

PALMER v. STOOKE and ATTORNEY-GENERAL

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Coussey, J.A.
and Kingsley, J. (Sierra Leone)): August 26th, 1953
(W.A.C.A. Civil App. No. 7/53)

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- [1] **British Commonwealth—legislative competence of King in Council—*ultra vires* and repugnancy—creation of Legislative Council for Colony of Sierra Leone not *ultra vires* Sierra Leone (Legislative Council) Order in Council, 1951:** In the preamble and enacting clause of the Sierra Leone (Legislative Council) Order in Council, 1951, the general words “and of all other powers enabling Him in that behalf” are not to be construed as being *eiusdem generis* the preceding more specific words “the powers vested in Him by the Foreign Jurisdiction Act, 1890” so as to restrict the authority of His Majesty in Council to the Foreign Jurisdiction Act, 1890; and therefore the creation of a Legislative Council for the Colony of Sierra Leone by the Order in Council is not *ultra vires* the legislative competence of His Majesty in Council (page 328, line 32—page 329, line 16). 10 15
- [2] **Civil Procedure—discontinuance and dismissal—Supreme Court has inherent jurisdiction to stay action which must fail—jurisdiction exercised only with great circumspection in clear cases:** The Supreme Court has inherent jurisdiction to stay an action which must fail, though such jurisdiction is not exercised except with great circumspection and unless it is perfectly clear that the action cannot succeed (page 330, lines 12–16). 20 25
- [3] **Constitutional Law—Legislative Council—creation—constitution of Council act of State over which courts have no jurisdiction:** The constitution of the Legislative Council set up under the provisions of the Sierra Leone (Legislative Council) Order in Council, 1951 is an act of State over which the courts have no jurisdiction (page 329, line 39—page 330, line 3). 30
- [4] **Constitutional Law—Legislative Council—creation—creation for Colony of Sierra Leone not *ultra vires* Sierra Leone (Legislative Council) Order in Council, 1951:** See [1] above. 35
- [5] **Constitutional Law—Legislative Council—creation—intention of Sierra Leone (Legislative Council) Order in Council, 1951 to create council for both Colony and Protectorate:** In the interpretation of legislation, the intention of the legislature must be gathered primarily from a review of the whole enactment so as to give effect to its paramount object; and therefore the Sierra Leone (Legislative Council) Order in Council, 1951 must be deemed to create a Legislative Council for both the Colony and the Protectorate of Sierra Leone, and not merely for the Protectorate (page 329, lines 17–24). 40

[6] Constitutional Law—royal prerogative—acts of State—Courts have no jurisdiction to question acts of State—constitution of Legislative Council act of State: See [3] above.

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[7] Courts—jurisdiction—acts of State—courts have no jurisdiction to question act of State: See [3] above.

[8] Courts—Supreme Court—jurisdiction—inherent jurisdiction—court has inherent jurisdiction to stay action which must fail—jurisdiction exercised only with great circumspection: See [2] above.

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[9] Statutes—interpretation—intention of legislature—intention to be derived from review of whole enactment: See [5] above.

[10] Statutes—ultra vires and repugnancy—creation of Legislative Council for Colony of Sierra Leone not ultra vires Sierra Leone (Legislative Council) Order in Council, 1951: See [1] above.

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The plaintiff (now the appellant) brought an action against the defendants (now the respondents) in the Supreme Court for a declaration of the invalidity of the Constitution and an injunction restraining the first defendant from giving effect to it in the Colony of Sierra Leone.

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The British Settlements Act, 1887, as amended by the British Settlements Act, 1945, authorised the King in Council to legislate for settled colonies, one of which was the Colony of Sierra Leone, being an entity apart from the Protectorate of Sierra Leone. The Sierra Leone (Legislative Council) Order in Council, 1951 was passed by the King in Council to provide for a Legislative Council in Sierra Leone constituted in accordance with the provisions of that Order. The Order went on to provide what proportion of the members of the Council should come from the Colony and the Protectorate respectively. In the preamble and enacting clause of the Order, it was stated under the heading "Foreign Jurisdiction" that it was made by the King "by virtue and in exercise of the powers vested in Him by the Foreign Jurisdiction Act, 1890, and of all other powers enabling Him in that behalf." The plaintiff instituted the present proceedings to have the Order declared invalid and to prevent the first defendant from giving effect to it.

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The Supreme Court (Smith, C.J.), on a motion by the defendants that the action be dismissed on the ground that it was frivolous and vexatious, took the view that the whole of the plaintiff's claim was hopeless and should not be allowed to proceed, and therefore exercised its inherent jurisdiction to dismiss the action.

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On appeal by the plaintiff, it was contended that (a) since

the specific Act mentioned in the preamble and enacting clause of the Order did not exhaust the *genus*, the words "and of all other powers enabling Him in that behalf" must be construed as meaning other powers in respect of foreign jurisdiction, and therefore the Order did not apply to the Colony of Sierra Leone and was *ultra vires* insofar as it purported to so apply because the British Settlements Act, 1887, as amended, was not mentioned; (b) with regard to the proportion of members of the Legislative Council from the Colony and Protectorate respectively, there was no Act or other authority enabling the Crown to give the Protectorate a majority; and (c) on a motion such as that filed by the defendants, it was not competent for the court to deal with questions of law, and therefore the correct procedure should have been to file a motion under O.XXI, r.2 of the Supreme Court Rules, 1947.

Legislation construed:

Supreme Court Rules, 1947 (P.N. No. 251 of 1947), O.XXI, r.2:

"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the same at or after the trial, provided that by the consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

Sierra Leone (Legislative Council) Order in Council, 1951 (No. 611), Preamble:

The preamble to this order is set out at page 328, lines 16-27.

O.I.E. During, R.W. Beoku-Betts and Cole for the plaintiff-appellant;
M.C. Marke for the defendants-respondents.

FOSTER-SUTTON, P.:

In this case the plaintiff sought, *inter alia*, a declaration that the Sierra Leone (Legislative Council) Order in Council, 1951 is invalid, and an injunction restraining the first defendant from continuing to give effect to it in the Colony of Sierra Leone.

After the statements of claim and defence had been delivered, a motion was filed by the defendants asking that the action be dismissed on the ground that it was frivolous and vexatious. The motion came on for hearing before Smith, C.J., who took the view that the whole of the plaintiff's claim was hopeless and should not be allowed to proceed, and, acting under the inherent jurisdiction of the court, he summarily dismissed the action.

The plaintiff then filed this appeal, which is confined to that portion of the judgment which dismissed his claim for the declaration and an injunction, to which I have already referred, and to the court's action in summarily dismissing the claim on the motion instead of allowing the case to go to trial.

5 The Sierra Leone (Legislative Council) Order in Council, 1951 was made by His late Majesty the King in Council on April 9th, 1951. It revokes the Sierra Leone (Legislative Council) Order in Council, 1924 and the Sierra Leone (Legislative Council) (Amendment) Order
10 in Council, 1939, and provides that there shall be a Legislative Council in and for Sierra Leone which shall be constituted in accordance with the provisions of the Order.

The original Order in Council contains the words "Foreign Jurisdiction" in the heading and its preamble and enacting clause
15 read as follows:—

"Whereas by the Sierra Leone (Legislative Council) Order in Council, 1924, provision is made for the constitution and powers of a Legislative Council for the Colony and Protectorate of Sierra Leone (hereinafter together called 'Sierra Leone'):

20 And whereas it is expedient to make other provision for the constitution and powers of a Legislative Council for Sierra Leone:

Now, therefore, His Majesty, by virtue and in exercise of the powers vested in Him by the Foreign Jurisdiction Act, 1890, and of all other powers enabling Him in that behalf, is
25 pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows"

In the court below and at the hearing of this appeal, the Attorney-General conceded that the Colony of Sierra Leone is a
30 British settlement, and the case was conducted by both sides on that footing.

Counsel for the appellant argued that the Order in Council was made under the Foreign Jurisdiction Act, 1890 to the exclusion of all other powers, that the specific Act mentioned in the enacting clause
35 does not exhaust the *genus* as there is another such Act which was enacted in the year 1913, that the words "and of all other powers enabling Him in that behalf" must be construed as meaning other powers of His Majesty in respect of foreign jurisdiction, applying, as he submitted should be done in this case, the *eiusdem generis*
40 rule, and that the Order in Council insofar as it purports to legislate for the Colony of Sierra Leone, as distinct from the Protectorate

of Sierra Leone, is *ultra vires* and therefore invalid, because the only Act which empowers His Majesty in Council to legislate for a settled colony is the British Settlements Act, 1887, as amended by the British Settlements Act, 1945, which is not mentioned in the Order. In further support of this submission, he drew attention to the heading of the Order—"Foreign Jurisdiction"—arguing that it makes it abundantly clear that no other powers were invoked in its making. 5

I, of course, accede to the well-settled principle that where there are general words following particular and specific words of the same nature, the general words are presumed to be restricted to the same *genus* as the particular and specific words, but taking the citation as a whole, which I think must be done, that is to say the words "Foreign Jurisdiction Act, 1890," I cannot create a *genus* out of them, and I am therefore unable to agree that the *eiusdem generis* rule is applicable. 10 15

In any event I am of the opinion that the rule must be subordinated to the more general principle of gathering the intention from a review of the whole of the enactment and giving effect to its paramount object. As I understand the *eiusdem generis* rule, its object is to give effect to the assumed intention to an enactment, and if the whole of the Order in Council is looked at I think it beyond argument that the intention was to legislate both for the Colony and the Protectorate of Sierra Leone. 20

It was not contended that the Order was invalid insofar as it purports to legislate for the Protectorate. That being so, it seems to me that the relevant question which requires to be answered in this matter is whether His Majesty in Council had the power to legislate for the Colony, and the answer to it is clearly in the affirmative. He had such power under the British Settlements Act, 1887, and in my view that Act must be held to have been contemplated by the words "and of all other powers enabling Him in that behalf." 25 30

The Order in question provides for a larger number of members of the Legislative Council from the Protectorate than from the Colony, and the plaintiff's counsel submitted "that there is no Act or authority which enables the Crown to give the Protectorate a majority in the Legislative Council in the Colony of Sierra Leone." This submission appears to me to ignore the fact that the Order in Council provides for a joint legislature. Moreover the constitution of the Legislative Council by the Order was, in my view, an act of State over which the Supreme Court has no jurisdiction. Of the 35 40

propriety or justice of that act, neither the court below nor this court have the means of forming, or the right of expressing if they had formed, any opinion.

5 The only matter which remains to be dealt with is the submission made by counsel for the appellant that on a motion such as that filed by the respondents it is not competent for the court to deal with questions of law; that in the present case, there being no facts in dispute, the correct procedure was to file a motion under O.XXI, 10 procedure which should be followed when a dispute involves only questions of law.

15 In my opinion there is no substance in the submission. It is well settled that the court has inherent jurisdiction to stay an action which must fail. It is the case that such jurisdiction is not exercised except with great circumspection and unless it is perfectly clear that the action cannot succeed. In the present case I concur with the learned Chief Justice in thinking that the claim, if allowed to proceed, would be bound to fail. This consideration satisfies 20 me that the order dismissing it ought to be sustained, not in pursuance of any order or rule, but in virtue of the inherent jurisdiction of the court to prevent abuse of its process.

For the reasons I have given I would dismiss this appeal with costs to be taxed.

25 COUSSEY, J.A. and KINGSLEY, J. (Sierra Leone) concurred.
Appeal dismissed.

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