

G.H.2.G.J.

19, 1961

IN THE PRIVY COUNCIL

No. 54 of 1959

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N : THE ATTORNEY-GENERAL OF THE GAMBIA Appellant

— and —

PIERRE SARR N'JIE Respondent



CASE FOR THE APPELLANT

33380

RECORD

1. This is an appeal from :

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(i) a judgment, dated the 5th June, 1959, of the West African Court of Appeal (Bairamian, Ag.P., Hurley and Ames, JJ.), setting aside an order made on the 22nd September, 1958 by a Deputy Judge of the Supreme Court of the Gambia that the name of the Respondent be struck off the Roll of Barristers and Solicitors of the Supreme Court of the Gambia, on the ground that the Deputy Judge had no jurisdiction to make that order;

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(ii) a judgment, dated the 6th July, 1959, of the West African Court of Appeal (Bairamian, Ag.P., Benka-Coker and Marke, JJ.), dismissing the Appellant's application for leave to appeal to Her Majesty in Council from the said judgment of the 5th June, 1959.

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2. The following are the legislative provisions relevant to this appeal :-

SUPREME COURT ORDINANCE
(Laws of the Gambia, 1955, Cap.5)

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2. In this Ordinance the following words and expressions shall have the meanings hereby respectively assigned to them, unless there be something in the subject or context repugnant to such meanings, that is to say -

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"cause" includes any action, suit, or other original proceeding between plaintiff and defendant, and any criminal proceeding;

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4. The Supreme Court shall consist of and shall be held by and before a Judge to be appointed by the Governor by Letters Patent under the Public Seal of the Colony in accordance with such instructions as he may receive from Her Majesty.

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7. (1) Notwithstanding anything in this Ordinance contained, it shall be lawful for the Governor to appoint a Deputy Judge to represent the Judge of the Supreme Court of the Colony of the Gambia in the exercise of his judicial powers, although he be present in the Colony or the Protectorate.

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(2) Such Deputy Judge shall exercise all the judicial powers of the Judge of the Supreme Court, and all acts done by such Deputy Judge, in the execution of his powers, shall be as valid and effectual, to all intents and purposes, as if they had been done by the Judge of the Supreme Court, and all judgments orders or decrees made by such Deputy Judge shall be subject to the same right of appeal in all respects as if they had been made by the Judge of the Supreme Court.

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(3) The Judge of the Supreme Court may direct at what time and place such Deputy Judge shall sit, and what causes shall be heard before him, and generally make such arrangements as to him shall seem proper for the division and despatch of the business of the Supreme Court.

(4) The Governor may, at any time, revoke the appointment of any Deputy Judge appointed under this section without assigning any cause for such revocation.

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15. The Supreme Court shall be a superior Court of Record, and in addition to any other jurisdiction conferred by this or any other Ordinance of this Colony shall, within the Colony, possess and exercise all the jurisdiction, powers, and authorities which are vested in or are capable of being exercised by Her Majesty's High Court of Justice in England, save and except the jurisdiction possessed and exercised by the High Court of Admiralty, unless or so far as such jurisdiction may become exercisable by such Court by virtue of any Act of the Imperial Parliament.

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72. (1) The Judge of the Supreme Court may at any time make rules of court for the Supreme Court of the Colony of the Gambia for carrying into effect this Ordinance, and in particular for all or any of the following matters -

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(c) for regulating the qualification, admission and enrolment of barristers, advocates, solicitors and notaries, and of persons acting temporarily in those capacities, and for regulating their employment in causes and their fees, and for regulating the taxation and recovery of their fees and disbursements;

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(3) No such rules, or any alteration, amendment or revocation thereof, shall be deemed binding until they shall have been approved by the Legislative Council, and shall have been published in the Gazette.

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(4) All such rules, and such alterations, amendments, and revocations thereof, when so approved and published, shall have the same force and effect for all purposes as if they had been made by Ordinance, and shall in like manner come into immediate operation, or on such day as shall be provided in such rules, subject to disallowance by Her Majesty.

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(5) Notwithstanding the provisions of subsection (4) hereof, to the contrary, the Rules of the Supreme Court, 1928, shall be deemed binding and to have come into operation on the 1st January 1929, without any publication in the Gazette.

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WEST AFRICAN COURT OF APPEAL ORDINANCE
(Laws of the Gambia, 1955, cap.6)

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14. An appeal shall lie to the Court of Appeal from any order of the Judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the roll, and for the purposes of such appeal any such order shall be deemed to be an order of the Supreme Court.

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RECORD

RULES OF THE SUPREME COURT 1928 ORDER IX

2. The Judge may, in his discretion, approve, admit and enrol to practice as a barrister and solicitor of the Court -

(1) any person who is entitled to practise as a barrister in England, Northern Ireland or the Republic of Ireland or as an advocate in Scotland, and who -

(a) produces testimonials sufficient to satisfy the Judge that he is a person of good character; and

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7. The Judge shall have power, for reasonable cause, to suspend any barrister or solicitor from practising within the jurisdiction of the Court for any specified period, or order his name to be struck off the Roll of Court.

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THE WEST AFRICAN (APPEAL TO PRIVY COUNCIL)
ORDER IN COUNCIL, 1949

3. Subject to the provisions of this order, an appeal shall lie -

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(a) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and

(b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

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3. Applications to the Court for leave to appeal

shall be made by motion or petition within 21 days from the date of the judgment to be appealed from and the applicant shall give the opposite party notice of his intended application.

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10 3. In 1956 an action was commenced in the Supreme Court of the Gambia entitled Dawooda O. Sowe v. Alhaji Ousman Jeng and Another, in which the Plaintiff alleged that he had been induced to execute a deed of conveyance by fraudulent misrepresentation about its nature made by the Respondent, when acting as his Solicitor. On the 9th May, 1957 Miles, C.J. gave judgment in this action for the Defendants, but said that, as there were certain features in the case which might require further investigation, he was directing that a copy of the proceedings be sent to the Appellant. The Plaintiff appealed to the West African Court of Appeal, and on the 21st January, 1958 the Court of Appeal set aside the Judgment of Miles, C.J. and
20 ordered a re-trial.

4. Judgment in the re-trial was given by Wiseham, C.J. on the 27th June, 1958 in favour of the Plaintiffs. In the course of his judgment, the learned Chief Justice said :

30 "Mr. S.A. N'Jie in his address said there was no fraud and that there was no false representation and that nothing was done carelessly and he even contends that the representation might have been innocent but I am unable to agree with him on any of these points and it seems also from the address of Mr. Forster that there can be misrepresentation of contents apart from misrepresentation as to the nature of the document but I find in this case misrepresentation as to both and also that deceit was practised by Mr. P.S. N'Jie on both first Plaintiff and first Defendant and that he has not accounted for monies received by him on the clearest of oral evidence and on the clearest of his own receipts."

40 The learned Chief Justice sent a copy of his judgment to the Appellant, drawing attention to the words quoted above. An appeal against this judgment was dismissed by the West African Court of Appeal on the 20th November, 1958.

5. On the 16th July, 1958 the Appellant served upon the Registrar of the Supreme Court and upon the

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Respondent a Notice of Motion, under Order IX rule 7 of the Rules of the Supreme Court, for an Order that an Enquiry be made by the Chief Justice into the allegations against the Respondent contained in the affidavit in support of the Notice of Motion, and, if reasonable cause be shown, the Respondent's name be struck off the Roll of the Court, or such other order be made as to the Chief Justice might seem fit. The affidavit in support of the Notice of Motion was sworn by the Appellant, and alleged that the Respondent had on six occasions utilised for his own purposes monies received by him on behalf of clients, had by two false representations with intent to deceive procured the execution of the document mentioned in the judgment of Wiseham, C.J., and had on another occasion with intent to deceive induced a client as mortgagee to accept a title by concealing from him the existence of two incumbrances.

pp.2-14

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pp.15-17

6. This Motion came before Wiseham, C.J. on the 19th July, 1958. Counsel appeared for the Respondent. He asked that an order be made for an enquiry, and the enquiry be held by someone other than the learned Chief Justice. Wiseham, C.J. made an order accordingly. He said that a fresh application would have to be made to fix a date for the enquiry. The Appellant then said that he had heard that the Respondent was going to England, and there ought to be an assurance that the Respondent would appear on the date fixed. This assurance was given by Counsel on behalf of the Respondent. Abbott, J. (a Judge of the Federal Supreme Court of Nigeria) was subsequently appointed Deputy Chief Justice of the Gambia under Section 7 of the Supreme Court Ordinance.

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p.109

7. The Respondent left the Gambia for England within a day or two of the 19th July, 1958, and on the 25th July wrote from London to the Appellant asking when the enquiry would be held. In his letter he wrote :-

"I had an idea that November was fixed but as I am anxious to finish with it I should like it held as early as possible, say, the first week of September next."

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Arrangements were then made for the enquiry to begin on the 15th September, and the Respondent was informed of this. He wrote on the 17th August acknowledging the information and saying that he would be present at

- the enquiry on the 15th September. On the 28th August, however, the Respondent sent a telegram from London to the Chief Justice, saying that he objected to the enquiry being held during the vacation. (The Long Vacation in the Gambia extends from the 1st August to the 31st October). The Chief Justice immediately sent a telegram in reply, saying that all arrangements had been made for Abbott, J. to sit on the 15th September and the Respondent must then attend. The Respondent subsequently sent other letters and telegrams protesting against the enquiry being held on the 15th September or at any time during the vacation.
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8. The enquiry began before Abbott, J. on the 15th September, 1958. Neither the Respondent nor anybody on his behalf appeared. On the 16th September the hearing of evidence began. In the course of that day Mr. E.D. N'Jie appeared on behalf of the Respondent, and asked for an adjournment until November on the ground that a certificate would be available at the week-end from a surgeon at Exeter. He abandoned any protest at the matter proceeding during the vacation. The learned Judge refused the application, but said he would consider a further application if a proper medical certificate were produced. Mr. E.D. N'Jie then withdrew. No further application for an adjournment was made nor was any medical certificate ever produced.
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9. The hearing of evidence continued on the 17th and 18th September, 1958, and the enquiry was completed on the latter day. Abbott, J. delivered his judgment on the 22nd September, 1958. He said he had at no time forgotten that the witnesses had not been subjected to cross-examination, and had therefore scrutinised their evidence with extreme care. He then went on to consider one by one the nine allegations contained in the affidavit sworn by the Appellant in support of his notice of motion, and found that eight of them had been established. (The one exception was one of the false representations alleged to have been made by the Respondent in order to procure the execution of the document mentioned in the judgment of Wiseham, C.J. (cf. paragraph 4 above). It was found that the Respondent had made the other false representation alleged for this purpose). The learned Deputy Chief Justice ordered that the Respondent's name be struck off the Roll of Barristers and Solicitors of the Supreme Court of the Gambia and the order be reported to the Benchers of the Respondent's Inn.
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10. On the 6th October, 1958 the Respondent gave

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notice of appeal to the West African Court of Appeal. His grounds of appeal, after amendments by a notice of the 27th December, 1958, were the following :

1. On the 19th July, 1958 Wiseham, C.J. ought not to have ordered an enquiry, because (a) he should not have dealt with the application except to adjourn it to be heard by a Deputy Chief Justice, (b) the evidence in support of the motion had been entirely hearsay, and (c) there had been no jurisdiction to order an enquiry on the matters alleged. 10

2. The order for the enquiry should have been served on the Respondent personally.

3. The Deputy Chief Justice had had no jurisdiction to hold the enquiry in the vacation.

4. The enquiry ought to have been adjourned to enable the Respondent to cross-examine the witnesses and present his case.

5. The punishment was excessive. 20

6. The Deputy Chief Justice had had no jurisdiction to make his order of the 22nd September, 1958.

7. Order IX rule 7 of the Rules of the Supreme Court was ultra vires and void.

8. Since the charges might have been the subject of criminal proceedings,

(a) they should not have been considered until the Respondent either had been convicted or had admitted them, and 30

(b) the Respondent ought not to have been required to attend the enquiry and answer the allegations.

11. The appeal was heard on the 26th and 27th May, 1959. Counsel for the Respondent argued only grounds 6 and 7 above. Judgment was delivered on the 5th June, 1959. The Court held that : (i) the Deputy Judge had had no jurisdiction to make his order, and (ii) (Hurley, J. Dissenting) Order IX rule 7 was ultra vires and void. 40

12. Bairamian, Ag.P. said that Abbott J. had said

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10 in his judgment that the Chief Justice had been moved, and not the Supreme Court, because it was the Chief Justice who, by the Rules of the Supreme Court, had control over barristers and solicitors. It was clear, the learned Acting President said, that Abbott, J. had not been sitting as the Supreme Court. He quoted section 7 of the Supreme Court Ordinance, and held that under it a Deputy Judge might be appointed to deal with cases pending before the Supreme Court, but not to deal with any matter which was not a proceeding in the Court. Abbott, J., therefore, had not, in his view, had any jurisdiction to hold the enquiry, and his order should be set aside as being null and void. Bairamian, Ag.P. went on to consider the question of the validity of Order IX rule 7. He said it had been conceded on behalf of the Respondent that the Supreme Court of the Gambia had jurisdiction to suspend a legal practitioner, and he inclined to the view that this jurisdiction was derived from section 15 of the Supreme Court Ordinance. The Judge of the Supreme Court could, therefore, make rules to regulate procedure on an application to the court to suspend a legal practitioner; but Order IX rule 7 did not do that, but empowered the judge to impose such suspension. The Appellant, he said, had argued that a judge holding an enquiry under Order IX rule 7 was not sitting as the Court. The learned Acting President held that the power to suspend resided in the Court under the Ordinance, so that a rule empowering a judge, apart from the Court to suspend was inconsistent with the Ordinance and so ultra vires. He held that the effect of S.72(5) of the Supreme Court Ordinance was that the Rules of the Supreme Court had to be treated as though they had received approval and been published in accordance with sub-s. (4). They had therefore to be treated as if they had been made by Ordinance, but the learned Acting President held that if there was any conflict between the rules and the Ordinance the Ordinance had to prevail. He accordingly held that Order IX rule 7 was not a valid rule, but said that the ground on which he thought that the appeal ought to be allowed was that the Deputy Judge had been without jurisdiction.

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36-p.64,
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37-p.65,
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p.66,11.
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p.72,11.
15-26.

13. Ames, J. said that a Deputy Judge could only exercise "the judicial powers" of the Chief Justice, which were powers exercised by him when constituting the Supreme Court under section 4 of the Supreme Court Ordinance. The application before Abbott, J. had not asked him to exercise judicial powers in this sense, so he had been without jurisdiction. Dealing

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with the validity of Order IX rule 7, the learned Judge said that section 72(1)(c) of the Supreme Court Ordinance did confer a power to make rules for the suspension and striking off of legal practitioners, but Order IX rule 7 was not a rule prescribing procedure for that purpose, but a rule conferring upon the Chief Justice power to suspend or strike off. The Supreme Court had inherent power to decide who should or should not practice before it, and the Supreme Court Ordinance had not conferred upon the Chief Justice personally any disciplinary powers. In his view, therefore, the Court had not parted with its power of discipline over legal practitioners, so Order IX rule 7 was ultra vires. He agreed with the learned President that section 72(5) of the Supreme Court Ordinance did not validate the rule.

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14. Hurley, J. agreed that Abbott, J. had had no jurisdiction, under section 72 of the Supreme Court Ordinance, to make the order striking the Respondent off the Roll. On the question of the validity of Order IX rule 7 he dissented, and held that rule to be intra vires. He summarised the effect of section 72(1) and Order IX, and said that section 72(1) empowered the Judge to make rules for carrying the Supreme Court Ordinance into effect. The Supreme Court had to administer English law, and English law, could not be administered to the best effect without legal practitioners with a right of audience in the Court. The Ordinance recognised this in section 72(1)(c). The Ordinance could not properly be carried into effect if unsuitable persons were to be able to acquire indefeasible right to practise in the Court, and provision for making rules to carry the Ordinance into effect must include a power to make rules about excluding such a person from practice. The Supreme Court had power to admit persons to practise as barristers and solicitors and to disqualify them, and what the rules did was to regulate the exercise of that jurisdiction, which was well within the ambit of section 72(1). The jurisdiction to discipline practitioners was a jurisdiction ancillary to the litigious jurisdiction of the Court, and such a jurisdiction might be exercised by the Judge, as opposed to the Court. The rules regulating its exercise were therefore intra vires in providing for its exercise by the Judge.

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p.67,1.
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p.69,1.18-
p.70,1.52.

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p.71,1.1-
p.72,1.10.

15. At the time of the delivery of these judgments,

the Respondent was still absent from the Gambia and was, so far as the Appellant knew, in the United Kingdom. On the 23rd June, 1959 the Appellant gave Notice of Motion in the West African Court of Appeal for leave to appeal to Her Majesty in Council, on the ground that the question involved was one which by reason of its great public importance ought to be submitted to Her Majesty in Council, and for an order that the Notice of Motion be served on the Respondent by registered post at the address which the Respondent had given in London. On the 24th June the Deputy Registrar of the Court of Appeal at Freetown sent a cable to the Deputy Registrar at Bathurst, saying that the Motion would be heard on the 3rd July and asking that the Respondent be warned. The Respondent not being in the Gambia, the Deputy Registrar at Bathurst caused a notice of the hearing to be served upon Mr. E.D. N'Jie, but Mr. E.D. N'Jie refused to accept it.

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16. The Motion came before Bairamian, Ag.P., Benka-Coker and Marke, JJ. on the 3rd July, 1959 and on the 6th July Judgment was given dismissing it. The learned Acting President said that the Court would have been disposed to grant leave under section 3(b) of the West African (Appeal to Privy Council) Order in Council, 1949, but for section 5 of that Order. Under that section, notice had to be given of an "intended application"; the application had to be made within 21 days, so, the Court held, it followed that notice of intention to make it could not be given after the 21 days had expired. The learned Acting President added that it had not been possible for the Appellant to give notice to the Respondent, since the Respondent was in England, but they regretted that, nevertheless, section 5 prevented them from giving leave to appeal.

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p.77,1.32-
p.78,1.21.

17. The Appellant respectfully submits that the Court of Appeal was wrong in holding that Abbott, J. had no jurisdiction to hold the enquiry and to strike the Respondent's name off the roll. The power to hold such an enquiry and make such an order is conferred upon the Chief Justice by Order IX of the rules of the Supreme Court. It is conferred upon him by virtue of his office as Judge of the Court; it is a power to be exercised judicially; and from an order made in exercise of it there is a right of appeal to the West African Court of Appeal. The power to discipline legal practitioners is thus one of the "judicial powers" of the Chief Justice. It follows that, under section 7(1) and (2) of the Supreme Court Ordinance, it is a power which can be exercised by a Deputy Judge appointed by virtue of that section.

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RECORD

18. The Appellant respectfully submits that Order IX rule 7 of the Rules of the Supreme Court is intra vires and valid, and the decision of the majority of the Court of Appeal on this point was wrong. Section 72(1)(c) of the Supreme Court Ordinance expressly authorises the Judge to make rules "for regulating the qualification, admission and enrolment of" legal practitioners. The power of regulation conferred by this section must extend not only to the addition of names to the roll, but also to the removal of names therefrom, and a necessary part of such regulation is the statement who is to be entitled to add or remove the names. The power is therefore wide enough to cover a rule under which this is to be done by the Judge himself. There is, in the Appellant's submission, no contradiction between such a power of regulation and the provisions of section 15. If there were any such conflict, the particular provision of section 72 would prevail over the general provision of section 15.

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19. Alternatively, the Appellant respectfully submits that the power of deciding who is to practise before the Supreme Court is an inherent power of that Court. By section 4 of the Supreme Court Ordinance, the Court consists of the Judge; so a rule providing for the exercise of disciplinary jurisdiction over legal practitioners by the Judge is a procedural rule validly made under section 72 of the Ordinance. It follows that Order IX rule 7 is intra vires.

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20. The Appellant respectfully submits in the further alternative that Order IX rule 7 is for all purposes a valid and binding rule by reason of section 72(3)(4)(5) of the Supreme Court Ordinance.

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21. The Appellant respectfully submits that the Court of Appeal was wrong in its interpretation of Section 5 of the West African (Appeal to Privy Council) Order in Council, 1949. Under that section, the motion or petition for leave to appeal has to be made within 21 days from the date of the judgment to be appealed from, in the sense that it must be filed with the Court in that time. It remains an "intended application" until it has come on for hearing, and notice of it may be given to the opposite party either before or after the expiration of the 21 days. The Appellant's application for leave to appeal, therefore, was still an intended application on the 3rd July, 1959, and the Court ought then to have given him leave to serve notice on the Respondent in London by registered post.

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22. Of the Respondent's grounds of appeal to the Court of Appeal, set out in paragraph 10 of this Case, the Appellant respectfully submits that all except nos. 6 and 7 were abandoned by the Respondent in that Court. Were it necessary to do so, the Appellant would make the following submissions on the other grounds :

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1. Wiseham, C.J. had jurisdiction to make his order of the 19th July, 1958, and made it at the request of counsel for the Respondent.

2. There was nothing to require personal service of that order on the Respondent. If there had been, the Respondent's letters of the 25th July and the 17th August, 1958 (c.f. paragraph 7 above) would have constituted waiver of that requirement.

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3. Abbott, J. had a discretion, which he exercised properly, to hold the enquiry in the vacation. Any objection to his doing so was expressly abandoned by counsel for the Respondent before him (cf. paragraph 8 above).

4. In the circumstances Abbott, J. was abundantly justified in proceeding in the absence of the Respondent.

5. The misconduct proved against the Respondent merited the penalty imposed.

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8. There was no reason why the disciplinary proceedings should await the outcome of criminal proceedings. In any case, the Appellant stated publicly before Abbott, J. that he did not propose to institute criminal proceedings.

23. The Appellant respectfully submits that the judgments of the West African Court of Appeal of the 5th June, 1959 and the 6th July, 1959 were wrong and ought to be reversed, and Abbott, J.'s order of the 22nd September, 1958 ought to be restored, for the following (amongst other)

R E A S O N S

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As to the judgment of the 5th June, 1959 :

1. BECAUSE in holding the enquiry Abbott, J. was exercising one of the judicial powers of the Judge of the Supreme Court:

2. BECAUSE the making of Order IX rule 7 was a valid exercise of the power conferred by section 72 of the Supreme Court Ordinance:
3. BECAUSE Order IX rule 7 has the same force and effect for all purposes as if it had been made by Ordinance:
4. BECAUSE of the other reasons set out in paragraph 22 of this Case:

And as to the judgment of the 6th July, 1959 :

5. BECAUSE on the 3rd July, 1959 the Appellant's application for leave to appeal to Her Majesty in Council was still an 'intended application':
6. BECAUSE on the 3rd July, 1959 it was not too late for the Appellant to give notice to the Respondent of that intended application.

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J.G. Le QUESNE.

No. 54 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE WEST AFRICAN COURT OF APPEAL

THE ATTORNEY-GENERAL OF THE GAMBIA
Appellant

— v —

PIERRE SARR N'JIE

Respondent

C A S E

- for the -

A P P E L L A N T

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