LAMINA CONTEH - - - - *Appellant.*

29th *January*, 1923.

v.

REX - - - - - - - *Respondent.*

Writs of Habeas Corpus in the Protectorate—Order in Council fixing fees in the Circuit Court—Committal for Contempt distinguished.

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.

T. Taylor for the Appellant cites:—

The Supreme Court Ordinance, 1904 (No. 14 of 1904),[1] section 1.

The Protectorate Courts Jurisdiction Ordinance, 1903 (No. 6 of 1903)[2], section 37.

The Protectorate Courts Jurisdiction Order in Council of 11th February, 1904,[3] Vol. IV. p. 1536 (*Gazette* No. 813 of 1904).

Wright for the Crown cites:—

The Protectorate Courts Jurisdiction Ordinance, 1903 (No. 6 of 1903),[4] sections 37, 38 and 39.

The Protectorate Courts Jurisdiction Ordinance, 1905,[5] (No. 33 of 1905), section 11.

The Supreme Court Ordinance, 1904 (No. 14 of 1904), section 4.[1]

Maxwell on Statutes, 3rd Ed., pp. 407 and 412.

Halsbury, Laws of England, Vol. I, p. 1.

Ibid., Vol. X, p. 41.

Foreign Jurisdiction Act, 1890, sections 3, 5 and 9.

Taylor in reply cites:—

In *re* M. Amadon Taylor, L.R., A.C., P.C. (1912), p. 347.

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[1] Now Cap. 205, sec. 3, Vol. II., p. 1416.
[2] Now Cap. 169, sec. 38, Vol. II, p. 1165.
[3] Vol. III, p. 221, line 20.
[4] Now Cap. 169, secs. 38, 39 and 40, Vol. II, pp. 1165-1166.
[5] Now Cap. 169, sec. 53, Vol. II, p. 1169.

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CASE STATED.

On 22nd December, 1922, an application was made to Mr. Acting Justice Prior—whilst sitting as Judge of the Circuit Court at Moyamba—by Mr. Thomas Taylor on behalf of the Defendant, Lamina Conteh, for a rule nisi for a writ of habeas corpus, and in support of such application the affidavit which is appended and marked "A" was filed.

Mr. Acting Justice Prior decided that the Circuit Court had no jurisdiction to issue a writ of habeas corpus and refused the application.

On 10th January, 1923, Mr. Prior being then *functus officio* so far as the Circuit Court was concerned, Mr. Thomas Taylor made a similar application to me as Chief Justice of the Supreme Court of Sierra Leone under the provisions of section 11 of Ordinance No. 33 of 1905[1], on behalf of Lamina Conteh, for a rule nisi for a writ of habeas corpus.

I entertained the application and granted a rule nisi subject to the opinion of the Court of Appeal now sitting in Freetown.

The question the Court of Appeal is invited to express its opinion upon is—whether the Judge of the Circuit Court or the Chief Justice when sitting to hear applications, etc., under the provisions of sectioon 11 of Ordinance No. 33 of 1905,[1] has jurisdiction to grant a rule nisi for a writ of habeas corpus and when necessary to make such rule absolute.

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

JUDGE'S CHAMBERS,
LAW COURTS,
18th January, 1923.

"A."

IN THE CIRCUIT COURT OF THE PROTECTORATE OF SIERRA LEONE.

(Criminal Jurisdiction).

Rex *v.* Lamina Conteh.

I, Lamina Conteh, of Kangahun, in the District of Moyamba, make oath and say as follows:—

1. That I am the brother of Lamina Conteh, of Kangahun, in the said District, now a convict in the prison at Moyamba.

[1] Now Cap. 169, sec. 53, Vol. II, p. 1169.

2. That my brother is a licence holder in the said town and a Temne by birth.

3. That early in November there was some disturbance at Kangahun arising from counter instructions given by the respective Chiefs of Kangahun and Moyamba.

4. That as result of these disturbances my brother was arrested by the Chief of Moyamba and without any chance of a defence he was ordered to be imprisoned for six months.

5. That this matter was then reported to the District Commissioner at Moyamba as the Chief wished to make use of the prison at Moyamba, and the said District Commissioner contrary to the rules of justice did not give my brother a chance to defend himself, even though my brother asked leave to make a statement.

6. That my brother is now undergoing sentence of imprisonment through the said process, *i.e.*, a conviction obtained without a chance of defence to the accused, my brother, being given either by the Chief or by the District Commissioner.

7. That the said disturbances arose out of a faction or tribal fight.

8. That my brother was committed to prison on or about the 20th day of November, 1922.

Dated the 13th day of December, 1922.

His
LAMINA X CONTEH.
mark.

This affidavit was read in the presence of the above named deponent, who seemed perfectly to understand it before making his mark thereto at 4.30 o'clock in the afternoon in the presence of—

F. McEWEN.
Asst. Master and Regr.,
Cir. Court.

McDONNELL, Acting J.

The Full Court is asked to decide whether the Circuit Court has jurisdiction to grant a rule nisi for a writ of habeas corpus *ad subjiciendum* and, when necessary, to make such rule absolute.

On the one hand it is urged that there is an inherent jurisdiction in all Superior Courts of Record to issue this writ and

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that the Order in Council of 11th February, 1904,[1] fixing Circuit Court fees under section 66 of Ordinance 6 of 1903 (Vol. IV., p. 1534) expressly provides for the payment of a fee of 10s. on the issue of such a writ.

On the other hand it is said that the Circuit Court is a Court created by statute in a protected territory, the jurisdiction of which is strictly limited by the Ordinance to which it owes its birth.

With regard to the alleged inherent jurisdiction to issue the writ, an analogy has been suggested with the power of committal for contempt incident to Courts of Justice.

On the question of contempt, Cockburn, C.J., in R. *v.* Leroy, 1873 (L.R., 8 Q.B., at p. 134), says:—

> "In the case of the Superior Courts at Westminster "which represent the one Superior Court of the land, this "power was coeval with their original constitution and has "always been exercised by them. These Courts were "originally carved out of the one Supreme Court and are "Divisions of the *aula regis* where, it is said, the king in "person dispensed justice and their power of committing "for contempt was an emanation of the royal authority, for "any contempt of the Court would be a contempt of the "Sovereign."

This, I think, clears up any false idea of analogy between the two. Committal for contempt is a prerogative of the Crown; the right to habeas corpus is a privilege of the subject. It is a common law privilege, but it has been confirmed and regulated by various statutes of which the Act 31st of Charles II, c. 2 (1679) is the most famous. This Act and its amending Acts if, as seems undoubted, they are statutes of general application, are imported into the Statute Book of the *Colony* by section 8 of the Supreme Court Ordinance No. 14 of 1904.[2]

At Common Law the writ of habeas corpus being a prerogative writ could be issued by the English Courts to any part of the Dominions of the Crown. In consequence of the decision in *Ex parte*, Anderson 1864 (Ellis and Ellis, p. 487), that a writ could issue to Canada, there was passed the Habeas Corpus Act, 1862, 25 and 26 Vict., c. 20, which enacted that no writ "shall issue out "of England . . . . . into any Colony or foreign Dominion of "the Crown where Her Majesty has a lawfully established Court "or Courts of Justice having authority to grant and issue the

[1] New Vol. III, p. 221, line 20.
[2] Cap. 207, sec. 8, Vol. II, p. 1417.

" said writ and to ensure the due execution thereof throughout " such Colony or Dominion."

In Rex *v.* Earl of Crewe, 1910 (2 K.B., p. 516), to which our attention was drawn by Mr. Sawyerr as *amicus curiæ*, it was held by Vaughan Williams and Kennedy, L.J., that the Bechuanaland Protectorate was not a foreign Dominion of the Crown within the meaning of the section just cited. It is not in this connection, however, that the case is of chief importance for our present purpose. Its value lies, as I consider, in the following dictum by Vaughan Williams, L.J., who said at p. 602:—

> " It is convenient to note that in my opinion even if the " Act of 1862 did apply there will be considerable difficulty " as to the existence of a Court with authority to grant a " habeas, for I do not find anything in the statutes, Orders- " in-Council or Proclamations which satisfies me as to the " existence of such a Court with such a power to ensure " due execution of a writ of habeas."

This I think disposes of the question of inherent authority. In plain English you must find the authority in the legislative instrument creating the Court. Mr. Taylor points to the Order-in-Council expressly prescribing a fee for this writ. If this table of fees formed a schedule to the Ordinance creating the Court; if, to use an expressive phrase, it were thereby clear that it had had the eye of the Legislature upon it, it would have had much more weight as indicating the intention of the Legislature in creating the Circuit Court: standing as it does alone, as a subordinate legislative instrument made subsequently to the coming into operation of the Ordinance, it is liable, like all such subordinate legislation, to be impugned as *ultra vires*.

We must now consider the statute to which the Circuit Court owes its genesis, and particularly sections 37 to 39 of this Ordinance, the Protectorate Courts Jurisdiction Ordinance No. 6 of 1903 (Vol. II. p. 687).[1] Mr. Wright properly contrasted those sections with the corresponding section 4 of the Supreme Court Ordinance No. 14 of 1904 (Vol. II. p. 768).[2]

The points of sections 37 to 39 of No. 6 of 1903, as seems apparent to me, are:—

> (i) That the Court has jurisdiction only in cases arising under the provisions of the Ordinance. These provisions are sections 38 and 39.

[1] Now Cap. 169, secs. 38-40, Vol. II, pp. 1165-1166.
[2] Now Cap. 295, sec. 3, Vol. II, p. 1446.

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(ii) That the powers and authorities of the Supreme Court are possessed by the Circuit Court *only* in the exercise of jurisdiction conferred by the Ordinance.

(iii) That the Court has no jurisdiction in Divorce and Matrimonial causes.

(iv) That it has no civil jurisdiction as between two natives.

(v) That it cannot try a non-native on a capital charge, nor can it try a native for the murder of a non-native.

It will be seen then that the jurisdiction of the Court is in both civil and criminal matters expressly limited, both as to the civil actions or criminal cases which it can determine, and as to the nature of the persons amenable to its jurisdiction. Consideration has clearly been given in sections 38 and 39 to the rights of native courts in civil suits between natives, to native marriage customs and to the rights of British subjects charged with capital offences, to trial by jury of their peers. Sections 38 and 39 set out the classes of civil and criminal cases which the Court can try and the only other relevant section that I can find is section 68,[1] which I may well call a monument of ambiguous draftmanship:—

> "In hearing and determining matters or causes the "Circuit Court and the Courts of the District Commissioner "shall, as far as possible, be guided in arriving at a decision "by the laws in force in the Colony."

Mr. Wright cited from Maxwell a dictum as to the principle of construction applied to enactments creating new jurisdiction. The rule of construction is, I think, well expressed by Craies, 2nd edition, at page 255:—

> "When a statute confers jurisdiction upon a tribunal of "limited authority and statutory origin, the conditions and "qualifications annexed to the grant must be strictly com-"plied with."

The Circuit Court owes its origin to Ordinance 6 of 1903; its authority is limited by sections 37, 38 and 39.

As was stated in Mr. Wright's able and interesting argument upon which I cannot improve, an application for a writ of habeas is not a criminal case under section 39; it is not an action or suit, or, if it is such, it is not one as contemplated under section 38.

[1] Now Cap. 169, sec. 78, Vol. II, p. 1173.

The only conclusion then to which one must come is that the Court has no jurisdiction to issue the writ in question.

PURCELL, C.J.

I agree.

SAWREY-COOKSON, J.

I am of the same view and will only add the following:— Much has been heard in the course of the arguments of learned Counsel of the inherent powers of a Superior Court of Record and the analogy right or wrong, between the power to commit, by virtue of that right, for contempt of court and the power to issue a writ of habeas corpus.

I cannot find that any such analogy exists, the power to issue the writ being given by statute but the power to commit having accrued, as shown in my learned brother McDonnell's very able and lucid judgment, from the earliest days, quite independent of any statute.

There may or may not be something to be said for the position that the Legislature should or should not have allowed natives in the Protectorate to share a right common to all His Majesty's subjects, but with that aspect this Court is very clearly not concerned in the least. But supposing this Court could properly be concerned with that question, Mr. Wright's contention that writs of habeas corpus *ad subjiciendum* should not issue from the Circuit Court into the Protectorate so as to interfere with the jurisdiction of Chiefs over natives, has probably a good deal to be said for it. In any event it is only with the intention of the Legislature, as is to be gathered from the Ordinance, that this Court can deal, and I am clear, for the reasons given by my brother McDonnell that such writs were not intended to be issued.