

~~CH 4.92.~~

19/1963

IN THE PRIVY COUNCIL

No.13 of 1962

UNIVERSITY OF LONDON
SCHOOL OF ADVANCED
STUDIES
17 JUN 1964
11 BEDFORD SQUARE
LONDON, W.C.1.

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N:

71000 SIR ABUBAKAR TAFAWA BALEWA Appellant

-- and --

SENATOR CHIEF T. ADEBAYO DOHERTY Respondent

10 SIR VAHE ROBERT BAIRAMIAN
JAMES MALCOLM HARRISON, and } Pro-forma
GERALD PERCY COOKE } Respondents

A N D B E T W E E N:

SIR ABUBAKAR TAFAWA BALEWA Appellant

-- and --

WESTERN NIGERIAN DEVELOPMENT
CORPORATION Respondent

SIR VAHE ROBERT BAIRAMIAN, JAMES
MALCOLM HARRISON, and GERALD PERCY } Pro-forma
COOKE } Respondents

(CONSOLIDATED)

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C A S E FOR THE APPELLANT

RECORD

1. This is an appeal, by leave of the Federal
Supreme Court of Nigeria dated the 5th p.145
February 1962, from a judgment of the Federal
Supreme Court dated the 27th October 1961, p.125
whereby, upon a reference by the High Court
of Lagos dated the 31st July 1961, it was p.115
declared that the Commissions and Tribunals
of Enquiry Act 1961 was outside the legislative
competence of the Federal Parliament of
Nigeria and further that certain provisions of
that Act were void, and the Appellant should
pay the costs of the reference.

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2. The principal questions raised in this
appeal are:

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- (a) Whether the said Act was outside the legislative competence of the Federal Parliament, and
- (b) Whether in any event the said Act was totally void or whether only certain provisions thereof were void.

3. The Appellant is the Prime Minister of the Federation. The First Respondent in the first of these consolidated suits was at all material times a director of the National Bank of Nigeria Limited. The Second, Third and Fourth Respondents in each suit were members of a Commission of Inquiry set up by the Appellant to enquire into the affairs of the National Bank of Nigeria Limited: upon giving certain undertakings, these three parties were released from the two suits on the 31st July, 1961, and have taken no further part therein. The two suits were consolidated on the 31st July 1961 by order of Onyeama J. in the High Court of Lagos.

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p.113 L.31

p.113 Ll.38-41

4. The relevant statutory provisions are:-

The Constitution of the Federation of Nigeria

(Second Schedule to The Nigeria (Constitution) Order in Council No. 1652 of 1960).

1. This Constitution shall have the force of law throughout Nigeria and, subject to the provisions of section 4 of this Constitution, if any other law (including the constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

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.....

20(1) No person shall be deprived of his personal liberty save in the following cases and in accordance with a procedure permitted by law.

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- (a) ... in execution of the sentence or order of a Court in respect of

a criminal offence of which he has been found guilty or in the execution of the order of a Court of Record punishing him for contempt of itself;

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(b) By reason of his failure to comply with the order of a Court or in order to secure the fulfilment of any obligation imposed on him by law.

(c) For the purpose of bringing him before a Court in execution of the order of a Court ...

21.(2) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a Court.

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22.(1) Every person shall be entitled to respect for his private and family life, his home and his correspondence.

(2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

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(a) in the interest of defence, public safety, public order, public morality, public health or the economic well being of the community; or

(b) for the purpose of protecting the rights and freedom of other persons.

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64.(1) Parliament shall have power to make laws -

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(a) for the peace, order and good government of Nigeria (other than the Federal territory) or any part thereof with respect to any matter included in the Legislative Lists; and

RECORD

(b) for the peace, order and good government of the Federal territory with respect to any matter whether or not it is included in the Legislative Lists.

- (2) The power of Parliament to make laws for the peace order and good government of the Regions with respect to any matter included in the Exclusive Legislative List shall (save as provided in section 72 of this Constitution) be to the exclusion of the Legislatures of the Regions: 10

Provided that

- (4) If any law enacted by the legislature of a Region is inconsistent with any law validly made by Parliament, the law made by Parliament shall prevail and the Regional law shall, to the extent of the inconsistency, be void. 20

- (5) Subject to the provisions of subsection (4) of this section, nothing in this section shall preclude the legislature of a Region from making laws with respect to any matter that is not included in the Exclusive Legislative List.

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72.(1) Parliament may make laws for Nigeria or any part thereof with respect to banks and banking. 30

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THE SCHEDULE
THE LEGISLATIVE LISTS

Part I - The Exclusive Legislative List.

Item

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43. The matters with respect to which Parliament is empowered to make provision by sections 4..... 72..... of this Constitution.
44. Any matter that is incidental or supplementary 40

- (a) to any matter referred to elsewhere in this list, or
- (b) to the discharge by the Government of the Federation of any function conferred by this Constitution.

PART III - Interpretation

1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality -

- 10 (a) Offences;
- (b) The jurisdiction, powers, practice and procedure of Courts of Law;
- (c) The compulsory acquisition and tenure of land;
- (d) The establishment and regulation of tribunals of inquiry

Commissions and Tribunals of Enquiry Act
1961 (Federal Statute)

.....

- 20 1.(2) This Act shall apply, throughout the Federation and shall be deemed to have come into operation on the twentieth day of July, 1961.

.....

- 2.(2) A commission of inquiry is a tribunal of enquiry and accordingly references in this Act to commissions of inquiry shall include references to any tribunal of enquiry or court of enquiry however established.
- 30 3.(1) The Prime Minister may, whenever he shall deem it desirable issue a Commission appointing one or more Commissioners, or any quorum of them that may therein be mentioned, to hold a Commission of Inquiry into any matter or thing within or affecting the general welfare of the Federal Territory, or into any matter or thing within Federal competence

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anywhere within the Federation in respect of which in his opinion, an inquiry would be for the public welfare, or into the conduct of any chief or the management of any department of the public service....

- (2) Each commission shall specify the subjects of inquiry, and may, in the discretion of the Prime Minister, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made and the report thereof rendered, and prescribe how such commission shall be executed
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.....

- (4) The fact that a commission is issued under this section shall be sufficient proof of the proper exercise by the Prime Minister of his authority to do so; and neither the Commission itself nor any action of the Prime Minister in relation thereto shall be enquired into in any court of law.
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8. Subject to the provisions of this section the commissioners shall have and may exercise all or any of the following powers, that is to say, -

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- (c) the power to summon any person in Nigeria to attend any meeting of the Commissioners to give evidence or produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession, subject to all just exceptions;
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- (d) the power to issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails to do so, and does not
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10 excuse such failure to the satisfaction of the Commissioners, and to order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his refusal to obey the summons, and also to fine such person a sum not exceeding five pounds, such fine to be recoverable in the same manner as a fine imposed by a Magistrates' Court;

.....

20 15. Notwithstanding any duty of secrecy laid upon him by any Act or law or otherwise howsoever, any person who being summoned to attend as a witness or produce a book, document or any other thing refuses or neglects to do so or to answer any question put to him by or with the concurrence of the commissioners shall be liable -

(a) to a fine of fifty pounds or to imprisonment for three months to be imposed by the commissioners and recoverable or enforceable in the same manner as a fine or imprisonment imposed by a Magistrates' Court; or

30 (b) on summary conviction to a fine of one hundred pounds or to imprisonment for six months;

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18. (1) Any person who commits an act of contempt, whether the act is or is not committed in the presence of the commissioners sitting in commission, shall be liable -

40 (a) In summary conviction before a court of competent jurisdiction to a fine of one hundred pounds or to imprisonment for three months; or

(b) On the order of the commissioners to a fine of ten pounds;

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5. By Government Notice No.1446, dated the 21st July 1961, the Appellant appointed a Tribunal of Inquiry under the powers conferred on him by section 3 of the Commissions and Tribunals of Enquiry Act 1961. The Second Third and Fourth Respondents were appointed Commissioners, and the terms of reference were as follows:-

1. The general business operation and financial policy of the National Bank of Nigeria Limited and of its subsidiary companies during the period 1st October, 1959 to 31st December, 1960. 10

2. The nature, amounts and terms of advances or credit facilities or guarantees, as well as validity and sufficiency of any securities therefor, made, granted or given by the said Bank at any time to:

(a) all subsidiary companies of the said bank; 20

(b) directors of the said bank or members of their families;

(c) any corporation, firm or other association of persons in which it may appear that any director of the said bank has or has had any interest at any material time;

(d) any private individual, corporation, firm or other association of persons, whether or not any director or official is or was interested therein. 30

3. The relationship and dealings at any time between the said bank and its directors or any of them on the one hand and on the other hand:

(a) The National Investment and Properties Co. Limited

(b) The Western Region Marketing Board;

(c) The Western Nigeria Development Corporation and its statutory predecessors; 40

(d) The Mutual Aids Society Limited;

(e) Any political party, group or association, or any persons, corporation, firm or other association of persons acting on behalf of any such political party, group or association.

10 4. Whether, and, if so, to what extent party political considerations or associations have at any time influenced the said Bank in its dealings with customers or prospective customers whether as borrowers or as depositors.

5. Whether, and, if so, in what respect the business and affairs of the said bank have not been conducted at any material time in accordance with the provisions of the Banking Ordinance 1958 or of any other relevant Ordinance.

20 6. Whether in respect of any of the aforesaid matters or of any matters affecting the business and affairs of the said bank which, not having been herein before specifically mentioned, may come to the notice of the Commissioners, any director or other officer of the said bank has failed to adhere to the standards of conduct or propriety demanded of him in his office, and if so in what respect.

30 6. Pursuant to the said Notice No.1446 the Tribunal held its first meeting at 9 a.m. on the 25th July 1961, when it was addressed by Mr. Neil Lawson Q.C., counsel for the Tribunal. After counsel for interested parties had made their appearances, Mr. Lawson summarised the allegations which had given rise to the setting up of the Tribunal as follows:-

40 "Firstly, that the National Bank of Nigeria during the period referred to in the first terms of reference has seriously infringed the provisions of the Banking Ordinance in ways that are far more than merely technical. Secondly, that the former Directors of the Bank, Doctor Maja, Senator Doherty, Mr. Bademosi, Chief Hunponu-Wusu and Mr. Ladipo who were the Board of the Bank's Directors until some early date this year and who at all material times by their

P.51 L1.5-30

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disregard of the provisions of the law and by the unsound banking policies which they followed have gravely endangered the security of funds entrusted to the bank by members of the public and by the great public corporations of the Western Region. Thirdly, that during the period of the former Directors' control, substantial funds deposited with the Bank, both private money and public money, have been used for the personal benefit of the former Directors and for private commercial enterprises with which those Directors or members of their families have been associated. Fourthly, that the economic powers of the Bank have been directed and the funds under its control have been employed to a considerable extent for party political ends and purposes."

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p.52 L.38
p.53 L.44

Mr. Lawson then considered the position in law of a Nigerian Bank, and in particular the terms of the Banking Ordinance, Cp.19 of 1958, which it was alleged had been specifically infringed by the National Bank of Nigeria on a number of occasions. Counsel then opened the specific facts relating to the subject matter of the enquiry, and the Commissioner adjourned at 1.40 p.m. The Commission did not sit again.

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p.1

7. On 25th July 1961, the First Respondent applied in the High Court of Lagos for an injunction to restrain the Commission proceeding further pending the hearing of a claim for declarations that the Tribunal appointed by Notice No.1446 was illegal, unconstitutional and invalid and that it should be restrained from holding further hearings. After certain preliminary proceedings, Onyeama J. ordered that certain questions should be referred under section 108(2) of the Constitution for the opinion of the Federal Supreme Court. The questions so referred were:

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p.115

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p.118

1. Whether or not the Commissions and Tribunals of Enquiry Act 1961 is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.

2. Whether or not section 3(4) of the said Act is constitutional and valid or contravenes sections 21, 31 and 108 of the Constitution of the Federation of Nigeria.

10 3. Whether or not sections 8(c), 8(d), 15(a) and 18(1)(b) of the Commissions and Tribunals of Enquiry Act 1961 (or any of them) are constitutional and valid, or contravene sections 20 or 21 of the Constitution of the Federation of Nigeria.

8. Such reference was heard by the Federal Supreme Court (Ademola F.C.J., Mbanefo C.J. of Eastern Region, Brett, Unsworth, and Taylor, F.J.J) on 4th, 5th, 6th and 9th October 1961. Judgment was given on 27th October 1961, in favour of the First Respondent in the first of the consolidated appeals.

p.125

20 Ademola F.C.J. giving the judgment of himself, Mbanefo C.J. of E.R. and Unsworth F.J., said, after referring to section 108 of the Constitution and to the questions before the Court, that the Nigerian Constitution was a truly Federal constitution, wherein the residual powers are vested in the Regions: it followed that Federal legislation was only valid if provided for in the Constitution. The Federal power to legislate in respect of Tribunals of Enquiry was found in Item 44 of the Exclusive Legislative List and Part III of the Schedule to the Constitution. The First Respondent had argued that these provisions only empowered the Federal Parliament to appoint tribunals to enquire into specific matters on the Exclusive Legislative List, and had relied upon Attorney-General for the Commonwealth of Australia -v- The Colonial Sugar Refining Co.Ltd. (1914) A.C. 237 (hereinafter called "the Colonial Sugar Co. case"): the Appellant had argued that the legislation was within the terms of the Constitution.

p.126 L.42

40 The learned Federal Chief Justice held that a review of previous legislation had not been of great assistance in construing the 1960 Constitution: the question for the Court was whether the powers granted by that Constitution were wide enough to justify the legislation under review: he then referred to the facts of and the decision in the Colonial Sugar Co. case, and quoted from the advice submitted by

p.129 L.13

p.129 L.28

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- p.130 L.33 the Judicial Committee in that case: this decision was considered in ex parte Walsh 37 C.L.R. 36 where the High Court of Australia held that matters incidental to the execution of a power must be ancillary to some specific power, and could not be linked to the general power of the Parliament to legislate on all Federal matters or to the general executive power under section 61 of the Australian Constitution: this case was followed by Le Mesurier v. Connor 42 C.L.R. 481. The effect of these decisions was that in Australia ancillary legislation must come either within the well established rules relating to matters incidental to the subject matter of legislation or be incidental to the execution of a specific existing power. In considering the main question before the Federal Court, the Colonial Sugar Co. case was of great relevance, as the legislation was very similar to that considered in the Australian case: the Federal Court was of opinion that the legislation in question before it was too wide to come within Paragraph (a) of Item 44 of the Exclusive Legislative List: this paragraph would permit legislation providing for Tribunals of Enquiry and matters incidental thereto, but is not wide enough to provide generally for the attendance of witnesses, the disclosure of information and the production of documents: the learned Federal Chief Justice would hold that the Tribunals and Commissions of Enquiry Act 1961, insofar as it applied to the whole Federation, exceeded the power of Parliament under the Constitution. The fact that this finding might require a large number of individual laws to be enacted was not of great objection, as the Commonwealth Parliament of Australia had been able to follow such a course; which was not dissimilar to that followed in England consequent to the Tribunals of Enquiry (Evidence) Act 1921. In view of the above conclusion, it was unnecessary to consider a further submission to the effect that the Act was invalid because the particular provisions found invalid could not be severed from the rest of the Act: no decision was required in this case as to whether section 22 of the Constitution had been infringed.
- p.132 L.28 10
- p.133 L.11 20
- p.133 L.36 30
- p.134 L.12 40
- p.135 L.16 50
- In regard to the second and third questions before the Court, section 3(4) of the Commissions and Tribunals of Enquiry Act, 1961, was unconstitutional and invalid: as to sections 8(c)

and (d), 15(a) and 18(1)(b), section 8(c) was valid but the Commissioners could not be granted any power under the Constitution to imprison or to impose a fine, and the sections in question must be read down accordingly: there would be declarations to give effect to this judgment.

10 Brett, F.J. in agreeing to answer the questions in the manner proposed by the learned Chief Justice, said that he thought that there was some distinction between the Colonial Sugar Co. case and the present: there was a difference in the wording of the relative Acts purporting to set up the Commission, and there was a difference in the wording of the relative Constitutions: it was arguable that Item 44 of the First Part of the Schedule of the Nigerian Constitution granted a wider power than the corresponding provision in the Australian Constitution: however the framers to the Nigerian Constitution had the knowledge of the interpretations put upon the Australian Constitution and if they had intended to grant a separate power to set up tribunals, they would not have included it as an incidental or supplementary power in the Schedule to the Constitution: for these reasons he agreed with the judgment of the learned Chief Justice.

p.137 L.2
p.137 L.17
p.138 L.1
p.138 L.34
p.139 L.1

30 Taylor F.J. said he wholly agreed with the judgment of the learned Chief Justice: he wished to deal with certain arguments raised in the hearing: he did not consider that any valid distinction could be drawn between "Commissions" and "Tribunals" of enquiry: he further did not accept the Attorney General's argument that the Commissions of Inquiry Ordinance, before its repeal on the 20th July 1961 was an "existing law" within the meaning of section 3 of the Constitution Order in Council 1960, on which could be hung the legislation in question, because even if it was an existing law, it would only be valid so far as it was consistent with the Constitution.

p.140 L.9
p.141 L.25
p.141 L.33

40 9. Final leave to appeal to the Privy Council was granted to the Appellant by the Federal Supreme Court on the 5th February 1962.

p.145

10. The Appellant respectfully submits that the judgment of the Federal Supreme Court was wrong and should be reversed. It is submitted

that Brett F.J. was right in pointing out the danger of adopting decisions upon different Federal Constitutions as binding in questions of interpretation of the Nigerian Constitution. It is submitted that the decision in the Colonial Sugar Co. case is not decisive of the issues in the present case. In particular there are material differences between the Australian and Nigerian Constitutions which make the application of that case inappropriate. 10
The Appellant draws attention to the words "incidental to the execution of any power" in placitum XXXIX of section 51 of the Australian Constitution, which, it is submitted, were the basis of the reasoning in the Colonial Sugar Co. case at pages 256 and 257 of 1914 A.C. whereby it was held that the legislation impugned in that case was unconstitutional. The words indicated are not found in the Nigerian Act under consideration, nor are there any words of a comparable effect. For this reason, and by reason of the differences of wording between the two Constitutions, it would be misleading to rely upon the conclusion reached in the Colonial Sugar Co. case. It is further submitted that, upon a true interpretation of Item 44 of the Exclusive Legislative List (as further defined by Part III of the Schedule), it will be found that the Federal Parliament did have power to enact a law relating solely to Tribunals of Enquiry without particular reference to any specific legislative power of the Federal Parliament. 20
Inter alia, the Appellant relies upon the words "or supplementary" in item 44 which, it is submitted, give a wider effect than the words in section 51 (XXXIX) of the Australian Constitution. The Appellant further submits that the Colonial Sugar Co. case is not conclusive of the present appeal because the legislation under review in that case was not strictly comparable with the legislation impugned in the present case: the detailed differences and the relevance thereof will be referred to at the hearing of this appeal. 30
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11. The Appellant submits that in any event the Federal Supreme Court, in holding the whole Commissions and Tribunals of Enquiry Act 1961 invalid, has exceeded what the Privy Council held proper in the Colonial Sugar Co. case, namely to excise only those parts of the Act which are inconsistent with the Constitution. 50

10 If it is accepted that sections 3(4), 8(d), 15(a) and 18(1)(b) of the 1961 Act are invalid, nevertheless the rest of the Act can stand effectively without them, and the Court ought to have so declared. The Appellant submits that these sections are merely incidental to the main purposes of the Act, and that the First Respondent in each appeal was premature in his application, since in neither case was there any purported use of such sections to his detriment. It was incorrect for the Federal Supreme Court to make declarations with reference to the whole Act without considering whether or not the excision of the particular sections complained of were fatal to the execution of the Act.

20 12. The Appellant submits that section 3(4) of the Commissions and Tribunals of Enquiry Act 1961 is not contrary to the Constitution. It is submitted that this section ought not to be read as importing the exclusion of the courts into all aspects of a Commission, but only such aspects as are matters of discretion, which would never in the ordinary course be a matter for enquiry by the courts. This section ought, in case of possible contravention of the Constitution, to be read in such a way as not to conflict with the Constitution. The Appellant submits that the Federal Supreme Court was right in holding that section 8(c) of the Commissions and Tribunals of Enquiry Act 1961 was not un-constitutional, and he does not now contend that Commissions appointed under the Act can properly exercise any powers of fining or imprisoning offenders as given by sections 8(d), 15(a) or 18(1)(b). However, the absence of such powers does not, it is submitted, affect the working of the other provisions of the Act, or render ineffective the general purposes of the Act. The Appellant submits that section 22 of the Constitution has no relevance to or effect upon the terms of the Commissions and Tribunals of Enquiry Act 1961. In general any particular provision repugnant to the Constitution may be declared void, but unless such repugnant provisions form the overwhelming part of the Act, it is submitted that the Court would not be justified in making any declaration in respect of the Act as a whole.

50 13. The Appellant respectfully submits that this

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appeal should be allowed with costs, and the judgment of the Federal Supreme Court reversed or varied for the following, (amongst other)

R E A S O N S

- (1) BECAUSE the Commissions and Tribunals of Enquiry Act 1961 is within the legislative competence of the Federal Parliament.
- (2) BECAUSE the Commissions and Tribunals of Enquiry Act 1961 is within Item 44 of the Exclusive Legislative List in the Constitution of Nigeria. 10
- (3) BECAUSE the main purposes of the Commissions and Tribunals of Enquiry Act 1961 are not contrary to the terms of the Nigerian Constitution.
- (4) BECAUSE the judgment of the Privy Council in the Colonial Sugar Co. case is not binding in the present case.
- (5) BECAUSE even if certain provisions of the Commissions and Tribunals of Enquiry Act 1961, are unconstitutional, the whole Act is not thereby invalidated. 20
- (6) BECAUSE the Federal Supreme Court failed to consider whether the exclusion of any invalid provisions of the Commissions and Tribunals of Enquiry Act 1961 would leave valid the remaining parts of the Act.

MERVYN HEALD

No.13 of 1962
IN THE PRIVY COUNCIL

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(CONSOLIDATED)

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