

14th February,
1922.

IN THE ESTATE OF JESSE D. PARKER (Deceased).

JOHN L. HAGAN and Another - - - Appellants.

v.

FRANCIS A. JOHN and Others - - - Respondents.

Originating Summons held not proper mode of dealing with questions and matters requiring account, enquiry and relief.

The facts of this case are sufficiently set out in the judgments.

Case stated by Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

During for Appellants cites:—

White Book, Order 55, rules 3 and 4.

Rules of the Supreme Court, Order 52, rule 1.¹

White Book, Order 54A, rule 1.

N. J. P. M. Boston for Respondents cites:—

White Book, Order 72.

CASE STATED.

The following question is reserved for the opinion of the Court of Appeal, viz.:—

Whether on the true construction of the provisions of Order 52 of the Rules of the Supreme Court of Sierra Leone,¹ it is within the competency of the said Court to deal with the questions and matters requiring account, enquiry and relief as set out in the Originating Summons hereto appended.

(Sgd.) G. K. T. PURCELL,

Chief Justice.

¹Vol. III, p. 415.

The following was the Originating Summons in the case:—

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1921 H. No. 1.

IN THE SUPREME COURT OF THE COLONY OF
SIERRA LEONE.

In the Matter of the Estate of Jesse David Parker (deceased).

Between

John Lawrence Hagan and Annie Marie Ecessami

Hagan, his wife - - - - - *Plaintiffs,*
and

Francis Alphonso John, Moses Thomas George

Lawson, William Patrick Golley and Horatio

Nelson Williams - - - - - *Defendants.*

(L.S.)

(Sgd.) J. F. St. A. Fawcett.

5/7/21.

Stamp 10s.

Let the Defendants, Francis Alphonso John, of Walpole Street, Freetown, in the Colony of Sierra Leone, Merchant, Moses Thomas George Lawson, of Charlotte Street, in Freetown aforesaid, Superintendent of the Baptist Church, Freetown, William Patrick Golley, of Fort Street, in Freetown aforesaid, Carpenter, and Horatio Nelson Williams, of Pademba Road, in Freetown aforesaid, Merchant, the Executors and Trustees of the Will dated the 28th day of October, 1913, of the above named Jesse David Parker, late of Freetown aforesaid, deceased, within eight days after the service of this Summons on them, inclusive of the day of such service, cause an appearance to be entered for them to this Summons, which is issued upon the application of John Lawrence Hagan, of Pademba Road, in Freetown aforesaid, and Annie Marie Ecessami Hagan, his wife, of the same place, who claims to be interested in the relief, sought as a devisee and legatee and the residuary devisee and legatee under the Will of the said Jesse David Parker, deceased, for an Order under the rules of the Supreme Court of Judicature, Order 55, rules 3 and 4, for the determination of the following questions and matters, and that the following account, enquiry, and relief may be taken, made and given, that is to say:—

1. An account of the personal estate not specifically bequeathed of the Testator, Jesse David Parker, deceased, in the hands of the Defendants, the Executors and Trustees of his Will, or in the hands of any other person or persons by the order or for the use of the defendants.

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2. An account of the rents and profits of the Testator's real estate devised to the female Plaintiff under the said Will received by the said Defendants or any other person or persons by the order or for the use of the Defendants.

3. An enquiry of what the estate of the Testator consisted of at the time of his death.

4. An enquiry what parts (if any) of the Testator's personal estate are outstanding.

5. An account of what is due from the Defendants as such Executors and Trustees as aforesaid to the female Plaintiff as the residuary legatee of the personal estate of the Testator.

6. Payment by the Defendants to the Plaintiffs of what shall appear to be due to the female Plaintiff on taking the last mentioned account.

7. Payment and delivery forthwith by the Defendants to the female Plaintiff of all the specific legacies to which she is entitled under the Will and all moneys specifically bequeathed to her under the said Will.

8. Whether the Defendants as Executors and Trustees as aforesaid have power under the said Will or otherwise and ought to sell the real estate of the Testator, No. 56, Pademba Road, Freetown, devised under the said Will to the female Plaintiff and Thomas John Parker.

9. How the costs of this application ought to be borne? If necessary for an Order for administration of the real and personal estate of the said Testator.

The Plaintiff, John Lawrence Hagan, sues as the husband of the female Plaintiff.

Dated the 5th day of October, 1921.

This Summons was taken out by Claudius Dyonisius Hotobah During, Solicitor for the above named Plaintiffs.

The Defendants may appear hereto by entering an appearance, either personally or by Solicitor, at the Master's Office, Westmoreland Street, Freetown.

NOTE.—If the Defendants do not enter appearance within the time and at the place above mentioned, such Order will be

made and proceedings taken as the Judge may think just and expedient.

CLAUDIUS DIONYSIUS HOTOBAB DURING,
25, Charlotte Street,
Freetown,
Plaintiffs' Solicitor.

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To—

FRANCIS ALPHONSO JOHN,
MOSES THOMAS GEORGE LAWSON,
WILLIAM PATRICK GOLLEY, and
HORATIO NELSON WILLIAMS.

I appoint Thursday, the 20th day of October, 1921, for the hearing of this Summons at 1.45 p.m.

(Sgd.) MICHAEL F. J. McDONNELL,
Acting Chief Justice.

McDONNELL, Acting J.

The question in this case stated is whether the Supreme Court can, on an Originating Summons, deal with questions and matters requiring account, enquiry and relief, as set out in the Originating Summons appended to the case.

On the one hand it is urged that Order 52¹ of the local rules, which is a reproduction *mutatis mutandis* of Order 54A of the White Book, is the only provision in force in this Colony prescribing the purposes for which an Originating Summons may be employed, and that, in consequence, its use must be confined to applications for the construction of written instruments and declarations of the rights of the persons interested.

On the other hand it is urged that Order 65, rule 2,² of the local rules imports Order 55, rules 3 and 4, of the White Book into the practice of this Colony.

Order 55, rule 3, enables the personal representatives of a deceased person, the trustees under any instrument and certain other interested persons to approach the Chancery Division for certain forms of relief or for the determination of certain questions, as are respectively set forth in sub-sections (a) to (g) of the rule in question.

Order 55, rule 4, enables any of the persons named in the last rule, by Originating Summons, to obtain orders for the administration of the real or personal estate of the deceased

¹ *Loc cit.* ² Vol. III, p. 436.

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or of the trust as the case may be. It will be seen that these two rules enable Originating Summonses to be employed for much wider purposes than are contemplated under Order 54A of the White Book and 52 of our rules.

One has to bear in mind the exact purport of our Order 65, rule 2,¹ the essential parts of which are as follows:—

“Where no other provision is made by these rules or by the Supreme Court Ordinance, 1904,² or by those portions of the Judicature Acts which apply to this Colony, the procedure and practice in force in England on 1st January, 1905, so far as they can be conveniently applied to the circumstances of this Colony, shall be in force in the Supreme Court.”

It may be said with truth that the local rules are an abridgment of the White Book embodying such of the provisions of the latter as were considered suitable to a small Colony. The words upon which I lay stress in Order 65, rule 2, are at the beginning, “*where no other provision is made,*” and at the end, “*so far as they can be conveniently applied to the circumstances of this Colony.*”

Now the legislature in approving our rules inserted in Order 52³ a paraphrase of Order 54A with its heading “Declaration on Originating Summons,” it inserted in Order 51⁴ a paraphrase of Order 54 with its heading “Applications and Proceedings at Chambers” and omitted, I cannot but suppose deliberately, the whole of Order 55 with its heading “Chambers in the Chancery Division,” which is sub-divided into parts, of which Part 2, beginning with rule 3, has a sub-heading “Administrations and Trusts, Foreclosure and Redemption.”

Why were some Orders included and others omitted?

The position of our rules in relation to the contents of the White Book of 1905, both of which are statutory enactments subject to the rules of statutory interpretation, is analogous to the case of a subsequent statute re-enacting some of the sections of a former statute, but departing from its provisions in certain respects. The presumption in such a case is that the departure is intentional.

One can well believe that the procedure in Chancery Chambers was considered unsuitable to the needs of this Colony and that omission to provide for it was intentional.

¹ Vol. III, p. 436. ² Now Cap. 205, Vol. II, p. 1414.

³ Vol. III, p. 415. ⁴ Vol. III, p. 413.

To interpret Order 65, rule 2, in such a way as to enable *any* provision contained in the White Book of 1905 to be applied here would, in my opinion, lead to an absurdity, by making the preceding 64 Orders of our rules a superfluous redundancy, and would be repugnant to the principle of selection of English Orders suitable to local use, upon which our rules appear clearly to be based.

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When the draftsman has, as we must suppose deliberately, inserted one form of procedure under Originating Summons we cannot, I hold, under Order 65, rule 2, import all the remaining forms, on the ground that "no other provision is made" by our rules; and when the draftsman has, as we must again suppose, deliberately omitted the whole of Order 55 dealing with chambers in the Chancery Division, we must, I hold, refuse to import any of its rules on the ground that, to use the words of the conclusion of Order 65, rule 2, they cannot "be conveniently applied to the circumstances of this Colony."

For these reasons, albeit, it has been submitted that at a former sitting of the Full Court a contrary opinion was expressed on grounds which are not set forth on the record, I hold that the answer to the case stated must be in the negative.

PURCELL, C.J.

I agree.

SAWREY-COOKSON, J.

I agree, but think I might usefully add that I had no doubt after hearing Mr. During's argument that Order 65, rule 2, operated so as to admit of recourse being had to Order 55, rule 4, of the White Book, despite the fact of the omission of the whole of that Order from what may be referred to as "The Local Orders." It appeared to me, indeed, that the words in Order 65, viz., "Where no other provision is made, etc." must mean, if they were to mean anything at all, that if it is found that certain of the machinery supplied by the White Book is required and can conveniently be applied here, then by all means have recourse to it, although you may find no reference whatever to it in the local Orders.

But I am no longer free from this doubt when I consider, and am faced by, the fact that both of the local Orders, Nos. 51 and 52,¹ do clearly make provision for the disposal of several matters by way of Originating Summonses.

¹ Vol. III, pp. 413 & 415.

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COCKSON, J.
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When, therefore, it is found that provision is made for proceeding by way of Originating Summons in certain respects and matters, it surely cannot be held that the condition required to be satisfied before the White Book is resorted to and comprised in the words, "Where no other provision is made by these rules," has been complied with.

I agree, therefore, that the whole of Order 55 of the White Book was intentionally omitted, and that the questions and matters here sought to be dealt with by Originating Summons must be dealt with by a method which the legislature must be taken to have decided in its wisdom was the better suited to the requirements and convenience of this Colony. *i.e.*, by administration suit.