed Obribriwase and led them along the path made under Capt.Lilly to the motor road, where was a heap of stones said to have been placed there by Capt. Lilly, passing through farms from 1 to 5 years old made by men from Okadjakrom. p.79 p.79

Then the Defendant (the present Respondent) led the party along the motor road to a spot marked by a dead tree, which it was agreed was the old road clearing boundary. Thence the Defendant led the party to the Konsu, passing through land where palms were being cut by Atonkor people as land owners and cocoa farms had been made by them. The Defendant alleged that this line from the motor road to the Konsu was the limit to which his people had cultivated to meet the Atonkor people, because there was no boundary between them. It was (he said) not an established boundary and no fixed boundary had ever been established between them. p.80 p.80 ll.17-29.

15. In their judgment on the 2nd July 1940 the State Council first stated the question at issue, namely firstly whether there existed an established boundary and secondly whether the Defendant had trespassed over it. pp.80-82

They were satisfied that about 18 years before Captain Lilly (referred to as the Political Officer) did order that a boundary should be fixed between the lands of the Plaintiff and Defendant but they did not accept a fragmentary copy of Capt. Lilly's judgment ordering the cutting of a boundary path as proof that this was cut, though they accepted that the witness Adabra with another were the deputies of the Omanhene entrusted with the cutting. p.81 l.9 p.81 ll.39-47

They did not however accept Adabra's evidence that the boundary from Obribriwase to the motor road was actually cut because (they said) Brantuo had said the contrary. In this the Court appear to have been in error, for the recorded evidence of Brantuo does not contain any such statement but shows that, after Capt.Lilly had sent the boundary p.76 ll.21-36

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cutters off towards the motor road, Brantuo went in another direction with Capt.Lilly and did not see the cutting party again until they emerged upon the motor road. Indeed Brantuo implies by
p.76 l.40 his evidence that a path was cut by this party, for his business was to continue it on the other side of the road.

p.81 ll.29-33 From the view the Court found that, apart from the two heaps of stones (at Obribriwase and on the motor road respectively), there were no signs of a boundary between the then Plaintiff (now Respondent) and the then Defendant (now Appellant).

p.81 ll.43-45 The Court on the evidence found that the boundary was not cut (from Obribriwase to the motor road) and not completely cut (from the motor road to the west to the end of the lands of the Plaintiff and Defendant).

Holding therefore that the Plaintiff had failed to prove that there existed an established boundary, so that consequently it was not possible for the Plaintiff to prove a trespass, the Court gave their decision in the following words:-

p.82 l.3 "Judgment is for Defendant with costs to be taxed. Defendant to retain his farms.

No order as to the fixing of boundary is made until one or both the parties move the Court for it."

pp.82-83 16. An appeal to the Provincial Commissioners Court was dismissed on the 22nd May 1941, the Provincial Commissioner, while holding that Captain Lilly had determined the (whole) boundary between the parties, finding that his decision owing to mutilation could not be interpreted.

p.84 17. A further appeal to the West African Court of Appeal was dismissed as without substance on the 27th November 1941.

p.87 l.14 18. On the 17th December 1941 the then Defendant (the present Appellant) presented to the said trial Court an ex parte application for an order to cut and demarcate the boundary between Okadjakrom and Atonkor, proposing that it should be cut right and

left through the parties' old road clearing boundary or for any other order which to the Court might seem meet. It is presumed that the reference to the old road clearing boundary is to the spot on the motor road where there had been in 1922 an Otokotaka tree, which in 1940 was dead. The Court on the 18th December 1941 adjourned the application to a date to be fixed, both parties to be served. Record

A date for the hearing was given in April 1942 but the Applicant declined to attend in the absence of the Paramount Chief and objected to the constitution of the Court, and to the members of the Court entering the land. The Court thereupon dismissed the application. pp.88-89

19. On the 8th August 1949 the then Defendant (the present Appellant) applied to the State Council for an order to proceed upon the judgment of the 2nd July 1940 and "to inspect the boundary in dispute and determine the course thereof and to effect and complete the demarcation thereof" or for such other order as the Tribunal thought fit. In his Affidavit in support he stated that his previous objections had been made under misapprehension. The then Plaintiff (the present Respondent) countered by asking that the order of the Court should be to cut and demarcate the boundary by planting boundary trees on the line between the two heaps of stones referred to in the Tribunal's judgment of the 2nd July 1940. This application was referred to the Native Appeal Court of Borada for hearing and determination. p.97 l.5 p.85 p.91 p.85 p.90 l.29 p.95 l.1

Both parties appeared before the Court and consented to the boundary being demarcated by the Court and the then Defendant (the present Appellant) admitted that he knew the two heaps of stones and that they had been put there by Captain Lilly. p.92

The Court decided to view the land and did so on 4th November 1949 with the parties, who showed their respective boundary marks. p.93

On the 27th February 1950 the Court decided that the boundaries claimed by the parties could not be relied upon and made an order upon the motion that in accordance with Buem Customary laws and usage the area in dispute should be measured and divided into two equal parts, the northern half to be the property of the then Plaintiff (the p.97 l.46 to p.98 l.30

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present Respondent) and the southern half to be the property of the then Defendant (the present Appellant) and that if after this sharing any of the parties might possess cocoa or other farms of the other party there should be an amicable adjustment in accordance with custom.

pp.99-101 In accordance with their decision and order of the 27th February 1950 the members of the Court on the 31st July and 1st August 1950 demarcated on the disputed area a boundary between the lands of Atonkor and Okadjakrom by planting ntome trees and performing custom. The line of this boundary appears as a red line on Exhibit J.

p,101 20. However the then Defendant (the present Appellant) desired to appeal against the order of the 27th February 1950 and applied to the Magistrate's Court for special leave to appeal, which application the Magistrate's Court appears to have refused to entertain for a reason which does not distinctly appear but may have been that the

p.102 application was out of time. Upon further appeal to the Supreme Court of the Gold Coast the Supreme Court on the 9th September 1950 held that the order of the 27th February 1950 was an interlocutory order in Suit No.6 of 1940 consequent upon the judgment of the 2nd July 1940 and the application was not out of time. The Supreme Court

p.103 accordingly ordered the Magistrate's Court to hear the application for special leave to appeal.

pp.103-4 21. On the 22nd March 1951 the Magistrate's Court decided, contrary to the contention of the then Defendant (the present Appellant), that the Native Appeal Court had had jurisdiction in making the Order of the 27th February 1950 but, in accordance with another contention of the then Defendant, set it aside on the ground that the decision of the State Council (of the 2nd July 1940) gave to the then Defendant the whole area in dispute and that therefore the Native Appeal Court could not divide it between the then Plaintiff and the then Defendant but it was their duty to define the boundary between the area in dispute and the then Plaintiff's land which it had not attempted to do.

THE PRESENT LITIGATION.

p.2 22. In his Summons, dated the 5th December, 1951, in a suit No.73/1951 brought by the above named Nana Adjei III in the Native Court of Omanhene of Buem against Nana Adjedu II (hereinafter called

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"the Principal Respondent") the Plaintiff (now the Appellant in the consolidated appeals) claimed (1) a declaration of title to land more particularly described in the said Summons and therein called Kafuetonku (subsequently identified as the area edged red upon Exhibit J) (2) £50 damages against the Principal Respondent and his subjects for their trespass on the said land and (3) a perpetual injunction to restrain the Principal Respondent, his agents, servants, subjects and people from further commission of any form of trespass on the said land. p.4

23. In his said Summons the Appellant relied on the said judgment of the Buem State Council, dated 2nd July, 1940, he alleging that suit 6/1940 had been in respect of the land Kafuetonku as described in the summons in suit 73/1951 and set out that the judgment in suit 6/1940 had been:- "Judgment for the Defendant with costs to be taxed - Defendant to retain his farms," but omitted to add the following words: "No Order as to fixing of boundary is made until one or both of the parties move this Court for it". p.3 ll.4-5
He alleged that this had had the effect of an Estoppel per rem judicatam, preventing the Principal Respondent or any of his subjects of Atonkor from alleging that they owned the land the subject matter of the suit. p.3. l.34

24. By an order dated 15th March, 1952 of the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Division, Accra, the said suit was transferred from the Native Court of the Omanhene, Buem, to the Land Division of the Supreme Court of the Gold Coast at Accra and became transferred suit No.1/1952.

25. On the 17th April, 1952, pleadings were ordered, and on the 20th August, 1952, the Appellant delivered a Statement of Claim, which in all essentials contained the same allegations and claims for reliefs as in the Summons, but now claimed £1,000 damages instead of the £50 originally claimed. The Statement of Claim, in paragraph 2 thereof, repeated as the conclusion of the said Judgment on the 2nd July, 1940,: "Judgment for the Defendant with costs to be taxed - Defendant to retain his farms" but again omitted the words referred to at the end of paragraph 23 hereof. In paragraph 3 of the Statement of Claim there was a pp.6-8
p.6
(sic)
p.7

Record

p.30 l.35

p.7 l.3

a reference to a plan of the land in dispute said to be dated 18th, but actually 11th, August 1952, which was subsequently put in by consent of all parties as Exhibit "J", and in regard to which the Appellant stated that the area of the land the subject of the former suit was shown by the yellow line to the East and green line to the West and embraced the area marked Red which was the subject matter of that present suit - "the Defendant having now abandoned his claim to the land between the purple line and the yellow line shown on the said plan". It is submitted that the allegation that the land between the yellow line and the green line was the subject of the former suit is contradicted by the documents in that suit and particularly by Exhibits A, K, B and C.

p.7 l.10 et seq.

26. The Statement of Claim proceeded to allege, inter alia, as follows:-

"4. The said judgment of the Tribunal of the Buem State Council dated 2nd July, 1940, was subsequently confirmed on Appeal by the Provincial Commissioner's Court, and later by the West African Court of Appeal." (This is correct and is stated in paragraphs 16 & 17 of this Case).

"5. In subsequent Interlocutory proceedings commenced in the Native Court "B" of the Omanhene of Buem in respect of the same parcel of land which came on appeal before the Magistrate (constituted by the District Commissioner) Kpandu, the said Magistrate, on the 2nd March, 1951 ruled as follows:-

> 'Counsel for the Defendant argues that the original decision by the State Council gave to the Defendant the whole area in dispute. This is correct, Counsel for Plaintiff argues that the boundaries of the area in dispute are not known and that the Buem/Borada Native Court has sensibly settled the matter by dividing equally between the parties the area in dispute. This may be a sensible solution, but it is in face of the original Judgment giving the area in dispute to the Defendant.. ..... The Appeal therefore allowed and the Order made by the Buem/Borada Court ordering that the Land in dispute shall be divided equally between the two parties is set aside.'

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"6. The Line of Demarcation made by the Borada Native Court 'B' and which was set aside by the Appellate Court of the Magistrate (constituted by the District Commissioner) Kpandu as set forth in paragraph 5 supra, is that shown running through the middle of the area edged Red by the Red line running from the Southern Boundary from a point marked "Nguan Tree" in a Northerly direction to three Onyma Trees by the old track from Atonkor Jasikan called "ABIBRIWASE".

"7. The parties in both the original Suit and the subsequent Interlocutory proceedings are the same as in this present Suit, and the subject matter is also the same - and the Defendant in this Suit is Estopped "Per Rem Judicatam" by the said recited decisions or Judgments from alleging that he or any of his subjects or Atonkor own the Land the subject matter of the Suit edged Red in the Plan.

"8. The Defendant and his subjects, in spite of the judgments against them, have been persistently entering upon the Land in dispute and disturbing the Plaintiff and his subjects in their occupation of farms on the said Land and wrongly taking and carrying away crops from the said farms."

The reliefs claimed by the Appellant in the present Suit have already been set out in paragraph 25 of this printed Case.

27. The Principal Respondent filed his Statement of Defence on the 11th September, 1952. In paragraph 2 thereof he stated as follows:- p.8

"The Defendant avers that he is the Owner of All that piece or parcel of land edged Red in the Plan filed herein by reason of being the occupant of the Stool of Atonkor, and that the Suit referred to by the Plaintiff in paragraph 2 of his Statement of Claim was in respect of that portion of the land along the Southern Boundary of the land in dispute."

But at the hearing this was deleted and another paragraph substituted as is stated in paragraph 32 of this Case.

In paragraph 3 of his Statement of Defence the Principal Respondent stated that his claim in Suit 6/1940 was for damages for trespass committed by nine named Defendants who made cocoa farms on

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the Southern boundary of his land. Several of these farms are shown on Exhibit J on or straddling the southern boundary.

In paragraph 4 thereof he pleaded that the judgment of the 2nd July, 1940, never conferred title of the whole land upon the Appellant, and that it rather read as follows:-

> "Judgment is for Defendant with costs to be taxed. No Order as to fixing of boundary is made until one or both of the parties move this Court for it."

so omitting here the intermediate words "The Defendant to retain his farms" but referring to them in paragraph 9.

Paragraphs 5 to 11 inclusive of the Statement of Defence are as follows:-

"5. The Defendant therefore will contend that the said Judgment was not complete and that the Rights of the Parties in that case were not conclusively defined and that is borne out by the fact that the Plaintiff had to move the Borada Court 'B' in 1950 for the demarcation of the boundary between the Plaintiff and the Defendant's land.

"6. The Defendant admits the allegations contained in paragraphs 3,4,5 and 6 of the Plaintiff's Statement of Claim but will contend that the said Interlocutory Proceedings did not decide the issue between the parties.

"7. The Defendant avers that since the said Judgment of 2nd July, 1940 was incomplete and was in respect of mere Trespass to a portion of the land in dispute it cannot constitute an Estoppel "per rem judicatam" for the claim now before the Court is substantially a claim for Declaration of Title which was never decided by the said Judgment in favour of the Plaintiff.

"8. The Defendant in reply to paragraph 8 of the Plaintiff's Statement of Claim avers that his subjects have farms on the land and are still making farms on the land in dispute and they do so in exercise of their rights of Ownership.

"9. In further reply to paragraph 8 of the Plaintiff's Statement of Claim the Defendant avers that his subjects have not been disturbing the Plaintiff's

subjects for the use of the farms which they were allowed to retain under the 1940 Judgment. Record

"10. The Defendant denies that he or his subjects have trespassed on to the Plaintiff's land or farms belonging to Plaintiff's subjects.

"11. The Defendant denies that the Plaintiff is entitled to the Reliefs or any of the Reliefs he claims."

28. In paragraph 13 the Principal Respondent counterclaimed for a Declaration of Title to all that piece or parcel of land edged Red in the Plan (Exhibit "J") referred to in paragraph 25 hereof, and for a perpetual injunction restraining the Appellant and his subjects, servants, agents from interfering with the lawful use of the Principal Respondent's said land. p.10

29. On the 15th September, 1952, the Appellant delivered his Reply and in the first paragraph joined issue on the allegations contained in paragraphs 2 to 11 inclusive of the Statement of Defence. In the second paragraph he asserted that the principal Respondent claimed in the former suit to have title not only to the parcel edged Red on the plan in question, but also to the land further East to the line shown or marked yellow on the said plan, and that the whole area thus claimed by the principal Respondent in the former Suit was held or adjudged not to belong to him. In the third paragraph the Appellant averred that not only the description of the area involved in the first suit, but also the fact that the Appellant claimed right up to the western line, shown in green on the plan, refuted the Principal Respondent's allegation that the former suit related to and was in respect of only the portion of the land along the southern boundary of the land in dispute.

In the fourth paragraph of the Reply the Appellant pleaded that, notwithstanding the principal Respondent's claim for damages for trespass in the former suit, it clearly raised the issue of ownership of or title to the area of the land and that the Appellant defended it on the ground that he was the owner of the area of the land the subject-matter of that suit. In the fifth paragraph of the Reply the Appellant contended, inter alia,

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that "it was adjudged in the former suit that "the "principal Respondent"as plaintiff in the former "suit, was not the owner of the area of land claim- "ed in such former suit, which is the same as that "in respect of which he was now sued in the present "suit". In the sixth paragraph of his Reply the Appellant contended, in regard to paragraph 4 of the Statement of Defence that the matter of fixing a boundary or boundary marks has nothing to do with the adjudication that the area in dispute did not belong to one, but did belong to the other of the contesting parties. In the seventh paragraph of the Reply the Appellant contended that the judgment of the 2nd July, 1940, was definite enough to estop the principal Respondent in the present suit, and that the provision as to cutting or marking a boundary did not impinge on such finality. Apart from the last paragraph of the Reply denying any of the reliefs claimed in the Counterclaim the remaining paragraphs of the Defence were merely repetitive.

30. On the 11th September, 1952, the seven co-Defendants (now Co-Respondents) whose names are set out in the appeal Title hereof applied to the Court to be joined as Co-Defendants in the suit,

p.16 and on the 7th April, 1953 their application was granted. Not all the Co-Defendants (now Co-Respondents) were subjects to Atonkor, the Co-Defendant (now Co-Respondent) Darko being from a

p.37 l.32 place called Akaa and a subject neither to Atonkor nor to Okadjakrom.

pp.17-19 31. In their joint Statement of Defence, delivered on the 27th May, 1953, they virtually adopted the Statement of Defence (amended as stated in para.32 of this Case) of the principal Respondent,

p.17 l.41 but they alleged that no plea of res judicata was maintainable against them because (1) they were not parties to suit 6/1940 (erroneously called suit 60/1940) (2) their claims related to portions of the land in dispute other than the portion the subject of suit 6/1940 (3) they were not privies to the Principal Respondent, and they set up a claim to long and undisturbed usufructuary possession and occupation of the particular portions of the land in dispute. There are lands and farms of the first Co-Defendants shown upon Exhibit J but whether these are the lands and farms referred to was never proved.

p.19 32. On the 27th May, 1953, the Principal Respondent gave notice that he would at the hearing apply

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to the Court for leave to amend his Statement of Defence by deleting para.2 and substituting another paragraph, which leave was granted by the Court on the 23rd November, 1953. By the amended paragraph the Principal Respondent denied that in suit 6/1940 his claim had been that which the Appellant had alleged in para.2 of his Statement of Claim and set out verbatim what in fact it had been (which is stated in para.8 of this Case). There appears to be no leave for the Appellant to amend his Reply in consequence thereof, nor was any amended Reply delivered.

33. Meanwhile on the 12th September, 1951, Asafoatse Kwadjo Nkansah of Atonkor, the 4th of the seven Co-Defendants referred to in paragraph 9 hereof, and the successor of Kosome, whose dispute had brought Capt. Lilly on the scene, brought a suit by way of Civil Summons in the Native Court 'B' of Omanhene of Buem against the Appellant claiming a declaration of title to ownership and possession of a property at "Kafiertonku" near Atonkor more particularly therein described but which is not definitely identifiable upon Exhibit J and the site of which was never proved; £25 damages for trespass; mesne profits for the past two years; and a perpetual injunction restraining the Appellant his agents or servants from interfering with Plaintiff's lawful farms and enjoyment of his dealing with his said land. p.20

34. On the 7th July, 1953, the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Division, Accra, passed an order transferring the suit of Asafoatse Kwadjo Nkansah against Nana Adjei III, referred to in the preceding paragraph, to the said Land Division, where it became transferred suit L1/1953. p.22

35. On the 18th February, 1953, pleadings in the said suit were ordered, and on the 6th March, 1953, the Plaintiff delivered his Statement of Claim in which he claimed title to the property described in his Summons and averred that approximately three years previously the Appellant had plucked and carried away Plaintiff's cocoa and had since then prevented Plaintiff and his family having the lawful use and enjoyment of his farm or property. He also claimed damages, mesne profits and a perpetual injunction restraining Appellant, his servants or agents from further interfering with p.23

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the Plaintiff's lawful use and enjoyment of his property.

p.24

36. On the 8th April, 1953, the Appellant delivered his Defence, which was virtually a traverse of all the allegations in the Plaintiff's Statement of Claim and a setting up against this Plaintiff of the same case as he was making against the Principal Respondent.

p.26
p.28

37. On the 13th April, 1953, the Land Court ordered a survey of the disputed land, (which however was not made, presumably because of the existence of Exhibit J which as already stated in para.25 was subsequently put in) and on the 13th May, 1953, the Land Court ordered that the suits of Nana Adjei III and Asafoatse Kwadjo Nkansah be consolidated.

p.30

38. On the 24th November, 1953, the Court ordered on the application of the Plaintiff Adjei III that the question as to "Res Judicata" be tried first, after Counsel for Appellant had said that it was his case that the land which was the subject of the 1940 suit was that shown (on Exhibit J) up to the Yellow boundary on the south east. Counsel for Appellant confined his evidence to putting in the Exhibits "A" to "H" inclusive, relating to the litigation in suit No.6 of 1940 in the Buem State Council before referred to, and the plan Exhibit "J" made by the Licensed Surveyor. In his evidence the latter said inter alia as follows:-

p.31 ll.29-43

"I was also told there had been a recent demarcation of boundary by the Borada Tribunal. Plaintiff pointed this out to me in presence of Defendant. I have shown same on the plan by a Red line, but not surveyed because no definite marks were given to me and the track was not visible.

"I have indicated the several farms pointed out in the area: of these only 12 farms are claimed by both parties: all the others are claimed by one side or the other. The 12 disputed farms are numbered red in the plan and also described in my notes on the plan.

"I have also shown the relative positions of the towns of the two parties: Atonkor on the North West and Akadjakrome on the South East,"

and again

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"On the plan I have made reference Notes with respect to the farms whose numbers are shown on the plan as Nos. 1-12 in red ink. Where I have written letters P and D in front of any name, it shows both parties claim the farm; but where I have written either P or D alone it shows both parties agreed the person whose name is written after the number owns the farm." p.32 l.41 to p.33 l.2

39. On the 26th November, 1953, by consent the proceedings in Suit No.6 of 1940, referred to in paragraph 2 hereof, were put in evidence to enable the Court to ascertain the subject matter of the suit and the issues raised and determined and were marked Exhibit "K", whereupon the Appellant closed his case on the issue of res judicata. p.34 l.10

40. On the same day the Principal Respondent gave evidence identifying the evidence he had given in Suit No.6/1940. He deposed that the yellow line on Exhibit J was the line he had pointed out to Capt. Lilly as his boundary before the latter fixed the boundary from Obribriwase to Apeboa on the lorry road, this latter being the boundary pointed out by him in suit 6/1940 and claimed by him as his boundary in the present suit as extended (in a northerly line) to the River Konsu; that his contention in 1940 had been that, because Captain Lilly had fixed the boundary on the purple line, all the land to the north west up to Atonkor, including the River Konsu, was his land but not as land attached to his Stool but as family land, i.e. for the family of which in 1940 Kosome had been the head, and it was still for the same family. p.34 l.20 l.25 p.35 l.9 p.63 l.14

While under cross-examination he agreed that the dispute in 1940 had arisen over the same area of land except for the part from Obribriwase to the River Konsu (i.e. north of the path there from Atonkor) as was then in dispute but pointed out that in 1951 the Appellant had applied to the Native Court to demarcate the boundary when the Native Court had decided to divide the land equally and demarcated it (but this had been set aside on appeal). After his evidence was concluded, both Counsel addressed the Court on the 27th November 1953, but judgment was not delivered until the 16th July, 1954. That judgment was in favour of the R.35 p.39

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Appellant, in effect dismissed the Counterclaim of the principal Respondent and expressly dismissed the suit of Asafoatse Kwadjo Nkansah, referred to in paragraph 33 hereof.

R.41 l.11

41. In his judgment the learned Judge erroneously recited that in suit 6/40 the Principal Respondent had claimed a declaration of title (though all that the Principal Respondent had claimed was that the boundary laid down by Capt. Lilly was the territorial boundary between the land of the then Plaintiffs and the land of Defendant). He also

R.41 l.35

recited that in transferred suit 1/1952 the Appellant (Plaintiff in suit 1/1952) had pointed out to the surveyor the boundary (edged green on Exhibit

R.80 ll.17-29

J) which he had claimed in Suit No.6/40 (though in that suit he by his representative had admitted there was no established boundary).

R.41 l.39

He also recited that in transferred suit 1/1952 the Principal Respondent (Defendant in suit 1/1952) had pointed out to the surveyor the boundary (edged yellow on Exhibit J) which he had claimed in suit 6/40, (though in that suit it is

R.61 l.17

clear that he had claimed that the boundary laid down by Captain Lilly between Obribriwase and the lorry road (edged purple on Exhibit J) was the territorial boundary, the yellow line indicating

p.34 l.25

what the Principal Respondent had considered his territorial boundary before Capt. Lilly had laid down the Obribriwase - Apeboa lorry road boundary as the boundary).

But he entirely omitted to refer to the statement

p.81 l.3

by the Court in Suit 6/40 of the question at issue - whether there existed an established boundary and secondly whether the present Appellant had trespassed over that established boundary or to

p.82 l.1

refer to their conclusion that the cutting and demarcation of the boundary (that directed by Capt. Lilly) were not complete in (1) action as well as (2) custom, or to refer to the Court, after giving judgment for the Defendant and directing that the Defendant should retain his farms, having made it clear that not only was there no established boundary in existence between the parties but that no boundary was established by their decision by the statement that no order as to the fixing of a boundary was to be made until further motion, so that nothing was then decided as to where the boundary was or was to be.

R.42 l.20

He stated on the contrary that the judgment

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in suit 6/40 fully discussed the merits of the claims when there was no discussion of any question but whether the boundary directed by Captain Lilly had been made, sanctified and existed as the established boundary: And he also stated that the judgment in suit 6/40 had declared the present Appellant owner of the land between the two boundaries edged on Exhibit J green and yellow respectively when no such declaration was made, expressly or by implication, but on the contrary it was expressly made clear that the extent and boundaries of the lands of the parties had yet to be determined. He proceeded:- R.42 l.22

"I am satisfied that the parties now, as in the former suit No.6/40 are the same; the land subject matter of the suit is the same, in so far as the claim of the plaintiff is concerned; he having claimed river Konsu as his Northern boundary. The fact that defendant herein limited his claim up to Abribriwase as his Northern Boundary, thus showing that he did not claim a narrow strip of land south of the river Konsu, does not, in my view detract from the judgment the benefits conferred on the plaintiff in respect of that portion of the land he had in fact claimed."

It is submitted a further error of fact appears in the Statement of the learned Judge, due to his misconception of the scope of suit 6/40, that "the fact that" in suit 6/40 the Principal Respondent "limited his claim up to Abribriwase as his northern boundary, thus showing that he did not claim a narrow strip of land south of the River Konsu". In truth the Principal Respondent had alleged an established boundary southwards from Abribriwase to the motor road and trespass across it, which did not show one way or the other what he claimed in any other direction than across the alleged established boundary, which the narrow strip of land south of the River Konsu was not.

42. The Respondents respectfully contend that the learned Judge further misdirected himself, for it is a principle of Estoppel per rem judicatam that the previous judgment must be complete and the rights of the parties conclusively defined, for the judgment in suit No.6 of 1940 held that the cutting and demarcation of the boundary were not complete in (1) action as well as (2) custom, and the appeal to the Provincial Commissioner in appeal was dismissed on the 22nd May, 1941, followed by a p.82 ll.1-2

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dismissal of the further appeal to the West African Court of Appeal on the 27th November, 1941.

p.43

43. That the Respondents appealed to the West African Court of Appeal on the 28th July, 1954, against the judgment of the Land Judge of the 16th July, 1954, and their appeal was allowed on 25th February, 1956.

In the course of their judgment (which was delivered by Acting Judge of Appeal Ames (the other 2 Judges concurring)) the West African Court of Appeal said as follows:-

p.52 l.31 to p.53 l.15

"In the 1940 case, the Atonkor Stool had sued the Okadjakrom Stool for damages for trespass and a declaration that their boundary with Okadjakrom was in effect the purple line, and that the land in dispute was their land.

"Apparently in 1922 they had asserted that the boundary left the motor road at a point even nearer to Okadjakrom than in the purple line. That 1922 line is coloured yellow on the plan, and it joins the purple line at a spot called Obribriwase where the purple line begins to get close to the river.

"The reason that in the 1940 case they withdrew their claim from the yellow line back to the purple line was this. In 1922 or so, the then District Commissioner, Lilley by name, had attempted to settle a dispute by deciding that the boundary should run from Obribriwase to the motor road along the purple line and not the yellow line, and had put up heaps of stones at Obribriwase and at the road end of the purple line and had said that the length of it should be marked with the usual boundary marks. But it appears from the evidence that Okadjakrom never agreed that that was the correct boundary, and in fact (as found by the Court in the 1940 case) the line was never so marked and the customary ceremonies by which a disputed boundary is irrevocably and mutually established were not performed.

"It was this last fact which made the Buem Court reject the appellant's" /now principal Respondent's/ "claim in the 1940 case and give judgment for the respondent" /now the Appellant/.

and again

p.53 ll.29-38

"There was no counterclaim by the respondent"

/now Appellant/ for a declaration that the green line was the boundary or that he possessed a good title to the area of land in dispute. Record

"How, does that judgment constitute a declaration of title for the respondent to the whole area of land in between the green and purple lines so as to enable him to prosecute, without any further evidence of title, any claim founded on such title against any Atonkor farmer who is in occupation of any part of it without his permission?"

44. The Court thought that the answer depends on what was in issue between the parties, and after setting out the result of their persual of the inspection notes and of the judgment of the Court of the Buem State Council of the 2nd July, 1940 (Exhibit "C"), came to the conclusion in the words of the Honble. Acting Judge of Appeal Ames:- p.53 l.39 p.80 p.81

"With all respect, I do not see how that judgment can be said to establish the green line as the boundary or how one can read into it a declaration of title in favour of the respondent of the land between the green and the purple lines. I think too that the subsequent action of the respondent " /now Appellant/ "shows that he also did not so interpret it at that time, although he has now changed his interpretation." p.54 ll.37-45

45. The judgment of the West African Court of Appeal proceeded, inter alia, as follows:- p.55 ll.23-34

"In December, 1941, the respondent (Okadjakrom) applied to the Buem Court for an 'order to cut and demarcate the boundary ..... which should be 'through our old road clearing boundary' (which was where the green line left the road). It appears that the Court was going to demarcate the boundary (there is nothing to show where they were going to start) but it all came to nothing because the respondent objected that the Court was differently constituted from how it had been in 1940 and the motion was dismissed on the ground of 'obstruction' by the respondent."

46. After referring to the Appellant's Application to determine and demarcate a boundary and relying on the case of Outram v. Morewood (1803) 3 East 345 and making a reference to an unreported case before the West African Court of Appeal in 1947, Abutia Kwadjo II v. Addai Kwasi, which laid down that p.55 l.30 to p.57 l.33

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although a declaration of ownership and possession could not be given in a particular case because of the omission on the part of Counsel for the defendant to enter a counterclaim to this effect, nevertheless the judgment would be a bar to any further proceedings between the parties, the West African Court of Appeal said as follows:-

p.57 l.34 to p.58 l.6

"That case, which at first sight seems similar to this one, is nevertheless distinguishable. I have not the pleadings in the case, but from the judgment one must presume that it was the ownership of the land which had been in issue in the earlier case and which had been adjudicated upon.

"In this 1940 case of Atonkor v. Okadjakrom the Buem Court did not adjudicate upon the ownership of the land although the appellant had claimed a declaration to the land behind his alleged boundary line. The Court adjudicated only upon the issue "Is there an established boundary?" and omitted to consider where the boundary ought to be and how much, if any, of the land in dispute was owned by the appellant. There has been no adjudication upon these latter questions.

"I would allow the appeal and set aside the ruling and order of the Court below and order that the hearing of the two consolidated cases be continued."

Sir Henley Coussey, President, and Acting Justice of Appeal Jackson concurred in the main judgment without giving any reasons.

46. On the 29th October, 1956, the West African Court of Appeal granted the Appellant final leave to appeal to Her Majesty in Council, and the Respondents respectfully contend that the appeal should be dismissed with costs for the following, among other,

R E A S O N S

1. BECAUSE the issue in Suit No.6 of 1940 was whether there was an established boundary lying between Abribriwase and Apeboa and the issue in the present suit was whether the Appellant was entitled to a declaration of title to the lands claimed by him;

2. BECAUSE the Judgment in Suit No.6 of 1940 decided that there was not an established boundary;

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3. BECAUSE the said Judgment did not decide where the boundary was or ought to be;

4. BECAUSE with the exception of the Appellant and the Principal Respondent the parties are not the same;

5. BECAUSE the Judgment in Suit No.6 of 1940 was not complete and no rights of the parties to the present suit were defined conclusively or at all by the said judgment;

10 6. BECAUSE the said Judgment did not decide to which of the parties to the present suits belonged any part of parts of the land in dispute in the present suit but left that to be thereafter determined;

7. BECAUSE the Judgment of the West African Court of Appeal on the 25th February 1956 is right and ought to be affirmed.

GILBERT DOLD.

No. 24 of 1958

IN THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN:

NANA ADJEI III, Ohene of Okadjakrom for and on behalf of the Stool and people of Okadjakrom,
Plaintiff/Appellant

- and -

NANA ADJEDU II, Ohene of Atonkor for and on behalf of the Stool and people of Atonkor, Defendant/Respondent

and Others, Defendants/Respondents

AND BETWEEN:

NANA ADJEI III, aforesaid
Defendant/Appellant

- and -

ASOFOATSE KWADJO NKANSAH of Atonkor
Plaintiff/Respondent

(Consolidated Appeals)

C A S E

for the Respondent NANA ADJEDU II (Defendant/Respondent in the first appeal) and on behalf of the other Co-Defendants in the first appeal, and on behalf of ASOFOATSE KWADJO NKANSAH (Plaintiff/Respondent in the second Appeal).

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