

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal, the Honourable Sir John Gordon Sprigg, in his capacity as Prime Minister of the Colony of the Cape of Good Hope v. Sigcau, from the Supreme Court of the Colony of the Cape of Good Hope; delivered 26th February 1897.*

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Present:

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Respondent Sigcau was at one time an independent Native Chief, exercising paramount authority within the district of country in South Africa known as Pondoland. In the beginning of the year 1894, he made a peaceful cession of his territory to the British Crown, and became one of Her Majesty's subjects. Thereafter, Her Majesty's representative in the Government of the Cape Colony appointed officers for the administration of the ceded territory, and duly proclaimed certain laws to be in force within it. One of these laws was the Colonial Act No. 24 of 1886, which contains a complete criminal code. It specifies in detail numerous offences against public order, public tranquillity, and the administration of justice,

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and provides for their adequate punishment. By Section 112, any wilful attempt to obstruct the course of justice or the administration of the law is made punishable with death or with imprisonment for life. The 20th chapter of the Act provides a complete system of procedure for the arrest, trial and condemnation of offenders, and confers criminal jurisdiction upon certain local Courts; and by Section 268, power is reserved to the Attorney-General to remove any case for trial in the Supreme Court of the Cape Colony, if it shall appear to him that, by that course, substantial justice may be better attained.

On the 14th August 1894, an Act of the Cape Legislature was assented to by the Governor of the Colony on behalf of the Crown, which proceeds upon the preamble that it was the intention of Her Majesty to issue Her Royal Letters Patent to authorize the Governor, by Proclamation under his hand, and the public seal of the Colony, to declare that from and after a day to be therein mentioned, the country known as Pondoland, comprising the territories of East and West Pondoland, should be annexed to and form part of the Colony, in case the Legislature of the Colony should have passed an Act providing that the said country should become a part of the Colony. Section 1 of the Act provides that from and after such day as the Governor shall, pursuant to the powers in that behalf contained in any Royal Letters Patent which may be issued for that purpose, declare by proclamation, the country mentioned in the preamble, and with the name of Pondoland, shall be annexed to and form part of the Cape Colony.

Section 2, which it is necessary to construe for the purposes of this Appeal, enacts that, from and after the date of such proclamation the territory

of East Pondoland shall become part of that portion of the Colony known as Griqualand East, and the territory of West Pondoland part of that portion of the Colony known as Tembuland; " and the said territories shall be subject to such " laws, statutes, and ordinances as have already " been proclaimed by the High Commissioner, " and such as, after annexation to the Colony, " the Governor shall from time to time by " proclamation declare to be in force in such " territories: Provided always that all such " laws made under or by virtue of this Act shall " be laid before both Houses of Parliament " within fourteen days after the beginning of " the Session of Parliament next after the " Proclamation thereof as aforesaid, and shall " be effectual, unless in so far as the same shall " be repealed, altered, or varied by Act of " Parliament." The contemplated annexation was thereafter duly carried into effect, and the provisions of the Act became operative.

On the 11th June 1895, Sir Hercules Robinson (now Lord Rosmead) as Governor and Commander-in-Chief of the Cape Colony, and as Her Majesty's High Commissioner, &c., &c., issued the Proclamation which has given rise to these proceedings. It commences with the narrative, that it had been reported that the Respondent Sigcau, the chief of the tribes residing in the territory of East Pondoland had refused to permit a duly authorised officer of the Government to do his lawful duty; that it appeared that the presence of the said Sigcau in East Pondoland was dangerous to public safety and good order in that country, and was likely to lead to the disturbance of the public peace; and that it appeared expedient to make provision for the arrest of the said Sigcau, and for his detention in some suitable place either within or beyond the boundaries of Pondoland, but within the

territories of the Transkei, Tembuland, and Griqualand East. The operative part of the Proclamation is in these terms :—

“ Now therefore, under and in virtue of the  
 “ powers vested in me by law, more especially in  
 “ the Acts annexing the territories of the Transkei,  
 “ Tembuland, Griqualand East and Pondoland,  
 “ I, the Governor aforesaid, do proclaim declare  
 “ and make known that the said Sigcau has by  
 “ his acts in disregard and defiance of the law  
 “ rendered himself liable to arrest; and I do  
 “ hereby authorise and command the chief  
 “ magistrate of Griqualand East to cause the  
 “ said Sigcau, on failure to surrender himself, to  
 “ be forthwith arrested; and do ratify and con-  
 “ firm all acts done or authorised, or to be done  
 “ or authorised by the said chief magistrate, or  
 “ done with his approval by any officer of the  
 “ law proper for the execution of criminal  
 “ warrants, any member of the force of Cape  
 “ Mounted Riflemen, any constable, police officer  
 “ or gaoler, in or about the arrest of the said  
 “ Sigcau, or with a view to securing his person,  
 “ or in encountering, opposing or suppressing any  
 “ resistance by or on behalf of the said Sigcau,  
 “ and his subsequent arrest and custody under  
 “ this Proclamation. And I do authorise and  
 “ empower the said chief magistrate, or any other  
 “ person acting in accordance with my instruc-  
 “ tions, to detain the said Sigcau in such place  
 “ in the aforesaid territories as may be by me  
 “ from time to time determined, during such  
 “ time and under such conditions as to safe  
 “ custody as may appear to me to be necessary  
 “ and expedient for the preservation of public  
 “ order and safety: Provided that it shall be  
 “ lawful, after such enquiry as may be instituted  
 “ by my direction, and in case it may be possible  
 “ to do so without jeopardy to the interests of  
 “ public peace and order, to release the said

“ Sigcau from close custody in detention, and to  
 “ appoint a place within the said territories for  
 “ the residence of the said Sigcau, with the  
 “ pecuniary allowances to which he is entitled,  
 “ but under such terms and conditions as may be  
 “ determined by further proclamation.”

After the terms of the foregoing Proclamation came to his knowledge, Sigcau went to Kokstad, and on the 18th June 1895 reported himself to the chief magistrate, by whom he was at once placed in prison and kept in close confinement. No warrant was issued for his arrest, other than the proclamation; beyond the vague allegations contained in that document, no charge was preferred against him; and he was not brought before any tribunal, in order to his being dealt with according to the ordinary course of law.

On the 29th July 1895, a petition was presented, on behalf of the Respondent, to His Honour the Chief Justice and others the Judges of the Supreme Court of the Cape Colony, praying them to “ order his immediate liberation  
 “ and discharge; or otherwise that your Lord-  
 “ ships will call upon the magistrate of Kokstad  
 “ aforesaid under whose custody your petitioner  
 “ understands he is, to produce your petitioner  
 “ before your Lordships, and to show cause why  
 “ he should not be discharged; or may make  
 “ such other order in the premises as to your  
 “ Lordships may seem meet.” The petition was opposed by the Right Honourable Cecil John Rhodes, at that time Prime Minister and Secretary for Native Affairs of the Colony of the Cape of Good Hope, and by the Honourable William Philip Schreiner Q.C. the Attorney-General of the Colony. The case was heard before the Supreme Court, when it was maintained by the Attorney-General that the Proclamation of the 11th June was a special law, which the Governor

had full power to enact, under the provisions of Section 2 of the Pondoland Annexation Act 1894, which have already been cited at length, and that the Court had therefore no jurisdiction to interfere with its execution. Chief Justice de Villiers delivered the opinion of the Court, who ordered "that the said applicant be forthwith discharged from custody."

Mr. Rhodes and Mr. Attorney-General Schreiner applied to the Supreme Court for leave to appeal to Her Majesty in Council, which was refused, upon the ground that such leave can only be granted by them in civil suits or actions, in which the sum or matter at issue exceeds 500*l.* On the 12th December 1895, Her Majesty, upon the advice of this Board granted leave to appeal, subject to the condition that the Appellant should in any event pay the costs as between Solicitor and client incurred by the Respondent in defending the appeal. Mr. Rhodes and Mr. Schreiner having ceased to hold office in the Cape Government, the Supreme Court of the Colony, on 21st April 1896, substituted the new Premier of the Colony, Sir John Gordon Sprigg, as Appellant, in room of his predecessor, omitting the new Attorney-General, the Honourable Sir Thomas Upington, who had previously been a member of the Supreme Court, and was a party to the judgment under appeal.

The Proclamation in question is described in the Appellant's case as an act of State, which is beyond the cognizance of any judicial tribunal. Whatever may have been meant by that expression, the character of the document is, on the face of it, abundantly clear. It is an edict, dealing with matters administrative, judicial, legislative and executive, in terms which are beyond the competency of any authority except

an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated. If the Governor and High Commissioner of the Cape Colony could be shown to have occupied one or other of these positions, a Court of law would be compelled, however unwillingly, to respect his Proclamation. If he did not, then his dictatorial edict was simply an invasion of the individual rights and liberty of a British subject. It set aside the established law of Pondoland with respect to arrest, trial, conviction and punishment; and condemned the Respondent Sigcau, untried and unheard, to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the framer of the edict.

It was satisfactory to find that the Appellant's Counsel did not, in the argument before this Board, venture to trace the power of the Governor to enact such a proclamation to any authority directly derived from Her Majesty; because autocratic legislation of that kind, in a colony having a settled system of criminal law and criminal tribunals would be little calculated to enhance the repute of British justice. Various Acts of the Cape Parliament, annexing different tracts of country to the Colony, were referred to in the course of their argument; but none of these had a direct bearing upon the question raised in this appeal, save the Pondoland Annexation Act 1894, which is the only statute professing to confer legislative power upon the Governor within the territory of Pondoland. Whether his Excellency had, or had not, power to enact the Proclamation of 11th June 1895, is therefore a question depending, in the first instance, upon the due construction of the provisions of the Act of 1894.

The general scheme of all these Acts appears to have been to delay the enactment of many salutary laws elsewhere prevailing throughout the Colony,

until the native inhabitants of the newly annexed territories had so far advanced in civilization and in social progress, as to make the gradual introduction of these laws advisable. Thus the new laws which were in future to be made by the Governor under the provisions of the Tembuland Annexation Act were to be (Section 2), "new laws applicable to the said territories," an expression which obviously refers to general laws applying to all inhabitants of the territory, whether natives or not, and does not seem to contemplate or include special legislation directed against an individual inhabitant, and that in derogation of the rights conferred upon him by the general law of the Colony.

The legislative authority delegated to the Governor by the Pondoland Annexation Act is very cautiously expressed, and is very limited in its scope. There is not a word in the Act to suggest that it was intended to make the Governor a Dictator, or even to clothe him with the full legislative powers of the Cape Parliament. His only authority, after the date of the Act, is to add to the laws, statutes and ordinances which had already been proclaimed and were in force at its date, such laws, statutes and ordinances as he "shall from time to time by Proclamation declare to be in force in such territories." In the opinion of their Lordships, these words do not import any power in the Governor to make "new laws," in the widest sense of that term; they do no more than authorise him to transplant to the new territories, and enact there, laws, statutes and ordinances which already exist, and are operative in other parts of the Colony. It was argued for the Appellant, that the expression "all such laws made," occurring in the proviso, indicates authority to make new laws which are not elsewhere in force; but these words cannot control the plain meaning of the



enactment upon which they are a proviso ; and, besides, that enactment is left to explain the meaning of the proviso by the reference back which is implied in the word "such."

Their Lordships think it sufficient for the disposal of this appeal to point out that the Proclamation of which the Respondent Sigcau complains exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes and ordinances which he is authorised to proclaim ; and it in substance repeals the whole provisions of the existing law, with respect to criminal proceedings, is so far as the Respondent is concerned. Upon these grounds, their Lordships are of opinion that the issue of the Proclamation was an illegal and unwarrantable Act, and that the Supreme Court of the Colony did right in refusing to give effect to it, and in liberating the Respondent.

On the assumption that the Pondoland Annexation Act did, as the Appellant maintains, confer upon the Governor either expressly, or by plain and reasonable implication, the arbitrary powers which would be required in order to justify his Proclamation, a variety of important questions would arise ; but upon these, in the view of the case which they have taken, their Lordships find it unnecessary to express any opinion.

Their Lordships will therefore humbly advise Her Majesty to affirm the order of the Supreme Court appealed from, and to dismiss the appeal. The Appellant must pay to the Respondent his costs of the appeal as between Solicitor and client.

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