

36,1960

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED STUDIES
No. 144 of 1959

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL, GHANA

IN THE MATTER of the State Councils (Colony and Southern Togoland) Ordinance, 1952

- and -

IN THE MATTER of an application for a writ of certiorari to issue

BETWEEN

10 NANA OWUSU AHENKORA II (Applicant) ... Appellant

- and -

KWABENA OYE (Respondent) and
THE MINISTER OF LOCAL GOVERNMENT (Respondent)
... .. Respondents

CASE FOR THE SECOND RESPONDENT

RECORD

1. This is an appeal from an order, dated the 4th November, 1957, of the Court of Appeal of Ghana (Van Lare, Ag.C.J., Sharp, J.A. and Adumua-Bossman, J.), allowing an appeal from a judgment, dated the 7th February, 1957, of the Supreme Court of the Gold Coast (Windsor-Aubrey, J.), granting an order of certiorari by which the Respondents were required to surrender, in order that they might be quashed, the proceedings of a Committee of Enquiry appointed by the Governor under the State Councils (Colony and Southern Togoland) Ordinance, 1952 and the Governor's confirmation of the report of the said Committee. pp. 66-67
pp. 28-30

2. The following statutory provisions are relevant to this appeal:

30 COURTS ORDINANCE (Laws of the Gold Coast, 1951, cap. 4) Section 2

In this Ordinance and in any ordinance in which this Ordinance shall be incorporated or applied the following words shall have or include

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the meanings hereinafter attached to them, unless there be something in the subject or context repugnant to such meanings, that is to say:-

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding;

.....

"Matter" includes every proceeding in the Court not in a cause;

.....

Section 88

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The Supreme Court and Magistrates' Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for -

- (1) the trial of any question relating to the election, installation, deposition, or abdication of any Paramount Chief, Head Chief, or Chief;
- (2) the recovery or deliver up of Stool property in connection with any such election, installation, deposition, or abdication;
- (3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more Paramount Chiefs or Head Chiefs, or between two or more Chiefs; or between a Paramount Chief and a Chief, or between a Head Chief and a Chief.

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STATE COUNCILS (COLONY AND SOUTHERN TOGOLAND)
ORDINANCE, 1952 SECTION 5

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(1) Subject to the provisions of subsection (2) of this section and of section 8 of this Ordinance, a State Council shall have jurisdiction to enquire into and determine any matter of a constitutional nature, arising within the area of authority of such State Council, in which

the parties are members of or subject to the authority of such State Council under the provisions of this Ordinance or according to customary law.

10 (2) In the case of a matter of a constitutional nature arising within a Division in Togoland, a State Council shall not enquire into or determine such matter unless it shall first have been subject to the consideration of the Divisional Chief sitting in council with his sub-Chiefs, and due regard shall be paid by the State Council to any opinions expressed or recommendations made in respect of such matter by such Divisional Chief sitting in council with his sub-Chiefs.

20 (3) In the exercise of the jurisdiction conferred upon it by subsection (1) of this section, a State Council shall conduct its proceedings according to customary law, but for the purpose of compelling the attendance of parties and witnesses and the production of documents, a State Council shall, subject to the provisions of section 35 of this Ordinance, have the like powers as are possessed by a Magistrate's Court in the exercise of its civil jurisdiction.

Section 8

30 (1) If in the opinion of the Governor it is in-expedient that a State Council should enquire into any matter of a constitutional nature, or if in his opinion a State Council or a Committee is unable to arrive at a conclusion on such a matter without undue delay, or if such matter is not cognizable by a State Council or a Committee, he may appoint a Committee of Enquiry consisting of three persons, of whom at least two shall be Chiefs, to enquire into such matter, and such Committee of Enquiry shall enquire into the same and shall submit a report thereon to the Governor, who may confirm, vary or refuse to confirm the findings thereof or may remit the matter to the
40 Committee of Enquiry for further consideration with such directions as he may think fit as to the taking of additional evidence or otherwise. The Governor's decision upon the report shall be final and conclusive.

(2) Where a Committee of Enquiry has been appointed under sub-section (1) of this section

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to enquire into a matter of a constitutional nature, a State Council or a Committee, as the case may be, shall not have jurisdiction over the same, and any proceedings relating to the same then pending before a State Council or a Committee shall thereupon be stayed.

(3) In the performance of the duties imposed upon it under the provisions of sub-section (1) of this section, a Committee of Enquiry shall have power to regulate the conduct of proceedings before it and for the purpose of compelling the attendance of parties and witnesses and the production of documents a Committee of Enquiry shall have the like powers as are possessed by a Magistrates' Court in the exercise of its civil jurisdiction.

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pp. 1-2

3. On the 6th December 1956 the Appellant gave notice of motion in the Supreme Court of the Gold Coast for an order granting leave to issue a writ of certiorari, calling upon the Respondents to surrender the proceedings of a Committee of Enquiry appointed under Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952 and the Governor's confirmation of the report of that Committee. The following were the grounds of the application, as set out in the Appellant's statement in support of the notice of motion and the exhibits thereto:

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p. 3 ll. 31-36

(a) On the 1st September, 1952 Ntiamoa Kofi III, Ohene of Adowsena, had been destooled by the Akim Kotoku State Council.

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p. 3, ll. 24-26

(b) On the 26th March, 1955 the Appellant had been enstooled as Ohene of Adowsena.

p. 4, ll. 1-7

(c) Ntiamoa Kofi III had been prosecuted and convicted for failing to deliver Stool properties when ordered to do so by the State Council, and his conviction had ultimately been affirmed by the West African Court of Appeal on the 29th August, 1955.

p. 4, ll. 9-13

(d) On the 5th November, 1956 the first Respondent and others had preferred certain charges against the Appellant before the Akim Kotoku State Council and had applied for his destoolment.

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- (e) On the 24th March, 1956 the Officer administering the Government, acting under Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952 had appointed a Committee of Enquiry - p.4, ll.16-21; pp. 12-13

10 "to enquire into a dispute in Adowsena of the Akim-Kotoku State being a matter of a Constitutional nature, between Kwabena Ofe, Krontinhene of Adowsena of Akim-Kotoku State and others of Adowsena of Akim-Kotoku State and Nana Owusu Ahenkora II, Ohene of Adowsena of Akim-Kotoku State and to report on the dispute".

- (f) The said Committee in due course reported to the Governor that it had not been proved to their satisfaction that any barrier existed to preclude Nana Ntiamoah Kofi III from ascending the Adowsena Stool, no charges had been proved to merit his destoolment, and in the opinion of the Committee he had not been destooled and consequently he, and not the Appellant, was the Ohene of Adowsena. On the 5th November, 1956 the Governor, upon consideration of the report of the Committee, had confirmed these findings. p.4, ll. 22-30; p.13

- (g) The Committee, in the Appellant's submission, had exceeded their terms of reference, because they had not been asked to go into the merits or demerits of the destoolment of Ntiamoa Kofi III. The Committee, he submitted, had had no jurisdiction to go into that destoolment and had not been authorised to do so by any competent authority. p.4, l.31 - p.5, l.13

4. On the 17th December 1956 the Appellant's motion came before the Supreme Court of the Gold Coast, and leave was given to issue a writ of certiorari. p.14

5. The first Respondent swore an affidavit in which he said:

- 40 (a) That the Akim Kotoku State Council had had no power or authority to destool Ntiamoa Kofi III, and his destoolment had not been recognised either by the electors of the Stool of Adowsena, or by the Government. p.17, l.36- p.18, l.10

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- p.18, 11.
11-30 (b) The terms of reference of the Committee of Enquiry had been general and comprehensive. In order to determine the true position of the Appellant, the Committee had been entitled to examine the circumstances which had led to the alleged destoolment of Ntiamoa Kofi III, since one of the alleged charges brought against the Appellant was that he had aided and abetted certain persons to bring about this destoolment unlawfully. 10
- p.18, 11.
38-41 (c) The Governor's decision under Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952 was final and conclusive and could not be questioned.
- p.18, 1.42-
p.19, 1.1 (d) The Supreme Court had no jurisdiction to entertain the application because the proceedings were in respect of a matter of a Constitutional nature.
6. The Appellant swore a further affidavit, in which he said: 20
- p.20, 1.37-
p.21, 1.2 (a) The Akim Kotoku State Council had jurisdiction to hear and determine any Constitutional matter arising in the area of that State.
- p.21, 11.
3-9 (b) The destoolment of Ntiamoa Kofi III had been recognised and accepted by the State Council and by the proper electors of Adowsena and had been duly communicated to the Government.
- p.21, 11.
15-20 (c) This destoolment did not form part of the terms of reference of the Committee of Enquiry, which had been strictly limited to the charges preferred against the Appellant. 30
- p.21, 11.
23-26 (d) The point in issue in the application was whether the Committee of Enquiry had exceeded its terms of reference and had thereby exceeded its statutory authority.
7. The application came before Windsor-Aubrey, J. on the 23rd January, 1957. The learned Judge delivered a reserved judgment on the 7th February, 1957. He said that all Counsel seemed to agree that the purpose of the Committee's Enquiry had been to investigate certain charges preferred against the Appellant which, if proved, might justify his 40
- p.28, 11.
24-36

RECORD

p.28, 1.37 -
p.29, 1.18

10 destoolment. Counsel for the second Respondent had argued that, if the Committee decided these charges were proved and the Appellant ought to be destooled, it was bound to conclude also that the former Stool holder should be restooled. The learned Judge said that the Committee could not reverse a decision already taken by a State Council, and was bound by its terms of reference. Whatever those terms of reference might have meant, he could not read into them any term to recommend the restoolment of the former holder. It had been argued that Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952 deprived the Court of jurisdiction to enquire into the matter. The learned Judge held that the Court could not interfere with an order lawfully made within the scope of the Governor's powers under section 8, but could interfere when the whole of the order was totally illegal. In his view, the Committee, in recommending the restoolment of a 20 destooled Chief, and the Governor, in confirming that recommendation, had both acted without jurisdiction. An order of certiorari was accordingly granted, requiring the Respondents to surrender to the Court, in order that they might be quashed, the proceedings of the Committee of Enquiry and the Governor's confirmation of the Committee's report.

p.29, 11.
19-29

p.29, 1.39 -
p.30, 1.7

30 8. Both the Respondents appealed against this judgment. The first Respondent took a number of points in his Notice of Appeal, dated the 7th February, 1957, including the following:

pp.30-32

- 40 (a) By reason of Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952, the Supreme Court had had no jurisdiction to question the validity of the report of the Committee of Enquiry or the Governor's confirmation of that report.
- (b) The question in issue was of the nature of a Constitutional matter, so, by virtue of Section 88 of the Courts Ordinance, the Supreme Court had had no jurisdiction to entertain it.
- (c) The terms of reference of the Committee of Enquiry had been comprehensive, and the Committee had been obliged to enquire both into the charges preferred against the Appellant and into the unlawful destoolment of Ntiamoa Kofi III. The Governor's decision had not been ultra

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vires the terms of reference, because the simple issue before the Committee had been which of two persons was the Chief of the Community of Adowsena.

pp.33-34

9. The second Respondent's grounds of appeal, set out in his Notice of Appeal of the 13th February, 1957, were the following:

(a) The divisional Court had no jurisdiction because the Governor acted in his discretion under Section 8 of the State Councils (Colony and Southern Togoland), Ordinance, 1952. 10

(b) The Governor acted in his administrative capacity and his decision was therefore final and conclusive.

(c) The decision of the Governor based upon the report and recommendation of the Committee of Enquiry was not inconsistent with the terms of reference of the said Committee of Enquiry.

(d) The issue in question is a constitutional matter and the Court's jurisdiction is ousted by Section 88 of Cap. 4 (the Courts Ordinance). 20

pp.43-44

10. The appeal came on for hearing in the Court of Appeal of Ghana on the 22nd and 23rd October, 1957. Judgment was given on the 4th November, 1957. Sharp, J.A., who gave the first judgment, set out the facts, and said that the argument had revolved round the question of the right interpretation of Section 8 of the Ordinance of 1952 and Section 88 of the Courts Ordinance, and the limitation of the powers of superior Courts to intervene in circumstances such as those of the present case. Counsel for the first Respondent had argued that in confirming the Committee's report the Governor had acted purely in an executive capacity, and so was not amenable to a writ of certiorari. The learned Judge rejected this argument, and said it had been held that prerogative writs could be addressed to tribunals which did not at first sight appear to be judicial or to be performing judicial acts. It was clear from the wording of Section 8 of the Ordinance of 1952 that in considering a report of the Committee of Enquiry the Governor had to choose between four courses, viz. rejection, variation or confirmation of the report, or remission for further hearing. The learned Judge held that in so deciding the Governor 30 40

p.45, l.33-
p.47, l.35

had to act judicially, without taking into consideration any extraneous or irrelevant matters. The provision in Section 8(1) that the Governor's decision was to be final and conclusive meant only that it was a final determination of the issues as between the parties interested. The words of Section 8(1) were not necessarily to be construed as ousting the jurisdiction of the High Court. Sharp, J.A. then referred to Section 88 of the Courts Ordinance. He said that, although the appeal was not being decided upon that point, it had been so strongly argued that an expression of opinion upon it was desirable. There was a strong leaning against an interpretation of a Statute which would oust or restrict the jurisdiction of the superior Courts. If Parliament used expressions showing a clear intention to oust or restrict the jurisdiction, effect had to be given to those expressions, but it had been decided that an express provision that proceedings should not be removed to the High Court by certiorari did not apply when the lower tribunal had exceeded its jurisdiction, or had not been duly constituted, or where its order had been obtained by fraud. The learned Judge did not consider that the intention of Section 88 had been that the High Court was not in any circumstances to interfere, simply because the inferior tribunal had been engaged upon an enquiry into the matter described in that Section. If the Committee exceeded its jurisdiction, the Court would be entitled to intervene in the exercise of its supervisory jurisdiction. Counsel for the Appellant had based another argument on Section 88. This argument was that proceedings for certiorari were neither a "civil cause" nor a "civil matter". Counsel for the Respondents, on the other hand, had contended that an application for certiorari must be either a civil or a criminal cause or matter. The learned Judge held that it was neither one nor the other, but lay outside and beyond both. An application for certiorari, he said, was not a proceeding instituted for the trial of any of the matters mentioned in Section 88, because the Court was not concerned with the merits of the case before the inferior tribunal, but solely with the question whether that tribunal had acted judicially or had exceeded its jurisdiction. Accordingly, Sharp, J.A. said that, if it could be said that the Committee had acted in excess of its jurisdiction, he would hold that the decision of the Supreme Court had been right. He went on, however, to hold that

10 p.47, 1.36 -
p.49, 1.33

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30 p.49, 1.34 -
p.50, 1.18

40 p.50, 1.19 -
p.51, 1.18

50 p.51, 1.19 -
p.52, 1.9

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neither the Committee nor the Governor had committed any excess of jurisdiction, and therefore concluded that the appeal ought to be allowed.

p.52, ll.
11-23

11. Van Lare, Ag.C.J. said he concurred with the judgment of Sharp, J.A., but wished to express his opinion on the effect of Section 88 of the Courts Ordinance. He was of opinion that that Section did not exclude the supervisory jurisdiction exercised by the Supreme Court over inferior tribunals. He

pp.52-54
p.54, ll.
34-49

considered the nature and history of the prerogative writs, and said that the jurisdiction of the King's Bench in England could be summarised as, (a) criminal jurisdiction, (b) civil jurisdiction and (c) a general superintendence over the due observance of the law by officials and others. The prerogative writs lay in this last jurisdiction, which remained a distinct jurisdiction of the High Court and in Ghana was vested in the Supreme Court by Section 15 of the Courts

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p.54, l.50-
p.55, l.17

Ordinance. Section 88 of the Courts Ordinance ousted the jurisdiction at first instance or on appeal in civil causes or civil matters. There was, the learned Chief Justice said, no ousting of criminal jurisdiction or of the "general superintendence" jurisdiction of the Supreme Court. The latter was a quasi-criminal jurisdiction, exercised neither at first instance nor on appeal but in the nature of a review. There was therefore much force in the Appellant's contention that certiorari, although a "matter", could not properly be described as a "civil matter", and

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p.55, l.18-
p.56, l.17

undoubtedly it was not a civil cause. Even if it had not been correct to say that civil jurisdiction and "general superintendence" jurisdiction were separate and distinct, it would still be impossible to say that Section 88 of the Courts Ordinance prevented the use of prerogative writs against State Councils or Committees of Enquiry. It was settled by a long line of cases that the use of prerogative writs could be precluded only by express negative words. Jurisdiction to compel obedience to the law by a prerogative writ was quite a different matter from jurisdiction to entertain, either at first instance or on appeal, any civil cause or matter relating to elections, constitutional relations of Chiefs or such issues as

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p.56, ll.
18-38

were enumerated in Section 88. Furthermore, even if Section 88 had contained express words precluding the issue of a prerogative writ in any case or matter relating to elections or constitutional relations of Chiefs, this still would not, in the opinion of Van Lare, Ag. C.J., have prevented the use of the writ against the State Council or Committee of Enquiry

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acting in excess of jurisdiction, or without jurisdiction, or contrary to the rules of natural justice. The learned Chief Justice turned finally to the question whether a State Council or Committee of Enquiry acting in a judicial capacity was a "court of inferior jurisdiction" and so amenable to certiorari. He held that the system of law administered in a State Council sitting in a judicial capacity was not wholly distinct from the system administered in the Supreme Court. The State Councils were, therefore, amenable to certiorari. However, the learned Chief Justice held that the Supreme Court had been wrong in holding that the findings of the Committee of Enquiry and the confirmation of the Governor were ultra vires, and so concluded that the appeal ought to be allowed.

p.56,1.39 -
p.57, 1.39

p.57,1.40 -
p.58 1.9

12. Adumua-Bossman, J. said he agreed with the other learned Judges of the Court of Appeal that the Committee of Enquiry had not exceeded its jurisdiction and the Governor had not acted without authority in confirming the Committee's findings. He disagreed with their view of the operation of Section 88 of the Courts Ordinance. He referred to earlier cases in which it had been held that certiorari would not lie to remove into the High Court proceedings in a constitutional matter before a State Council. The core of the problem was whether an application for a prerogative process came within the words "any civil cause or matter" in Section 88, and whether a question, or questions raised by such a process in respect of constitutional proceedings in a constitutional tribunal could be said to be "a question or questions relating to a constitutional matter". Applying the definition of "matter" in Section 2 of the Courts Ordinance, the learned Judge held that an application for a prerogative order clearly fell within that definition. In view of the effect of the grant or refusal of such an order, which was to set aside, or not to interfere with, a constitutional determination, it was impossible to argue that the determination of the questions raised by an application for a prerogative order did not "relate to" the constitutional determination by the constitutional tribunal. Adumua-Bossman, J. accordingly held that Section 88 of the Courts Ordinance was an effective bar to the proceedings.

p.58,
ll. 11-33

pp. 58-61

p.61, 1.41 -
p.62, 1.31

p.62, 1.32 -
p.64, 1.19

p.64, 1.20 -
p.65, 1.31

p.65, 1.32 -
p.66, 1.9

13. This Respondent respectfully submits that the words "cause" and "matter" as defined in Section 2 of the Courts Ordinance comprehend between them every proceeding in the High Court. It follows that an

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application for a writ of certiorari, not being a "cause", is a "matter". The majority of the Court of Appeal, who did not refer at all to the definitions in Section 2, were wrong in holding otherwise. They were also wrong, in this Respondent's respectful submission, in holding that the jurisdiction of the High Court consisted of civil jurisdiction, criminal jurisdiction and "supervisory" jurisdiction. The jurisdiction of the High Court is of two kinds only, civil and criminal. Of these two categories, the present application fell clearly into the former, and was therefore a "civil matter".

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14. This Respondent respectfully submits that the question raised by the Appellant's application for certiorari was whether the Committee of Enquiry, and the Governor in confirming the Committee's findings, had validly determined that Ntiamoah Kofi III was the Ohene of Adowsena and the Appellant was not. This was either a

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"question relating to the election, installation, deposition, or abdication of ... (a) Chief",

or a

"question touching the political or constitutional relations subsisting according to native law and custom between two Chiefs".

The application for certiorari was a civil matter instituted for the trial of that question, and therefore Section 88 of the Courts Ordinance deprived the Court of jurisdiction to entertain it.

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15. Section 8 of the State Councils (Colony and Southern Togoland) Ordinance, 1952 provides that the Governor's decision upon a report of a Committee of Enquiry

"shall be final and conclusive".

These words, in the respectful submission of this Respondent, mean that the Governor's decision upon such a report is not to be open to challenge in any tribunal or by any authority. Thus, the words exclude any jurisdiction which would otherwise have existed in any Court to pronounce upon the validity or effectiveness of the Governor's decision. The purpose

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of the Appellant's application was to obtain the Court's decision upon the validity of the Governor's decision. Accordingly, Section 8 deprived the Court of jurisdiction to entertain the application.

10 16. This Respondent respectfully submits that in making his decision upon a report of the Committee of Enquiry under the State Councils (Colony and Southern Togoland) Ordinance, 1952 the Governor does not perform a judicial act, but an executive act. A prerogative writ will not issue, therefore, to control the making of such a decision by the Governor.

20 17. All the Judges in the Court of Appeal held that the report of the Committee of Enquiry had not been ultra vires. This Respondent respectfully submits that this decision was right. Even if the report had gone beyond the Committee's original terms of reference, those terms would by implication have been extended and the report validated when the Governor, who had appointed the Committee and framed the terms of reference, decided to confirm the report.

18. This Respondent respectfully submits that the order of the Court of Appeal of Ghana was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

- 30 1. BECAUSE by virtue of the Courts Ordinance, Section 88 the Supreme Court had no jurisdiction to entertain the Appellant's application:
2. BECAUSE by virtue of the State Councils (Colony and Southern Togoland) Ordinance, 1952, Section 8 the Supreme Court had no jurisdiction to entertain the Appellant's application:
3. BECAUSE the act of the Governor in confirming the report of the Committee of Enquiry was an executive act and not a judicial act:
4. BECAUSE both the report of the Committee of Enquiry and the confirmation of that report by the Governor were valid in every respect:
- 40 5. BECAUSE of the other reasons set out in the judgment of Adumua-Bossman, J.

No. 44 of 1959

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL, GHANA

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Ordinance, 1952 and

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B E T W E E N

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... .. Appellant

- and -

KWABENA OFE (Respondent) and
THE MINISTER OF LOCAL GOVERNMENT
(Respondent) ... Respondents

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