

9th February,
1923.

ALBERT GENET - - - - - Appellant.

v.

FRITZ SCHUMACHER & ALFRED

STRAUMANN - - - - - Respondents.¹

Leave to appeal to Privy Council as of right—Appointment of a new Judge—Constitution of the Court—Effect of death or illness of Judge—Costs.

The facts of this case are sufficiently set forth in the judgment.

Application for leave to appeal to His Majesty in Council from a judgment of the Full Court of the Colony of Sierra Leone.

Sawyerr for the Appellant.

Wright for the Respondents.

McDONNELL, Acting J.

The present sitting of the Full Court began on Thursday, January 18th, 1923.

The Court was constituted by the Chief Justice of this Colony, Sir Gilbert Purcell, as President, the Judge of the Colony of the Gambia (Mr. Justice Sawrey-Cookson), and myself, the Attorney-General of this Colony, who had been appointed, as at the two previous sittings of the Court, to act as Puisne Judge by Letters Patent under the Public Seal of the Colony. See sections 4 and 5 of Ordinance No. 14 of 1912, Vol. V., p. 2,032, section 2 of Ordinance No. 9 of 1915.¹

Among the appeals which came before us for hearing was the present case of Genet *v.* Schumacher and another, in which Mr. Shorunkeh Sawyerr appeared for the Appellant and Mr. Claude Wright for the Respondents.

On a preliminary point being taken on Thursday, January 25th, by Respondents' Counsel, the Full Court announced orally that it must on that ground dismiss the appeal, and stated that it would deliver a considered judgment on Monday, January 29th.

¹ See page 113.

² Now Cap. 205, sec. 62, Vol. II, p. 1429.

On that day a judgment was delivered by me, to which the learned President assented. My brother, Sawrey-Cookson, delivered a short judgment concurring with my view.

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Thereupon Mr. Shorunkeh Sawyerr stated that he proposed to appeal from the judgment to the Privy Council, and indicated that under section 4 of the Order of His Majesty the King in Council dated 15th February, 1909,¹ governing appeals to the Privy Council, he had fourteen days in which to apply by motion or petition for conditional leave to appeal.

It was pointed out to Mr. Sawyerr that the presence of my brother Cookson was urgently needed in his Court in the Colony of the Gambia several hundred miles from this Colony, that a ship for that place (the S.S. "Bodnant") was sailing in the course of four or five days, and that if Cookson, J., were to miss that ship his return would in all probability be delayed at least two weeks.

It was agreed by both parties that the matter in dispute on the appeal amounted to upwards of the value of £300 sterling. The Court thereupon pointed out to Mr. Sawyerr that, under section 2a of the above cited Order of the King in Council (Vol. IV., p. 1844),¹ he could appeal as of right; and that his application would be purely formal, and he was asked if, in consequence, he would not expedite his application, short notice of which Mr. Wright, for the Respondents, expressed himself prepared to accept.

In spite of this request and assurance, Mr. Sawyer expressed his inability to accelerate his application, and the Court adjourned until the return day of the petition which he announced it was his intention to file.

On Friday, the 2nd February, Mr. Sawyerr filed a petition, supported by an affidavit, and a notice to move the Full Court for conditional leave to appeal at 9 a.m. on Wednesday, 7th February. In the meanwhile, the learned President, in consultation with my brother Cookson and myself, came to the conclusion, in which we both concurred, that if Cookson, J., sailed by the S.S. "Bodnant," which was leaving on the following day, a Full Court for the purpose of hearing this purely formal application could be constituted, provided that His Majesty approved the appointment of the Police Magistrate of Freetown, Mr. William Butler Lloyd, Barrister-at-Law, as a Puisne Judge for the purpose in question.

¹ Now Vol. III, p. 767.

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In conformity with this decision, His Excellency the Governor was invited, and agreed, to send the following telegram to the Right Honourable the Secretary of State, which, with its reply, His Excellency has given me permission to quote in this judgment:—

“ From Governor.

“ To Secretary of State.

“ Date 1st February, 1923.

“ With reference to your telegram of 9th January sitting of the Full Court concluded except one outstanding application for leave appeal Privy Council. Applicant has 14 days in which move Court. Return of Cookson Gambia urgently required. I propose to release him and with your approval and His Majesty's instructions appoint Butler Lloyd third Judge for purpose of hearing the application. Vide section 4 Ordinance No. 14 of 1912.¹

“ Slater.”

Cookson, J., consequently sailed on the S.S. “ Bodnant ” on Saturday, 3rd February.

On Monday, 5th February, the following telegram was received by His Excellency.

“ From Secretary of State.

“ To Governor.

“ Date 5th February, 1923.

“ With reference to your telegram of 1st February, His Majesty is pleased to approve appointment of Butler Lloyd to be Acting Puisne Judge.

“ Secretary of State.”

In conformity with this instruction, Letters Patent under the Great Seal of the Colony were executed on Tuesday, February 6th, by His Excellency appointing Mr. Butler Lloyd a Puisne Judge. Mr. Lloyd on the same day took the oath of Allegiance and the Judicial Oath before His Excellency, who simultaneously addressed a letter to the learned Chief Justice in compliance with section 10 of the Supreme Court Amendment Ordinance, 1912 (No. 14 of 1912, Vol. V., p. 2033)¹ giving approval to his requesting Butler Lloyd, J.'s, attendance at the sitting of the Court. On the Chief Justice's request, Butler Lloyd, J., attended at 9 a.m. on Wednesday, 7th February, the return day of Mr.

¹ Now Cap. 205, sec. 62, Vol. II, p. 1429.

² Now Cap. 205, sec. 91, Vol. II, p. 1437.

Sawyerr's petition, and the Court which sat was constituted by the Chief Justice, Butler Lloyd, J., and myself.

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Mr. Sawyerr immediately objected to the constitution of the Court, emphatically demanded the presence of Cookson, J. He refused to address the Court, but stated he was addressing the Chief Justice alone.

The latter assured him that the Court was properly constituted. Mr. Sawyerr persisted that the only Court which could have cognisance of his application was one which was constituted exactly as was that against whose judgment he was appealing. He then stated in conclusion that the Court before him was neither the Full Court nor the Supreme Court, and refused to proceed with his application, stating that he would apply direct to the Privy Council for leave to appeal to that tribunal.

The Court then adjourned until to-day, in order that a considered judgment in the matter, setting out the whole facts might be prepared.

I am of opinion that there is no ground in Mr. Sawyerr's objection.

The application before the Court was entirely formal, involving no question as to the merits of the appeal, and was in no sense a continuation of the hearing, judgments in which had been delivered on January 29th. The Court had no discretion to grant or refuse leave to appeal: its power was confined merely to settling the security to be given, the time in which such security was to be given, and the conditions, if any, as to the time within which the Appellant should take the necessary steps for the purpose of procuring the preparation of the record and despatch thereof to England under sections 5 (a) and (b) of the Order of the King in Council.¹

If there were anything in Mr. Sawyerr's objection, the illness of one of the Judges of the Full Court for fourteen days after the judgment appealed from, or the death of such Judge in that period, would effectually stop any leave to appeal being granted by the Full Court.

By his withdrawal of his application Mr. Sawyerr has deprived his client—who, I learn from paragraph 3 of the affidavit, is absent from the Colony—of the right of appeal, except by the far more expensive process of going to the Privy Council direct, a right saved by section 28 of the Order of the King in Council.²

¹ Vol. III, p. 767.

² Vol. III, p. 771.

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The application not having been pursued must be taken to have been abandoned. It seems to me that the frivolous nature of Mr. Sawyerr's objection brings it dangerously near those cases in which the Court has to order the Solicitor to pay the costs, but in all the circumstances I hold that the costs entailed by to-day's proceedings and those of Wednesday, February 7th, should be borne by the Appellant.

BUTLER LLOYD, Acting J.

I agree.

PURCELL, C.J.

I agree.