13, 196,

IN THE PRIVY COUNCIL

No. 20 of 1968

ON APPEAL FROM

THE COURT OF APPEAL

FOR SIERRA LEONE

B E T W E E N :

JOHN JOSEPH AKAR
(Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL
OF SIERRA LEONE
(Defendant) Respondent

R E C O R D O F P R O C E E D I N G S

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1970
25 RUSSELL SQUARE
LONDON, W.C.1.

T.L. WILSON & CO.,
6, Westminster Palace
Gardens,
London, S.W.1.

Solicitors for the
Appellant.

HATCHETT JONES & CO.,
90, Fenchurch Street,
London,
E.C.3.

Solicitors for the
Respondent.

IN THE PRIVY COUNCIL No. 20 of 1968

ON APPEAL
FROM THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

JOHN JOSEPH AKAR

(Plaintiff) Appellant

\- and -

THE ATTORNEY GENERAL OF SIERRA LEONE

(Defendant) Respondent

RECORD OF PROCEEDINGS

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Amended Notice of intention to appeal to Her Majesty in Council	6th April 1968
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Bond	30th April 1968
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Proceedings	5th and 10th April and 22nd May 1968

IN THE PRIVY COUNCIL No. 20 of 1968

ON APPEAL FROM THE COURT OF APPEAL FOR SIERRA LEONE

B E T W E E N :

JOHN JOSEPH AKAR (Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL OF SIERRA LEONE (Defendant) Respondent

10

RECORD OF PROCEEDINGS

NO. 1

WRIT OF SUMMONS AND STATEMENT OF CLAIM dated 20th February 1967

In the Supreme Court of Sierra Leone

No. 1

Writ of Summons and Statement of Claim dated 20th February 1967

SIERRA LEONE (TO WIT) No. CC. 19 No.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN: IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 of 1961.

20

JOHN JOSEPH AKAR, Levuma Road, Freetown Plaintiff

- and -

THE ATTORNEY GENERAL OF SIERRA LEONE Law Officers' Department, Trelawney Street, Freetown Defendant

ELIZABETH THE SECOND, Queen of Sierra Leone and of her other Realms and

In the Supreme Court of Sierra Leone

No. 1

Writ of Summons and Statement of Claim dated 20th February 1967

(contd)

Territories, Head of the Commonwealth.

TO:- THE ATTORNEY GENERAL OF SIERRA LEONE, Law Officers Department, Freetown.

We command you that within (EIGHT) 8 days after Service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Supreme Court of Sierra Leone in an Action at the Suit of

JOHN JOSEPH AKAR 10

and take notice that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS The Honourable Mr. Justice G.B.O. Collier - Acting Chief Justice of Sierra Leone at Freetown the 20th day of February, in the year of our Lord, 1967.

(Sgd.) O.M. Golley

Master and Registrar.

N.B. - This writ is to be served within twelve calendar months from the date thereon, or if renewed, within six calendar months from the date of such renewal, including the day of such date, and not afterwards. 30

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

A Defendant appearing may, if he desire, enter his appearance by post and the appropriate forms may be obtained by sending a Postal Order for 2s.6d. with an addressed envelope, foolscap size, to the Master and Registrar, Supreme Court, Freetown. 40

If the Defendant enter an appearance he must also deliver a defence within ten (10) days for the last day of the time limited for

In the Supreme Court of Sierra Leone

No. 1

Writ of Summons and Statement of Claim dated 20th February 1967

(contd)

appearance, unless such time is extended by the Court of Judge, otherwise judgment may be entered against him without notice, unless he has in the meantime been served with a summons for judgment,

STATEMENT OF CLAIM

THE PLAINTIFF'S CLAIM as a Citizen of the State of Sierra Leone is for a Declaration that Provisions in Sections 1 (4), 23 (G) and 31 of the Constitution of Sierra Leone Public Notice No.78 of 1961 disqualifying him from eligibility for Election into the House of Representatives is an infringement of his entrenched rights conferred by Section 23 of the said Public Notice No.78 of 1961 and for an Order that for the reasons shown hereunder he is a fit and eligible person to be voted for as a Member of the House of Representatives at any Elections held in Sierra Leone.

PARTICULARS

1. The Plaintiff is a Citizen of the State of Sierra Leone and is the substantive Director of Broadcasting, Secretary Hotels and Tourist Board, and Director of the National Dance Troup and lives at Levuma Road, Juba, Freetown in the Western Area of Sierra Leone.

2. The Defendant is sued in his capacity as Legal Representative of the Government of the State of Sierra Leone.

3. The Plaintiff was born in Rotifunk in the Moyamba District in the Southern Province of the said State of Sierra Leone on the 20th May, 1927, of an indigenous Sierra Leone mother belonging to the Temne tribe and a Lebanese father born and bred in Senegal, Africa, who has lived in Sierra Leone for the last 56 years, and has never been to Lebanon.

In the Supreme Court of Sierra Leone

No. 1

Writ of Summons and Statement of Claim dated 20th February 1967

(contd)

4. On the attainment of Independence on the 27th day of April, 1961 the Plaintiff by virtue of Section 1 (1) of the Constitution of Sierra Leone became a Citizen of Sierra Leone enjoying the protection of the provisions contained in Sections 11-24 inclusive of the said Constitution.

5. By an Amendment to Section 1 of the said Constitution by Public Notice No.12 of 1962 the Plaintiff ceased to be a Citizen of the State of Sierra Leone. 10

6. The Plaintiff on the 7th day of January, 1964 was duly registered as a Citizen of Sierra Leone and also holds a Sierra Leone Passport No.13228 declaring him a Citizen of Sierra Leone and the Commonwealth.

7. By virtue of Section 1 (4) and 31 of the Constitution the Plaintiff is disqualified to become a member of the House of Representatives. 20

8. The Plaintiff is contending that having been registered as a Citizen of Sierra Leone the provisions of Section 1 (4) of the Constitution which is to the effect that having become a Citizen he shall not be disqualified to become a Member of the House of Representatives.

9. The Plaintiff is further contending that having once become a Citizen of Sierra Leone any Amendment of the said Constitution which tends to discriminate against him is ultra vires and void. 30

10. The Plaintiff is also contending that under the Laws of Sierra Leone prior to Independence he was a British Protected Person and entitled to sit in the then Legislative Council and on Independence his status was changed to that of a Citizen of Sierra Leone with the right to sit in the House of Representatives he therefore claims 40

that any Amendment to Section 1 of the Constitution depriving him of his status as a Sierra Leonean because of his race is ultra vires and void.

WHEREFORE THE PLAINTIFF CLAIMS:-

(A) A Declaration that Section 1(4) of the Constitution is ultra vires and void.

(B) Any other relief that may seem just and equitable.

10

(C) A Declaration as per the endorsement on the Writ.

(Sgd). John Smythe.

COUNSEL.

This Writ was issued by JOHN HENRY SMYTHE of and whose address for Service is Grenville Chambers, 22 Westmoreland Street, Freetown, Solicitor for the above-named Plaintiff who resides at Levuma Road, Freetown.

20

(Sgd.) John Smythe.

Plaintiff's Solicitor.

In the Supreme Court of Sierra Leone

No. 2

Defence dated 7th March 1967

NO. 2

SIERRA LEONE (TO WIT) NO. CC. 19 No.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN: IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 of 1961. 10

JOHN JOSEPH AKAR, Levuma Road, Freetown <u>Plaintiff</u>

\- and -

THE ATTORNEY GENERAL OF SIERRA LEONE, Law Officers' Department, Trelawney Street, Freetown <u>Defendant</u>

D E F E N C E

1. The Defendant admits paragraph 1 and 2 of the Particulars in the Statement of Claim endorsed on the writ of Summons herein. 20

2. The Defendant admits paragraph 3 of the Particulars in the Statement of Claim endorsed on the Writ, and says that the Plaintiff's Lebanese father is not of African origin nor a Negro.

3. The Defendant admits paragraphs 6 and 7 of the Particulars in the Statement of Claim endorsed in the Writ of Summons herein.

4. The Defendant will contend that the Plaintiff not being a person of negro 30 African descent and being registered as a citizen only pursuant to Section 1 (4) of the Constitution, has not in law any entrenched right conferred by Section 23 of the Constitution as alleged in his Statement of Claim unless after continuous residence in Sierra Leone for twenty-five

years after the date of his registration to wit the 7th of January, 1964.

5. Save as hereinbefore admitted the Defendant denies each and every of the allegations contained in the Particulars of the Statement of Claim endorsed on the Writ of Summons herein, as if the same were set out herein and traversed seriatim.

10 (Sgd.) N.D. Tejan-Cole.

COUNSEL.

TO THE: Plaintiff or his Solicitor,
John Henry Smythe,
Grenville Chambers,
22, Westmoreland Street, Freetown.
The Master & Registrar,
Supreme Court, Freetown.

This DEFENCE is delivered and filed on the 7th day of March, 1967 by N.D. Tejan-Cole,
20 Acting Senior Crown Counsel, Law Officers' Department, Freetown - Solicitor for the Defendant.

In the Supreme Court of Sierra Leone

No. 3

Notice of Motion dated 7th March 1967

NO. 3

NOTICE OF MOTION
dated 7th March 1967

SIERRA LEONE (TO WIT) No. CC. 19 No.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN: IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 of PUBLIC NOTICE NO. 78 of 1961.

10

JOHN JOSEPH AKAR, Levuma Road, Freetown — Plaintiff

- and -

THE ATTORNEY GENERAL OF SIERRA LEONE, Law Officers' Department, Trelawney Street, Freetown — Defendant

TAKE NOTICE that the Supreme Court will be moved on Friday the 10th of March, 1967, at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard for the above-named Defendant for (1) an Order pursuant to Order 21 Rule 2, that the points of law raised by the Defendant in paragraph 4 of his Defence to wit -

20

"The Defendant will contend that the Plaintiff not being a person of negro African descent and being registered as a citizen only pursuant to Section 1(4) of the Constitution, has not in law any entrenched right conferred by Section 23 of the Constitution as alleged in his Statement of Claim unless after continuous residence in Sierra Leone for twenty-five years after the date of his registration to wit the 7th January, 1964."

30

be set down for hearing and disposed of forthwith and before the trial of the issues of

fact in this action, and, (2), an Order that the Order prayed for in (1) above be not drawn up.

AND ALSO TAKE NOTICE that upon the hearing of the said application the Defendant will use the affidavit of Nasiru Deen Tejan-Cole filed and sworn herein on the 7th day of March, 1967 a copy whereof (together with a copy of the exhibits marked NDTC1 and NDTC2 respectively therein referred to) are annexed to and served with this Notice.

10

Dated the 7th day of March, 1967.

Yours etc.,

(Sgd.) N.D. Tejan-Cole.

(N.D. TEJAN-COLE.)

Ag. Senior Crown Counsel,
Law Officers' Department, Freetown.
SOLICITOR FOR THE DEFENDANT.

20

TO THE: Plaintiff or his Solicitor,
John Henry Smythe,
Grenville Chambers,
22, Westmoreland Street,
Freetown.

The Master & Registrar,
Supreme Court, Freetown.

In the Supreme Court of Sierra Leone

No. 4

Affidavit of Nasiru D. Tejan-Cole dated 7th March 1967

NO. 4

AFFIDAVIT OF NASIRU D. TEJAN-COLE dated 7th March 1967

SIERRA LEONE (TO WIT) No. CC. 19 No.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN: IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 of 1961.

10

JOHN JOSEPH AKAR, Levuma Road, Freetown — Plaintiff

- and -

THE ATTORNEY GENERAL OF SIERRA LEONE, Law Officers' Department, Trelawney Street, Freetown — Defendant

A F F I D A V I T

I, NASIRU DEEN TEJAN-COLE, Barrister-at-Law and Acting Senior Crown Counsel in the Law Officers' Department, Freetown, make Oath and say as follows:-

20

1. That I am the Solicitor for the above-named Defendant.

2. That I entered an Appearance on behalf of the Defendant to the specially endorsed Writ of Summons taken out by the Plaintiff on the 20th day of February, 1967: a true copy of the Statement of Claim endorsed on the said Writ is now produced and shown to me and marked "NDTC1."

30

3. That on the 7th day of March, 1967, I delivered to the Plaintiff's Solicitor and filed in the office of the Master & Registrar a Defence to the said Statement

of Claim, a true copy of which is now produced and shown to me and marked "NDTC2."

(Sgd.) N.D. Tejan-Cole.

Sworn at Freetown at 9.20 o'clock in the forenoon on the 7th day of March, 1967,

BEFORE ME:

(Sgd.) G.A. Coker.

10 A COMMISSIONER FOR OATHS.

This Affidavit is filed on behalf of the Defendant.

Exhibit "NDTC1" to this Affidavit is Document No.1 in this Record of Proceedings.

Exhibit "NDTC2" is Document No.2 in this Record of Proceedings.

In the Supreme Court of Sierra Leone

No. 5

Amendments to Writ of Summons dated 9th March 1967

NO. 5

AMENDMENTS TO WRIT OF SUMMONS dated 9th March 1967

AMENDED THE 9TH DAY OF MARCH, 1967
UNDER ORDER 24 RULE 2.

SIERRA LEONE
(TO WIT) No. C.C.58/67. 1967. A. No.30.

IN THE SUPREME COURT OF
SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO.78 OF 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 OF 1961. 10

BETWEEN: JOHN JOSEPH AKAR, Levuma Road, Freetown <u>Plaintiff</u>

\- and -

THE ATTORNEY GENERAL OF SIERRA LEONE, Law Officers' Department, Trelawney Street, Freetown <u>Defendant</u> 20

ELIZABETH THE SECOND, Queen of Sierra Leone and of her other Realms and Territories, Head of the Commonwealth.

To:- THE ATTORNEY-GENERAL OF SIERRA LEONE, Law Officers' Department, Freetown.

We command you that within (EIGHT) 8 days after Service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Supreme Court of Sierra Leone in an Action at the Suit of - 30

JOHN JOSEPH AKAR

and take notice, that in default of your so doing the Plaintiff may proceed therein and

In the Supreme Court of Sierra Leone

No. 5

Amendments to Writ of Summons dated 9th March 1968

(contd)

judgment may be given in your absence.

WITNESS The Honourable MR. JUSTICE G.B.O. COLLIER Acting Chief Justice of Sierra Leone at Freetown the 20th day of February in the year of our Lord, 1967.

(Sgd.) O.M. Golley.

MASTER AND REGISTRAR.

N.B.- (Usual endorsements on Writ, but not typed here).

10 FIRST AMENDMENT TO ORIGINAL WRIT OF SUMMONS:-

(This amendment was inserted just below the word "Leone" at page 2 herein and just above the word "Particulars" at page 2 herein.)

AMENDMENT:- "For a declaration that the amendments to Section (1) of the Constitution by Act. No.12 of 1962 and P.N. No.52 of 1965 are ultra vires the
20 Constitution and are void."

SECOND AMENDMENT TO ORIGINAL WRIT OF SUMMONS:-

(This amendment was made between lines 25 and 26 of page 3 herein and the amendment reads as follows:-)

WHEREFORE THE PLAINTIFF CLAIMS:-

(1) "For a declaration that the Amendments to Section (1) of the Constitution by Act No.12 of 1962 and Act No.52
30 of 1965 are ultra vires the Constitution and are void."

NO. 6

In the Supreme Court of Sierra Leone

PROCEEDINGS dated 10th and 21st March, 5th 13th and 24th April, 1st and 24th May 1967

No. 6

Proceedings dated 10th March 1967

Friday, 10th March, 1967.

Before the Hon. Mr. Justice Gershon Collier C.J.

J.H. Smythe for Plaintiff.

Tejan-Cole for Defendant. 10

Mr. Smythe with consent of Defendant's Counsel makes minor amendments to Writ filed 9th March, 1967. Smythe makes application for adjournment to 21/3/67.
No objection.
Case adjourned to 21st March, 1967.

(Sgd.) Gershon Collier. C.J.

21st March 1967

Tuesday, 21st March, 1967

Before the Hon. Mr. Justice Gershon Collier C.J. 20

J.H. Smythe for Plaintiff.

Tejan-Cole for Defendant.

Tejan-Cole states that Attorney-General is indisposed and applies for one week's adjournment.
Smythe agrees and states that he would insist to proceed at next hearing or ask that Motion be struck out.
Both Consel agree on 5th April.
Case adjourned by consent to 5/4/67. 30

(Sgd.) Gershon Collier. C.J.

In the Supreme Court of Sierra Leone

No. 6

Proceedings dated 5th April 1967

Wednesday, 5th April, 1967.

Before the Hon. Mr. Justice Percy R. Davies, Ag. P.J.

Mr. J.H. Smythe for Plaintiff.

Mr. T. Fewry, Tejan-Cole with him for Defendant.

By consent adjourned to 13th April, 1967 at 9 a.m.

(Sgd.) Percy R. Davies. Ag.J. 5/4/67.

13th April 1967

10 Thursday, 13th April, 1967.

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

N.D. Tejan-Cole for Defendant/Applicant.

A.B. Yilla deputising for J.H. Smythe.

A.B. Yilla applies for adjournment as Mr. Johnny Smythe is away in Kono. Both Counsel agree that case be adjourned to 25th April.

(Sgd.) Banja-Sie. 13.4.67.

24th April 1967

20 Tuesday, 24th April, 1967.

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

J.H. Smythe with him A.B. Yilla for the Plaintiff.

N.D. Tejan-Cole for the A.-G. - Defendant.

J.H. Smythe raises objection.

(1) That the Motion can only be raised after pleadings have been closed. Defence delivered on 7th March. Motion filed and
30 delivered on 7th March and no Reply has been filed.

In the Supreme Court of Sierra Leone

No. 6

Proceedings dated 24th April 1967 (contd)

Order 25 Rules, 2, 3 - 1963.

T.S. Johnson & Desmond Luke v. G. Collier. Can only use procedure by Motion when the facts are admitted. Order 25 Rule 4.

Winsor Refrigerator Co. Ltd. v. Branch Norwegian Ltd. - W.L.R. 1961 - Vol.2 - p.196: p.210.

Tejan-Cole:- Order 21 Rule 2 - (at any time before trial). The words Everett and Ribbers 'ought' do not mean shared. 10

Adjourned to 1st May, for Ruling.

(Sgd.) Banja Tejan-Sie. C.J.

1st May 1967

Monday, 1st May, 1967.

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

J.H. Smythe for the Plaintiff/Respondent.

N.D. Tejan-Cole for the Defendant/Applicant.

Ruling read in Court. Costs of Le.15.00c. to Plaintiff/Respondent. Adjourned to 24th May, 1967. 20

(Sgd.) Banja Tejan-Sie. C.J.

24th May 1967

Wednesday, 24th May, 1967

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

G. Okeke for the Attorney-General.

A.B. Yilla for Smythe for Plaintiff.

By consent of both Counsel adjourned to 3rd July, 1967.

(Sgd.) Banja Tejan-Sie. C.J.

In the Supreme Court of Sierra Leone

No. 7

Ruling dated 1st May 1967

NO. 7

RULING
dated 1st May 1967

C.C.58/67.

IN THE SUPREME COURT OF SIERRA LEONE

JOHN JOSEPH AKAR Plaintiff

vs.

THE ATTORNEY GENERAL Defendant

RULING delivered on the 1st day of
10 May, 1967

TEJAN-SIE - C.J.: The defendants filed a Motion on the 7th of March raising a preliminary point of law in paragraph 4 of the Defendant's Defence to wit - "The defendant will contend that the Plaintiff not being a person of negro African descent and being registered as a citizen only pursuant to Section 4 of the Constitution has not in law any entrenched right
20 conferred by Section 23 of the Constitution as alleged in his statement of claim unless after continuous residence in Sierra Leone for 25 years after the date of his registration to wit the 7th of January, 1964 to be set down for hearing and disposed forthwith before trial of the issues of facts." The Defendants contend that under Order 21 Rule 2 such a Motion can be heard at any time before
30 trial. The Plaintiffs on the other hand have submitted that the motion can only be raised after pleadings have been closed and they referred the Court to Order 25 Rule 2 (iii). This action is amply discussed in the case of Independent Automatic Sales Ltd. v. Knowles and Forster reported in 1962 - 3 All England Law Reports at page 29. I am going to quote exhaustively from this case as was
40 decided by Buckley, J. It is true he says,

In the Supreme Court of Sierra Leone

No. 7

Ruling dated 1st May 1967 (contd)

that Rules of Supreme Court - Order 25 Rules 1, 2 and 3 are the Rules which apply in cases where under the old procedure a defendant would have demurred to the plaintiff's action. Rule 1 provides that no demurrer shall be allowed, Rule 2, "provides that any party shall be entitled to raise by his pleadings any point of law and unless the Court may, a Judge otherwise orders any points so raised shall be disposed of by the Judge who tries the cause at or after the trial, and Rule 3 is, "if in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set off, counter claim or reply therein, the Court or Judge may thereupon dismiss the action or make such other Order herein as may be just. The defendants have rightly in their pleadings in this case raised a ground of demurrer and brought a point of law to be determined now as a preliminary point of law that could dispose of one aspect of the case. "One knows", continues Buckley, J. "that in practice, where a defendant demurs to a plaintiff's action, one course open to him is to raise the ground of demurrer in the pleading and bring that point of law on to be heard and determined as a preliminary point with a view to avoiding having to incur the Costs of preparing for the full trial of the action before that point is disposed of. Nevertheless, Buckley, J. continues, Counsel for the defendants in that case said that at the trial the defendants were not precluded by these rules from raising a pure point of law which disposed of the action, or may dispose of the action, notwithstanding that it was not mentioned at all in the pleading.

'At first glance,' Buckley, J. observes, "it appears to me that Rule 2 of R.S.C., Ord. 25 is somewhat against the submission of Counsel for the defendants; but we have to bear in mind the terms of

In the Supreme Court of Sierra Leone

No. 7

Ruling dated 1st May 1967 (contd)

R.S.C., Ord. 19, R.4, which provides that -

'Every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies ....;'

and undoubtedly, the Judge adds, a party is not bound, and indeed normally ought not, to plead points of law but to plead the facts on which he relies. In the notes
10 to R.S.C., Ord. 25, R.3, Buckley, J. continues -

"I find under the heading 'Objection in point of law', the following note:-

"If a party intends to apply for determination of a point of law he must raise it on his pleading. But at the trial itself he may raise a point of law open to him even though not pleaded.""

20 It is clear from the above that the defendants are at liberty at any time to raise questions of law. In this case, the pleadings are not closed. A reply is still forthcoming from the plaintiffs. I would have thought that what the defendants raised as a preliminary point of law could have been raised after the pleadings have been closed or even during the trial. The important question to be considered is why
30 were the above rules made? It is obvious that though parties can raise preliminary objections of law in their pleadings and move the Court to have them decided at any stage of the proceedings. But it is also clear that the ultimate decision as to whether the preliminary point of law raised is justifiable, is a question for the Judge. They are neither precluded from raising this point at the trial. I do not see why they
40 cannot raise this matter when the pleadings are closed. I would have thought that the principal reason why Courts encouraged preliminary objections on points of Law was

In the Supreme Court of Sierra Leone

No. 7

Ruling dated 1st May 1967 (contd)

to prevent surprised and embarrassments to parties in an action. In this case, I can see no question of embarrassing anybody arising. I have carefully considered every aspect of this motion and it is my considered opinion that important matters have been raised by the plaintiff in his statement of claim that would need to be determined by a full dress trial and not by raising purely technical points of law at this stage. I do not say the defendants have no right to raise a preliminary point of law, what I do say is that at this stage it is premature. I would therefore dismiss the motion. The case must be tried on its merits. The defendants have in their motion asked word for word what they have already pleaded.

(Sgd.) Banja Tejan-Sie.

No. 8

Reply dated May 1967

NO. 8

REPLY
dated May 1967

C.C.58/67.

IN THE SUPREME COURT OF SIERRA LEONE

JOHN JOSEPH AKAR — Plaintiff

vs.

THE ATTORNEY GENERAL — Defendant

REPLY

1. The Plaintiff joins issue with the Defendant on his Defence.

(Sgd.) John Smythe.
Solicitor for the Plaintiff.

In the Supreme Court of Sierra Leone

No. 8

Reply dated May 1968 (contd)

Delivered and filed this day of May, 1967 by John Henry Smythe, of Grenville Chambers, 22 Westmoreland Street, Freetown, Solicitor for the Plaintiff, pursuant to the Rules of the Supreme Court.

To:- The Master & Registrar, Supreme Court, Freetown.

And to:-

10 N.D. Tejan-Cole, Esq.,
Ag. Senior Crown Counsel,
Law Officers' Department,
Freetown.
Defendant's Solicitor.

No. 9

Proceedings dated 3rd July 1967

NO. 9

PROCEEDINGS
dated 3rd and 4th July
and 1st December 1967

Monday, 3rd July, 1967

20 Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

J.H. Smythe for the Plaintiff.

Chenery for the Defendant.

J.H. Smythe submits that his case which is a point of law stated in paragraph 10 of the Particulars in his Statement of Claim forms the issues which have to be decided. Mr. Chenery for the Crown agrees.

J.H. Smythe - Defence admits paragraphs 3,
30 6 and 7 of Statement of Claim.
Paragraph 3 reads - Plaintiff was born in Rotifunk ...... of an indigenous mother belonging to the Temne Tribe etc. etc.

In the Supreme Court of Sierra Leone

No. 9

Proceedings dated 3rd July 1967 (contd)

Paragraphs 9 and 10 read - That the Plaintiff .... ultra vires and void.
At the birth of the Plaintiff the operation of Law existing in Sierra Leone was that he was a British Protected Person. He held a Passport dated 1947 supplied him as a British Protected Person. By consent Passport tendered in evidence and marked Exhibit "A". 10

In Paragraph 10, Plaintiff contends that prior to Indpendence, he was a British Protected Person/Subject and the Act of Independence made him a citizen of Sierra Leone. Overnight he was declared a non-citizen by an amendment of the Constitution - a year after Independence. , Plaintiff's father at time of birth was domiciled in Sierra Leone. Plaintiff was therefore in Law a British Protected Person. 20

Where citizenship is acquired by birth no law in the World can change it. Constitutional and Administrative Law by Hood Phillips - 3rd Edition - p.416-421. Citizenship can only be deprived of from a person when he was either -

(1) Naturalised -
(2) Registered by that Country.

By virtue of - Section 9 of the Constitution - (side note reads Powers of Parliament) - Parliament may make provisions - 30
(a) for the acquisition of Citizenship ...
(b) for depriving of his Citizenship
(c) for the renunciation
Parliament has no power by virtue of Section 9(b) to deprive citizenship so acquired by virtue of sub-Section (1) of Section (1) of Section 4 of the Constitution. Cannot amend Section (1) of Public Notice 78 because of Section (9) of the Constitution. 40

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No. 9

Proceedings dated 3rd July 1967

(contd)

In April 27, 1961, the Constitution fused what was once known as British Protected Person and Citizens of the United Kingdom and Colonies.

By depriving a Protected British Person of Citizenship, you render him Stateless. His whole life is changed overnight. Such an Act cuts across all fundamental rights and acts of decency. Hood Phillips - p.43.
Courts must interpret the Constitution. In Political and Civil Rights of the United States by Emerson p.1048 - Hirabayash v. United States - 81 - 100.

Mr. Chenery submits that by virtue of Sections 42 and 43 of the Constitution, Parliament may make Laws for the peace, order and good Government of Sierra Leone and may alter any of the provisions of the Constitution - except the entrenched clauses which require specific procedure.

Question is not a question of fundamental rights but it is a question of law. Pillar v. Muchanayak - 1955 - 2 A.E.R., p.833. If it was intended that the Legislature should be deprived of the powers of altering Section 9. Section 9 would have been included in Section 43 ... but it is not included. Every country has its own powers in regard to Citizenship and its acquisition.
Plaintiff is still a citizen of Sierra Leone. It was within the orbit of the Legislature to restrict the Citizenship of the Plaintiff as regards registration. There is nothing to prevent the Legislature in imposing terms and conditions.
Issue .... Is the Legislature precluded from amending Section 9 .... I say no.

Smythe: Section 9 has not been amended by Parliament by a simple majority in

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No. 9

Proceedings dated 3rd July 1967 (contd)

Parliament as is required by Section 43 of the Constitution. Unless Section 9 is amended, Parliament cannot amend Section 1 which they purported to amend. Submits that A mendment of Section 1 by Act 12 of 1962 is ultra vires and void.

Adjourned to 4th July, 1967.

(Sgd.) Banja Tejan-Sie.

4th July 1967

Tuesday, 4th July, 1967

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J. 10

J.H. Smythe for the Plaintiff.

J.W.B. Chenery for the Defendant.

Chenery: Even if the Court should be disposed to accept Counsel's admission that Section 9 should be amended before the Legislature passed the amended Act. As this is a declining action the Court cannot exercise its discretion because the Plaintiff in 1964 accepted the Legislation as being 20 Constitutional when he made his declaration to be registered as a Citizen. - (Had he any choice then)? Court does not allow Plaintiff to accept and then not to accept. Plaintiff should have challenged Legislation before. Amended Act of 1962 was made to form part of original Act as if it had been passed in 1961. There was abundant opportunity for Plaintiff to challenge it if he was so disposed. 30 Plaintiff cannot accept the benefit of the Act and yet now come to say the Legislation was ultra vires.

Smythe:- Question of discretion does not arise - question of Law.

Judgment reserved.

(Sgd.) Banja Tejan-Sie.

Friday, 1st December, 1967.

Before the Hon. Mr. Justice Banja Tejan-Sie. C.J.

J.H. Smythe for the Plaintiff.

J.W.B. Chenery for the Defendant.

Both Counsel agree on an Order submitted to the Court.

COURT:- Order approved as agreed upon.

(Sgd.) Banja Tejan-Sie. C.J.

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NO. 10

JUDGMENT
dated 26th October 1967

IN THE SUPREME COURT OF SIERRA LEONE

C.C.58/67. 1967. A. No. 30.

BETWEEN:- JOHN JOSEPH AKAR Plaintiff

- and -

THE ATTORNEY-GENERAL Defendant

J.H. Smythe, Esq., for the Plaintiff.

20 J.W.B. Chenery, Esq., for the Defendant.

Judgment delivered on the 26th day of October, 1967

TEJAN-SIE: B. - C.J.: - On April 27, 1961, the country of Sierra Leone which immediately before that date had been a Colony and Protectorate of Great Britain,

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(contd)

became a fully independent State within the Commonwealth. Thenceforward the Government of Sierra Leone was to be carried on within the provisions of a written Constitution the terms of which had been agreed between duly authorised representatives of the people of Sierra Leone and the British Government. This Constitution came into force on 27th April, 1961 and was published as Public Notice No. 78 of 1961. 10

It is a recognised rule of law that where a country has a written Constitution, any acts of Government to be valid must be either expressly or impliedly permitted by the terms of the Constitution. This means that, for example, no legislation is valid even though the proper procedures have been followed if it goes beyond the scope of the powers of legislating given by the Constitution to the legislature; in other 20 words, it is bad if it is "ultra vires" the Constitution. Normally, the superior Courts of a country which has a written Constitution are the "watchdogs of the Constitution" and have to rule whether any piece of legislation is or is not ultra vires. This has been recognised particularly by Section 24 of the Sierra Leone Constitution - (hereinafter called the Constitution) - which I shall refer to later. 30

It must not be inferred from the foregoing that a Constitution is immutable. There must be provisions to make alterations to keep it in line with changes in economic and social conditions so marked in our time and also changes brought about in International relations. It is, however, a very solemn document and should not be altered without very serious deliberation and a clear recognition of the desirability of any such 40 proposed alteration. In this context, I should like to quote the following passage from an American case, Weens v. United States reported in 54 L. Ed.793 at p.801 - (1909). Here is what the American Judiciary had to say:-

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"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas.

Rights declared in words might be lost in reality -

And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

The Constitution contains powers whereby its own provisions may be altered and with these, I should deal in more detail later. At this stage, I merely say this, if one adopts the principles enumerated above, one must very jealously examine any purported alteration of the Constitution. I think

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Judgment dated 26th October 1967 (contd)

that in making such examination, one is entitled to consider whether the proposed alteration violates the spirit and general intention of the Constitution, although on the face of it complying with the requirements laid down thereon by the Constitution.

Having stated the general principles let us now examine the matter in detail. With those principles in mind, I think the first thing to be ascertained is the relevant position with regard to Sierra Leone citizenship on 27th April, 1961, the plaintiff having been alive on that date. The relevant provision of the Constitution as it affected the Plaintiff was Section 1(1) which reads as follows:-

> "Every person who, having been born in the former Colony or Protectorate of Sierra Leone was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British proteced person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961.
>
> Provided that a person shall not become a citizen of Sierra Leone by virtue of this sub-section if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone."

It will be noticed that at this stage race has not entered into the matter. The intention appears to be that anyone born in Sierra Leone and who could show long enough family connection with Sierra Leone automatically became a citizen of Sierra Leone even though he had no trace of African blood, in other words the intention appears to be the setting up of a multi-racial society with persons having equal rights whatever their racial origins - a principle which is in accord with progressive thinking throughout the world, but to which, alas in too many cases, only lip service

is paid.

Among the privileges of citizenship at that time was that of being eligible for election to the House of Representatives provided that the citizen was otherwise fully qualified.

Now it is admitted that on 27th April, 1961, the plaintiff fell within the scope of Section 1 (1) of the Constitution and therefore was a citizen on that date and qualified at least under this head, to be elected to the House of Representatives. Why, now, has he found it necessary to bring this action? The answer is that in 1962, Parliament purported to "amend" Section 1 of the Constitution retrospectively. Section 2 of the Constitution amendment (No.2) Act of 1962 which by Section 1 thereof was to be deemed to have come into operation on the 27th of April, 1961, provided as follows:-

(2) Section 1 of the Constitution is hereby amended - (a) by the insertion immediately after the words /Every person" in the first line of sub-Section (1) thereof of the words "Of Negro African descent" - (b) by the addition at the end thereof of the following new sub-Sections.

(3) For the purposes of this Constitution the expression "person of Negro African descent" means a person whose father and his father's father are or were negroes of African origin.

(4) Any person either of whose parents is a negro of African descent and would, but for the provisions of sub-Section (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be

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qualified to become a member of the House of Representatives or of any District Council or Local Authority unless he shall have resided continuously in Sierra Leone for 25 years after such registrationm or shall have served in the civil or regular Armed Services of Sierra Leone for a continuous period of 25 years.

Assuming that this new law was valid, the effect on the plaintiff was to deprive him of the citizenship he already had and to leave it to his option to remain stateless or to accept the status of what might be called "2nd class citizen" by registering. He chose to register. The defence has seized upon this fact and maintain that by so registering he is estopped from denying the validity of his deprivation of full citizenship because he has taken the advantage of what was offered to him. I feel certain that the doctrine of estoppel can have no application in the circumstances. The plaintiff derived no benefit from the new legislation - in fact he was already worse off because he no longer had the rights of a full citizen. I cannot see how he is in any way debarred from challenging the validity of the legislation. By his conduct in registering he did not cause the Government to be in any worse position or to act to its detriment.

But was this new law valid? Is it true that Section 1 of the Constitution is one of the Sections which by virtue of Section 13 (1) of the Constitution may be altered in the normal course of legislation without following the special procedure laid down in the proviso to that sub-Section. Be that as it may, I think any alteration must be one which does not conflict with any provision of the Constitution which limits the scope of the legislative power. This alteration must

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be considered in the light of two other provisions in the Constitution, viz. Section 9 - (which remains unaltered) - and Section 23. Section 9 reads as follows:-

Parliament may make provision -

(a) for the acquisition of citizenship of Sierra Leone by persons who do not become citizens of Sierra Leone by virtue of the provisions of this Chapter;

(b) for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of sub-Section (1) of Section 1 or Section 4 of this Constitution; or

(c) for the renunciation by any person of his citizenship of Sierra Leone.

From this it would appear that Parliament had no power to deprive the plaintiff of his citizenship. The answer to that of course is that because the alteration was retrospective in effect, it must be assumed that Section 1 was from the inception, in its altered state, and that although the plaintiff may have thought he was a citizen of Sierra Leone immediately after midnight on 27th April, 1961, he was all the time mistaken because Section 1 of the Constitution was not what it appeared in words to be. However, I shall deal with this question of retrospective Legislation later in the judgment. Section 23 of the Constitution - (which is one of the Sections in Chapter II of the Constitution which Chapter is headed, "Protection of Fundamental Rights and Freedom of the Individual") - at the time the purported alteration was made read as follows:-

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(1) "Subject to the provisions of sub-Sections (4), (5) and (7) of this Section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of sub-Sections (6), (7) and (8) of this Section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. 10

(3) In this Section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. 20

(4) Subsection (1) of this Section shall not apply to any law so far as that law makes provision - 30

(a) for the appropriation of revenues or other funds of Sierra Leone or for the imposition of taxation (including the levying of fees for the grant of licences); or

(b) with respect to persons who are not citizens of Sierra Leone; or

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death 40

or other matters of personal law; or

(d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

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(e) for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency; or

(f) whereby persons of any such description as is mentioned in sub-Section (3) of this Section may be

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subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be

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held to be inconsistent with or in contravention of subsection (1) of this Section to the extent that it makes provision with respect to qualifications for service as a public officer or as a member of a defence force or for the service of a local government authority or a body corporate established directly by any law.

(6) Subsection (2) of this Section shall

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not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in

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(contd)

subsection (4) or (5) of this Section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this Section may be subjected to any restriction on the rights and freedoms guaranteed by Sections 14, 18, 20, 21 and 22 of this Constitution, being such a restriction as is authorised by paragraph (a) of subsection (3) of Section 14, subsection (2) of Section 18, subsection (5) of Section 20, subsection (2) of Section 21 or subsection (2) of Section 22, as the case may be.

(8) Nothing in subsection (2) of this Section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

The altered Section 1 of the Constitution certainly appears to contravene Section 23 (1) in that it is discriminatory by affording different treatment to persons like the plaintiff attributable to his description by race. It would seem that after Section 1 had been altered Parliament had doubts as to the validity of the alteration; Act No. 39 of 1962 intitled "An Act to amend the Constitution in order to effect the Avoidance of doubts" with short title "The Constitution (Amendment) (No.3) Act 1962" was passed. Like its predecessor it was to be deemed to have come into operation on the 27th day of April, 1961.

Section 2 reads as follows - subsection (4) of Section 23 of the Constitution is hereby amended by -

(a) The substitution of a semi-colon and the word "or" for the full stop at the end of paragraph (f); and

(b) The addition immediately thereafter of the following new paragraph - (g) "for the limitation of citizenship of Sierra Leone to persons of Negro African descent, as defined in subsection (3) of Section (1) of this Constitution and for the restrictions placed upon certain other persons by subsection (4) of the said Section."

The final paragraph of the Act was as follows:-

"Passed in the House of Representatives for the Second time and in accordance with the provisions of subsections (1) and (3) of Section 43 of the Constitution this 3rd day of August in the year of our Lord one thousand nine hundred and sixty-two."

On the face of it, this would seem to put matters right so far as the question of the altered Section 1 contravening Section 23 (1) is concerned, although it still leaves the question outstanding of contravention of Section 9.

Let us now look at the provisions for the alteration of the Constitution. They are contained in Section 43 which is as follows:-

"(1) Parliament may alter any of the provisions of the Constitution or (in

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so far as it forms part of the law of Sierra Leone) any of the provisions of the Sierra Leone Independence Act, 1961;

Provided that in so far as it alters -

(a) this Section;

(b) Sections 11 to 25 (inclusive), Section 29, Section 44, subsection (2) of Section 54, Section 55, Sections 56, 73, 74, 75, 76, 77, 79, 80, 81, 84, 85, 86, 87 to 93 (inclusive), 94, 95, 96, 97, 98, 99, 102 and 103; 10

(c) Section 107 in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or

(d) any of the provisions of the Sierra Leone Independence Act, 1961,

a bill for an Act of Parliament under this Section shall not be submitted to the Governor-General for his assent unless the bill has been passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions. 20

(2) For the purposes of Section (1) of this Section, a bill passed by the House of Representatives in one session shall be deemed to be the same bill as a bill passed by the House in the preceding session if it is identical with that bill, or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since that bill was passed in the preceding session. 30

(3) A bill for an Act of Parliament under this Section shall not be passed by the House of Representatives in any 40

session unless at the final vote thereon in that session it is supported by the votes of not less than two-thirds of all the members of the House.

(4) The provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) the Sierra Leone Independence Act, 1961, shall not be altered except in accordance with the provisions of this Section.

(5) In this Section -

(a) references to any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to any law that amends, modifies, re-enacts with or without amendment or modification or makes different provision in lieu of, that provision; and

(b) references to the alterations of any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to the amendment or modification, or re-enactment, with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of different provision in lieu of that provision."

So far as procedure is concerned the legislation by Act No. 39 of 1961 appears to be in order. It now remains to consider whether it was valid in either respect. It will be seen that Section 43 (1) gives Parliament the power to "alter" the Constitution. What is meant by "alter" is shown in subsection 5 (b) recited above. Clearly it does not envisage alteration in the sense of mere change whether such change

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be good, bad or indifferent. Sub-section 5 (b) appears to place alterations in the following categories:

(i) Amendment

(ii) Modification

(iii) Re-enactment with or without amendment or modification

(iv) Suspension

(v) Repeal

(vi) Substitution 10

To some people the expression "Amendment" and "Modification" are synonymous with the expression "change" but such people in my opinion are in error.

The concise Oxford English Dictionary, 5th Edition has the following:-

"AMEND" - abandon evil ways; improve in health; correct an error in (legal document) make 20 professed improvements in (measure before Parliament), make better.

"MODIFY" - make less severe or decided, tone down, make practical changes in; (gram) qualify sense of (word) etc.

Chambers Twentieth Century Dictionary Revised Ediction p. 959, has the following:

"AMEND" - to free from fault or 30 error, to correct; to improve; to alter in detail; with a view to improvement, as a bill before Parliament; to rectify, to cure, to amend.

"MODIFY" - to moderate; (philos.) to determine the mode of; to change the form or quality of; to alter slightly; to vary; to differentiate; (gram) to limit or qualify the sense of (said of an adverb).

10 I think in this paragraph the word "amendment" indicates the intention behind the power of alteration - I think it even governs the word "modification" in that a modification which does not partake of the nature of an amendment would not be valid.

In short, I think that any alteration whatever form it takes has got to amount to an improvement of the existing law. 20 I think this applies equally to the power to alter by the making of different provision in lieu of a provision or in another word "substitution."

Let me give an example to illustrate what I mean. Section 42 of the Constitution is one of those Sections which by virtue of Section 43 (1) may be altered by a simple majority in Parliament. New Section 43 reads as 30 follows:-

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good Government of Sierra Leone."

Suppose Parliament purported to alter this Section to read:

> "Parliament may make laws for the unrest disorder and bad Government of Sierra Leone."

40 The immediate reaction normally would be to say "that's absurd - Parliament is mad"

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and of course that reaction would be right. Another illustration would be the case in which Mr. Wilfred Green K.C. addressed the Joint Select Committee of both Houses of Parliament in the petition of Western Australia to secede from the Commonwealth appearing in the London Times of 11th April, 1935. "That Parliament could pass an Act tomorrow that all persons over the age of one year should be put to death" was "repugnant to reason and good sense " This led Richard Sullivan in an article in the modern Law Review Vol.6 - 181 to declare as follows: "The reaffirmation of the rules of reason and of justice as the constitutive principles of Law is designed also to restore or to retain:" "the reasonable man of the law" in his proper dignity and status. For there are indications of a certain impairment not only in the external balance of the Constitution but also in the inner and central conceptions of the liber et legalis homo - the "free and lawful man." In my view, the time is ripe for Nations with written Constitutions and I refer particularly to New Independent nations within the Commonwealth to bring to life as an active legal force, the dictum of Coke in Bonhams case, a dictum which has considerable history in the United States to test the validity of Legislative actions of Governments to determine in varying degrees as Stonore, C.J. puts it - "That which is right." Coke said in Bonhams case - "When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act as void." And yet if one takes a wide interpretation of the powers of alteration given by Section 43 on the face of it, it is in order. It is a different provision in lieu of the provision made by Section 42. But if one takes a strict interpretation, then it fails to pass the test because it clearly is not an improvement.

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Having mentioned Section 42, I think it should be noted that no attempt has been made to alter it and its provisions may well be relevant to our consideration of the problems of the present case.

There now remains for us to consider what powers are given by the Constitution to this Court to question the validity of legislation. Section 24 is the relevant Section. Subsection (1) thereof is as follows:-

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"Subject to the provisions of subsection 6 of this Section - (we need not concern ourselves with subsection 6 in the present case) - if any person alleges that any of the provisions of Sections 12 to 23 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matters which is lawfully available, that person may apply to the Supreme Court for redress."

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Subsection (2) is as follows:-

"The Supreme Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this Section; and

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(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions

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of the said Sections 12 to 23 (inclusive) to the protection of which the person concerned is entitled.

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

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I think the subsections set out verbatim above are the only ones of Section 24 that we need to consider for the purposes of the present case. Although by his pleadings the plaintiff does not specifically invoke the jurisdiction given to this Court by Section 24 he does complain of the contravention of the rights conferred by Section 23.

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As he is complaining it is as a result of legislation that such contravention has taken place - I do not think this case falls within the proviso to subsection (2) because I can think of no action he could have taken under any other law to obtain adequate redress or, for that matter, any redress at all. This whole case rests on the validity or otherwise of purported amendments to the Constitution. I accordingly rule that the action properly comes within the scope of Section 24.

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Having set forth the relevant legislation, let us examine the facts of the present case in more detail.

In the main, the defence admits the facts alleged in the Statement of Claim and in effect say that he falls within the scope of Section 1 (4) of the Constitution. The plaintiff has no entrenched right to qualify for membership of the House of Representatives. I think this defence really begs the question because it would

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seem that the issue in this case depended upon the validity or otherwise of Section 1 (4) itself. In the course of argument, however, it appears that the defence relies to a large extent on the Privy Council case from Ceylon - Pillai v. Mudenayako - reported in 1955 - 2 All England Reports at p. 833. This case of course, is not binding on this Court as it is not a decision on appeal from Sierra Leone. However, it is recognised that principles enunciated in other Commonwealth cases may be examined and if they are relevant to a particular case in Sierra Leone, the reasoning whereby they have been arrived at may be adopted by Courts in Sierra Leone not as "binding" precedent but as persuasive precedent.

I do not think the actual facts of the Ceylon case are of much assistance in deciding the present case because there the question was whether legislation on which had the effect of debarring a person resident in Ceylon from having his name put on a register of electors was ultra vires the Constitution.

The person in question was not and never had been a citizen of Ceylon - the legislation in question debarred persons who were not citizens of Ceylon. The case is nonetheless of some assistance to this Court because of two principles enunciated in the judgment. I think it will be profitable to set out in extenso a large part of the judgment and I shall do so beginning from Letter H on p. 836 of the report.

"The Supreme Court of Ceylon unanimously granted the application for certiorari and quashed the order of the revising officer, holding, firstly, that the evidence tendered to them ought not to be admitted and in any event was irrelevant; secondly, that a court should not search among State papers and other

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political documents for the substance or the true nature and character of an impugned statute to speak for itself where such language is clear and unambiguous, and, thirdly, that the statutes in question do not, on the face of them, make the Indian Tamil community liable to any disability to which other communities are not liable."

At their Lordships' Board, it was contended on behalf of the appellant that the Citizenship Act and the Franchise Act makes persons of the Indian Tamil community, of which the appellant is a member, liable to a disability or restriction within the meaning of s.29 (2) of the Constitution Order in Council and are, therefore, ultra vires. It was conceded for the appellant that those Acts do not, on their faces, discrimate against the Indian Tamil community, but it was argued that they indirectly have that effect since, on the evidence before the court and as was conceded by the Attorney-General, a large number of Indian Tamil cannot become citizens of Ceylon because neither their fathers nor their grandfathers were born in Ceylon. It was further argued for the appellant that the Acts were what was called colourable, and that they disclose, when their pith and substance or their true character is ascertained, the intention of the legislature to do indirectly what admittedly it cannot do directly, namely to make persons of the Indian Tamil community liable to a disability to which persons of other communities are not made liable.

The appellant's counsel at first submitted that further evidence ought to be admitted as to the effect of the Acts on the Indian Tamil community, but in reply he expressly withdrew his application to introduce further evidence and no further evidence was referred to.

In these circumstances, and in view of

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the admission before the revising officer of the affidavit of the appellant dated May 15, 1951, without objection, their Lordships do not find it necessary to decide if, and how far, evidence is admissible of facts which go to show the actual effect of an Act after it has been passed. It was common ground between the parties, and is, in their Lordships' opinion the correct view, that judicial notice ought to be taken of such matters as the reports of parliamentary commissions, and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed - (cf. Ladore v. Bennett (1) [1939] 3 A.E.R. at p. 101), and both parties have referred their Lordships to a number of paragraphs in the report of the Soulbury Commission of 1945.

With much of the reasoning of the Supreme Court of Ceylon, their Lordships find themselves in entire agreement, but they are of opinion that there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that, in such circumstances, the legislation would be ultra vires. The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board, and a legislature must, of course, be assumed to intend the necessary effect of its statues. But the maxim - omnia praesumuntor rite esse acta is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a statute which is, on its face intra vires, that it was enacted as part of a plan to effect indirectly something which

In the Supreme Court of Sierra Leone

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(contd)

the legislature had no power to achieve directly.

It was argued that Section 4 and Section 5 of the Citizenship Act made it impossible that the descendants, however, remote, of a person who was unable to attain citizenship himself could ever be able to attain citizenship in Ceylon no matter how long they resided there, but their Lordships' attention was subsequently drawn to the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, by which an Indian Tamil could, by an application, obtain citizenship by registration and thus protect his descendants, provided he had a certain residential qualification. It was suggested on behalf of the appellant that this Act might itself be ultra vires as conferring a privilege on Indian Tamils within Section 29 (2) (c) of the Constitution Order in Council and that, therefore, it was inadmissible to rebut the inference that the legislature had intended by the Citizenship and Franchise Acts to make Indian Tamils liable to disabilities within the meaning of Section 29 (2) (b), but their Lordships cannot accept this argument. If there was a legislative plan the plan must be looked at as a whole, and when so looked at it is evidence in their Lordships' opinion, that the legislature did not intend to prevent Indian Tamils from attaining citizenship, provided that they were sufficiently connected with the island.

The cases which have been decided on the British North America Act, 1867, and the Australian Constitution have laid down the principle which their Lordships think is applicable to the present case, although it is true that in those cases the question was as to the construction of legislative subjects assigned to the Dominion or Commonwealth Parliaments on the one hand, and to the legislatures of the provinces or States on the other, whereas in the present case the question is as to the

construction of a constitutional limitation on the general sovereign power of the Ceylon legislature to legislate for the peace, order and good government of Ceylon. But, in their Lordships' opinion, the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what
10 is the true character of the legislation which is challenged: sec. A.G. for Ontario v. Reciprocal Insurers (2)([1924] A.C. at p. 337), and Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna (3) (1947) (74 L.R. Ind. App. 23).

Is it in the present case legislation on citizenship, or is it legislation intended to make and making Indian Tamils liable to disabilities
20 to which other communities are not liable? It is, as the Supreme Court observed, a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence are, as it seems to their Lordships, standards which a legislature may think it right to adopt in
30 legislation on citizenship, and it is clear that such standards, though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, do not create disabilities in a community as such, since the community is not bound together as a community by its illiteracy, its poverty or its migratory character, but by its race or its religion. The migratory
40 habits of the Indian Tamils (see para. 123 and para. 203, Soulbury Report) are facts which, in their Lordships' opinion, are directly relevant to the question of their suitability as citizens of Ceylon, and have nothing to do with them as a community."

Let us consider what taken as a whole

In the Supreme Court of Sierra Leone

No. 10

Judgment dated 26th October 1967 (contd)

was the Legislative plan before the purported amendments were passed. We hark back to what I said earlier on - that the intention appears to be the setting up of a multi racial society with persons having equal rights whatever their racial origins.

Now what is the pith or substance of the amendment to the legislation commented on by the Privy Council in Pillar case? Is it not in reality to exclude certain persons particularly of Lebanese origin from being elected to the House of Representatives? That it is not purely legislation on citizenship is shown by its allowing such persons to register as citizens albeit not quite the same sort of citizens as before. Could not this end have been achieved merely by an alteration of Section 31 to some such effect as that for the purpose of that Section the expression "citizen" should include only citizens of "Negro African descent?". I think not, such a provision would fall into the category dealt with in paragraph (f) of subsection (4) of Section 23 and would have to pass the test of "reasonably justifiable in a democratic society." Would this not be contrary to the spirit of a democratic society if the electors are debarred from choosing for their representative a fellow citizen who is otherwise unexceptionable or have to wait until he is too old to serve them usefully.

Borrowing the words of their Lordships in the Pillar case quoted above, is Parliament then trying to do indirectly what it feels it cannot do directly? In an article in the Modern Law Review Vol. 29 p. 273 D.K. Singh writes:-

> "Vast problems of a legal nature are posed in the observance of prohibitions and limitations imposed on legislative powers in a federal state where the legislative jurisdiction is divided between the central and regional

governments; similar problems are also likely to arise in a unitary state having a written constitution, e.g., the South Africa Act of 1909. Presumably the solution to such problems has to be found in the working of judicial machinery, courts being the watchdogs of constitutional provisions; hardly anyone today would deny the role played by courts in the growth and development of constitutionalism. In the judicial process are involved a set of "unwritten" rules for the guidance of judges in the understanding, what is known as interpretation or construction, of "written" laws including written constitutions. Such rules is that if a legislature is prohibited from doing something, it may not do so even under the "guise or pretence" of doing something that appears to be within its lawful jurisdiction; a legislature may prima facie purport to act within the limits of its powers, yet it may in substance and reality be transgressing those powers, their purported exercise being merely a "guise or pretence." This rule may broadly be explained as the observance of "good faith" in the exercise of legislative powers, and it is implied in the operation of the maxim "what cannot be done directly cannot be done indirectly."

I think that such is the case and for this reason alone, I should hold that the taking away from the plaintiff his right to stand for election to the House of Representatives, a District Council or other Local Authority without having to wait for the lapse of 25 years is ultra vires, the Constitution and consequently null and void.

Even assuming, however, that this is

In the Supreme Court of Sierra Leone

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(contd)

simply a case of legislation citizenship, I still see many objections. All the relevant sections of the Constitution must be considered together. I refer again to Section 42 of the Constitution which provides that subject to the provisions of the Constitution, Parliament may make for the peace, order and good Government of Sierra Leone. As I have indicated earlier, I do not think the powers of alteration given by Section 43 entitle Parliament to make any alteration irrespective of whether it is good, bad or indifferent. An alteration must in my view effect an improvement and also still be made for the peace, order and good Government of the country. Can this be said of a change in the law which deprives a man of his citizenship and then in place of it gives him the option to take some positive step himself to acquire second class citizenship? If the numbers involved had been sufficiently numerous, well organised and vociferous, who knows what breaches of the peace might have occurred on the passing of such legislation?

In my mind what makes the matter worse was that the so-called amendments were retroactive. One realises that there are occasions where retroactive legislation is necessary but it should be passed very sparingly and only when fully justified. In my view the making of the Amendments by Act No. 12 of 1962 to Section 1 and by Act No. 39 of 1962 to Section 23 retroactive was completely unjustified and contrary to the spirit of Sections 42 and 43 of the Constitution - in fact if we bear in mind my quotation earlier from the American case from where alone I am afraid we can in cases of this kind singularly draw our inspiration, we find that what is written there conflicts in large measure to the whole conception of the Constitution as treated by the Legislature in the instant case.

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(contd)

If as I hold it was ultra vires for Parliament to make the Amendments retroactive then Section 9 has its full significance and Parliament has no power to deprive the plaintiff of the citizenship he automatically acquired on 27th April 1961.

My remarks on retroactivity apply equally to Act No. 4 of 1965 which purports to consolidate the Amendments. It cannot consolidate any of them which were not valid amendments in the first place. From what I have said, I do not wish it to be thought I am of the opinion that under no circumstances can the constitutional provisions regarding citizenship be altered. For example, if Parliament were to enact that so far as regards persons born after the coming into force of that particular enactment or on some future date, only persons of Negro African descent would automatically become citizens that would be a very different matter because that would not be a case of interfering with the rights already acquired by living persons. Nor do I wish it to be inferred that I think that in no circumstances would a restriction on entry into the House of Representatives, etc. by reference to race be reasonably justifiable in a democratic society. I merely think that such a restriction would not have been justified at the time the purported amendments were made.

In this connection I find it very significant that by the very terms of the purported amendment it is implied that persons of mixed race like the plaintiff are considered fit and proper to be civil servants or regular soldiers of Sierra Leone. Why let them be engaged in services in which quality of loyalty, obedience and integrity are required and yet say they are not fit to be <u>elected</u> to take part in the law making of their

In the Supreme Court of Sierra Leone

No.10

Judgment dated 26th October 1967 (contd.)

country? In the light of this could it be said to be reasonably justifiable in a democratic society to so restrict them? For all the reasons set forth above, I am of the opinion that the plaintiff must succeed because:-

1. The purported amendment by Act No. 12 of 1962 of Section 1 of the Constitution was ultra vires the Constitution and therefore null and void.

2. The purported amendment by Act No. 39 of 1962 of section 23 of the Constitution was ultra vires the Constitution and therefore null and void.

I also hold that any consequential amendments to other sections of the Constitution, e.g., the inclusion of the figure '1' on line 1 of section 31 of the Constitution is ultra vires and void. I am therefore prepared to grant a declaration in favour of the plaintiff consonant with my decision. I leave the wording of such declaration to be settled by counsel on both sides between them for final decision by the Court.

Adjourned for further consideration.

(Sgd) (Banja Tejan-Sie)

Chief Justice.

NO. 11

DRAFT ORDER SUBMITTED TO COURT

C.C.58/67 1967. A. No. 30.

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 of 1961.

B E T W E E N:

10 JOHN JOSEPH AKAR Plaintiff
LEVUMA ROAD, FREETOWN

- and -

THE ATTORNEY-GENERAL
OF SIERRA LEONE Defendant
LAW OFFICERS' DEPARTMENT,
TRELAWNEY STREET,
FREETOWN.

BEFORE THE HONOURABLE MR. BANJA TEJAN-SIE
CHIEF JUSTICE OF SIERRA LEONE

20 THURSDAY, 26TH OCTOBER, 1967

THIS ACTION coming on for trial before the Court on the 3rd day of July, 1967 and divers other days in the presence of the parties and their Counsel AND UPON READING the Writ of Summons and the pleadings filed herein AND UPON HEARING what was argued by Counsel on both sides - IT IS ADJUDGED AND ORDERED as follows:-

(1) That the Amendments to Section (1) of the Constitution by Act 12 of 1962 and Act No. 52 of 1965 are ultra vires the Constitution and therefore null and void.
30

(2) That the purported Amendment by

In the Supreme Court of Sierra Leone

No.11

Draft Order submitted to Court 30th November 1967 (Contd.)

Act No. 39 of 1962 of Section 23 of the Constitution was ultra vires the Constitution and therefore null and void.

(3) That all consequential Amendments to other Sections of the Constitution - e.g. - the inclusion of the figure '1' on line 1 of Section 31 of the Constitution is ultra vires and void. 10

(4) COSTS to be taxed.

BY THE COURT,

MASTER AND REGISTRAR.

Approved,

(sgd) John Smythe,

Counsel for the Plaintiff.

30/11/67

Approved,

(sgd) John Winston Beresford Chenery, 20

Counsel for the Defendant.

30/11/67.

In the Supreme Court of Sierra Leone

No.12

Order 1st December 1967

NO. 12

ORDER

C.C. 58/67. 1967. A. No. 30.

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 OF 1961.

BETWEEN:-

JOHN JOSEPH AKAR — Plaintiff

10

- and -

THE ATTORNEY-GENERAL OF SIERRA LEONE LAW OFFICERS' DEPARTMENT, TRELAWNEY STREET, FREETOWN. — Defendant

BEFORE THE HONOURABLE MR. BANJA TEJAN-SIE: CHIEF JUSTICE OF SIERRA LEONE.

FRIDAY THE 1ST DAY OF DECEMBER, 1967

THIS ACTION having on the 3rd and 4th days of July, 1967 been tried by the Honourable the Chief Justice in the presence of the parties and their Counsel AND the Chief Justice on the 26th day of October, 1967 having in his judgment ordered a Declaration in favour of the Plaintiff leaving the wording of such declaration to be settled by Counsel on both sides for final decision by the Court AND UPON HEARING Counsel as a further hearing this day AND UPON READING the order settled by Counsel on both sides and approved by the Court IT IS THIS DAY ADJUDGED AND DECLARED as follows:-

20

30

(1) That the amendments to Section (1) of the Constitution by Act 12 of 1962 and Act No. 52 of 1965 are ultra vires

In the Supreme Court of Sierra Leone

No.12

Order 1st December 1967 (Contd.)

the Constitution and therefore null and void;

(2) That the purported amendment by Act No. 39 of 1962 of Section 23 of the Constitution was ultra vires the Constitution and therefore null and void;

(3) That all consequential amendments to other sections of the Constitution - e.g. - the inclusion of the figure '1' on line 1 of section 31 of the Constitution are ultra vires and void.

10

IT IS FURTHER ORDERED that the Plaintiff do have the costs of this action such costs to be taxed.

BY THE COURT,

(sgd) O.M. Golley.

MASTER AND REGISTRAR.

20

In the Court of Appeal

No.13

Notice and Grounds of Appeal 16th January 1968

NO. 13

NOTICE AND GROUNDS OF APPEAL

C.C.58/67 1967. A. No. 30.

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 OF 1961.

BETWEEN:-

10 JOHN JOSEPH AKAR Plaintiff
LEVUMA ROAD,
FREETOWN

- and -

THE ATTORNEY-GENERAL OF SIERRA LEONE Defendant
LAW OFFICERS' DEPARTMENT,
TRELAWNEY STREET,
FREETOWN.

TAKE NOTICE that the Defendant being
20 dissatisfied with the decision of the Supreme Court contained in the Judgment of the Chief Justice dated the 26th day of October, 1967 doth hereby appeal to the Sierra Leone Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the Appeal seek the relief set out in paragraph 4.

AND THE APPELLANT further states that the names and addresses of the persons
30 directly affected by the Appeal are those set out in paragraph 5.

2. Part of decision of the lower Court complained of: - The whole Decision.

In the Court of Appeal

No.13

Notice and Grounds of Appeal 16th January 1968 (Contd.)

3. Grounds of Appeal

(1) That the learned Chief Justice was wrong in law in holding that it was beyond the competence of the Sierra Leone Legislature to make the amendments of the Constitution contained in Acts No. 12 of 1962 and No. 39 of 1962 restrospective in operation. 10

(2) That the learned Chief Justice was wrong in law in holding that the Acts No. 12 of 1962 and No. 39 of 1962 were ultra vires the Constitution.

4. Relief sought from the Sierra Leone Court of Appeal -

That the Judgment of the learned Chief Justice of October, 26th 1967 be reversed and the Order set aside. 20

5. Persons directly affected by the Appeal:

JOHN JOSEPH AKAR - c/o J.H. Smythe,Esq., 22, Westmoreland Street, Freetown.

ATTORNEY-GENERAL - c/o Law Office, Guma Building, Trelawney Street, Freetown.

Dated this 16th day of January, 1968. 30

(Sgd) J.W.B. Chenery.

Senior Crown Counsel.

SOLICITOR FOR APPELLANT.

NO. 14

NOTICE AND AMENDED GROUNDS OF APPEAL

In the Court of Appeal

No.14

Notice and Amended Grounds of Appeal 15th February 1968

IN THE COURT OF APPEAL FOR SIERRA LEONE

Civ. App.1/68

IN THE MATTER OF SECTION 24 OF THE CONSTITUTION OF SIERRA LEONE

PUBLIC NOTICE NO. 78 of 1961: SECTION 24 OF PUBLIC NOTICE NO. 78 OF 1961.

10 B E T W E E N:

THE ATTORNEY-GENERAL OF SIERRA LEONE - LAW OFFICE, FREETOWN — Defendant/Appellant

- and -

JOHN JOSEPH AKAR - LEVUMA ROAD, FREETOWN — Plaintiff/Respondent

PROCEEDINGS BEFORE THE SUPREME COURT OF SIERRA LEONE - C.C.58/67 - 1967 - A. No. 30.

20 RULE 12 (5) OF THE COURT OF APPEAL RULES

TAKE NOTICE that this Honourable Court will be moved on Monday the 19th day of February, 1968, at 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard, by Counsel for the Defendant/Appellant, for leave to amend by addition the following grounds of appeal - to wit:-

(1) Particulars of Ground 1 - in that he held that it was ultra vires for Parliament to make amendments retroactive - P. 29 of Judgment.
30

(2) Particulars of Ground 2 - in that he held that the altered Section 1 of the Constitution is discriminatory by affording different treatment to persons like the Plaintiff attributable

In the Court
of Appeal

No.14

Notice and
Amended Grounds
of Appeal
15th February
1968
(Contd.)

to his description of race -
P.11 of Judgment.

(3) The learned Chief Justice was wrong in law in holding that "one is entitled to consider whether the proposed alteration violates the spirit and general intention of the Constitution although on the face of it complying with the requirements laid down thereon by the Constitution. 10

(4) The learned Chief Justice was wrong in law in interpreting the words "reasonably justifiable in a democratic society" in Section 23(4)(f) in that he modified the words used in the Section in order to bring it in accordance with his views of what is right or reasonable. 20

(5) The learned Chief Justice failed to give the word "alter" in Section 43 of the Constitution (Public Notice No. 78 of 1961) its plain and ordinary meaning. In so doing he interpreted the power of Parliament to alter the Constitution not according to the words of limitation contained in Section 43 but according to the limitations which that wording does not import. 30

(6) The learned Chief Justice was wrong in holding that in passing the amendments of the Constitution contained in Act No. 12 of 1962 and Act No. 39 of 1962, Section 9 of the Constitution should have been specifically amended or in the alternative, the learned Chief Justice in construing Section 23(1) of the Constitution, failed to take account that the subsection had no application to legislation on citizenship. 40

In the Court of Appeal

No.14

Notice and Amended Grounds of Appeal 15th February 1968 (Contd.)

(7) The learned Chief Justice was wrong in law in holding that the amendment contained in Act No. 12 of 1962 and Act No. 39 of 1962 is discriminatory.

(8) That the judgment is against the weight of evidence.

AND ALSO TAKE NOTICE that upon the hearing of the said application the Defendant/Appellant will use the affidavit of Pierre Perkin Cann Boston, Crown Counsel, sworn herein on the 15th day of February, 1968, a copy whereof together with copy of the exhibit marked "PPCBI" therein referred to, is annexed to and served with this NOTICE.

Dated the 15th day of February, 1968.

Yours faithfully,

(Sgd) J.W.B. Chenery.

Senior Crown Counsel,

Law Office, Freetown.

Solicitor for Defendant/Appellant.

To:- J.H. Smythe,
Solicitor for the Plaintiff/Respondent.
22, Westmoreland Street,
Freetown.

In the Court of Appeal

No.15

Order 19th February 1968

NO.15

ORDER

IN THE COURT OF APPEAL FOR SIERRA LEONE

Certificate of the Order of the Court.

Appeal from the judgment of the Honourable Mr. Justice Banja Tejan-Sie - Chief Justice - dated the 26th day of October, 1967.

(L.S.) C.C.58/67............Petition.

Civ.App. 1/68 ....Appeal No.

The Attorney-General of Sierra Leone...... Applicant. 10

John Joseph Akar..............Respondent.

(Sgd) S.B. Jones.
President.

THIS APPEAL coming on for hearing on the 19th day of February, 1968 - before the Honourable Sir Samuel Bankole Jones - President - the Honourable Mr. Justice G.F. Dove-Edwin - Justice of Appeal - and the Honourable Mr. Justice J.B. Marcus-Jones - Justice of Appeal in the presence of N.D. Tejan-Cole, Esquire - Counsel for the Applicant and J.H. Smythe, Esquire - Counsel for the Respondent: 20

I hereby certify that an Order was made as follows:-

"APPLICATION IS GRANTED:"

'COSTS TO PLAINTIFF/RESPONDENT ASSESSED AT Le8.40c..'

Given under my hand and the Seal of the Court this 19th day of February, 1968. 30

(Sgd) A. Nithianandan.
Registrar -
COURT OF APPEAL FOR SIERRA LEONE.

In the Court of Appeal

No.16

Proceedings 19th February 1968

NO.16

PROCEEDINGS

IN THE COURT OF APPEAL FOR SIERRA LEONE

(Monday - 19th February, 1968)

CORAM:- Hon. Sir Samuel Bankole Jones - President.

Hon. Mr. Justice G.F. Dove-Edwin - Justice of Appeal.

10 Hon. Mr. Justice J.B. Marcus-Jones - Justice of Appeal.

Civ. App. No. 1/68 - The Attorney-General of Sierra Leone.

v.

JOHN JOSEPH AKAR.

Mr. Tejan-Cole for Defendant/Applicant.

Mr. Smythe for Plaintiff/Respondent.

Tejan-Cole:- A Motion brought under Rule 12(5) of the Court of Appeal Rules, 1960 for the purpose 20 of amending a Notice of the Grounds of Appeal filed in this Court on 24.1.68 by addition of the following grounds set out in Motion. I rely on affidavit of Pierre Perkin Cann Boston sworn on 21.1.68 and filed herein.

The necessary fees prescribed under the Rules have been 30 paid.

Mr. Smythe:- No objection.

ORDER:- Application is granted. Costs to Plaintiff/Respondent assessed at Le8.40c..

In the Court of Appeal

No.16

Proceedings 19th February 1968 (Contd.)

By consent the hearing of the case is adjourned to 4.3.68.

(Sgd) S.B. Jones.

4th March, 1968

The Attorney-General (Abu A. Koroma, Esq.,) with him C.S. Davies - Assistant Legal Draughtsman and Mr. N.D. Tejan-Cole - Senior Crown Counsel for the Appellant.

Mr. Johnny Smythe with him Dr. W.S. Marcus-Jones and G. Gelaga-King for the Respondent. 10

The Attorney-General:- This is an appeal against the Judgment of the Learned Chief Justice delivered on the 26th October, 1967.

The action commenced with a Writ for a declaration - see p. 3. The relief granted is at pages 58 - 9. Grounds of Appeal - p. 60 - 61.

On a Motion, additional grounds of appeal were allowed to be added. The first 2 are mere particulars to Grounds 1 and 2. 20

Ground 1:- The particulars have been filed on the Motion - see p. 56 of Record - lines 2 - 5. To understand the legislative supremacy of the Sierra Leone Parliament one has to understand the Supremacy of Parliament at Westminster which is the mother Parliament of all 30 Commonwealth countries. The United Kingdom Constitution is unwritten and therefore has power to pass any law without reference to a written Constitution. See Wade and Philipps Constitutional Law 6th Edition. P. 43. See

In the Court of Appeal

No.16

Proceedings 4th March, 1968 (Contd.)

Anson on Law and Custom of The Constitution - 4th Ed. p. 7. "Our Parliament is omnipotent . . . . . ." The Supremacy of the Sierra Leone Parliament. Refers to Public Notice 78 of 1961 - (our Constitution) - deals with the powers of Parliament to legislate. These are to be found in Secs. 42, 43, 51 and Sec. 9 which gives power to pass legislation on Citizenship. Sec. 9 deals only with Citizenship. Sec. 42 deals with general powers of Parliament to make laws. The only limitations - (subject to the provisions of this Constitution) - to the legislative supremacy of Parliament are to be found in the Constitution itself and not outside of it. Sec. 43 deals with the alteration of the Constitution. All the provisions of the Constitution can be altered, but so far as these mentioned in Sec. 43 (a), (b), (c) and (d) - these can only be altered by following a certain procedure laid down in that section. Some written Constitutions have expressly written in provisions where ex-post facto legislations as well as retroactive legislations shall not be passed.

See American Constitution - Sec. 9 - found in Constitutional Law and Cases and other problems. Vol. 1 by Little Brown - 2nd Ed., 1961. The American Constitution therefore contains a prohibition on Parliament to pass ex-post facto and retroactive enactments.

In Craies on Statute Law - 6th Ed. at p. 388 - footnote 44 is to be found The French Code. It contains a positive provision

In the Court of Appeal

No.16

Proceedings 4th March, 1968 (Contd.)

that laws are not to have any retrospective operation - Code Civil Article 2.

There is no express provision in our Constitution which prohibits Parliament from passing retrospective legislations or ex-post facto ones. The distinction between these two kinds of legislation is to be found in Craies 6th Ed. p. 387. 10

The Bribery Commissioners v. Pedrick Ranasingha - 2 W.L.R. 1964 p. 1301 is an authority for the meaning of the words - "Subject to the provisions of the Constitution" at p. 1310. Parliament can alter any provision of the Constitution. The power of Parliament in Commonwealth Countries in general to pass legislations is referred to 20 at p. 53 etc. of Jennings on Constitutional Laws of the Commonwealth - Vol. 1.

What is the effect of retrospective legislations? See Craies p. 388 - 9. There is nothing to prevent Parliament passing an Act retrospectively if the intention is apparent. Retrospective Statutes can be passed if the legislature 30 thinks fit. See Maxwell on Interpretation of Statutes - 1962 - p.213 - 4.

At this stage the Court rose and adjourned to 5.3.68.

(Sgd) S.B. Jones.

President.

5th March, 1968

Same representation as before.

Ground 1 (Continued) Parliament has a right to 40 pass retrospective legislations if the intention is clear on the face

of the Act itself even though the consequences may appear unjust and hard.

Refers: (a) Rex. v. Vine - L.R. Q.B. Vol.1 - 1874 at p. 195.

This case states that Parliament can pass a legislation retrospectively even though it takes a vested right from an individual. The Proprietor of the Bar (Theaker) had a vested right in the form of a licence to sell liquor to the public. When the Act was passed and he made an attempt to transfer his licence to Vine and Vine applied before the Magistrate, the Magistrate ruled that Theaker had no licence to transfer as he had been "convicted of a felony" some years ago.

10

20

(b) Williams v. Stephen - 64 L.T.R. - 1891 - p. 795.

(c) "Law in the making" by Allen - 6th Ed. 1958 at p. 451 - 2. It must be emphasised . . . . . Policy and Statesmanship and wise Government. If a wise Government has decided that a legislation should have a retrospective effect, the Court shall give effect to it.

30

(d) Sapally and N'jie v. The Attorney-General of the Gambia: 1964, 3 W.L.R. p. 732 - see dictum of Lord Denning at p. 742, 744.

Apply these principles to the present case.

40

Firstly No. 12 of 1962 - "An Act to provide for the amendment of certain sections of the Constitution."

In the Court of Appeal

No.16

Proceedings 5th March, 1968 (Contd.)

Sec. 1 . . . .
and shall be deemed to have come into operation on the 27th day of April, 1961."
Parliament expressed itself in no uncertain terms that the enactment should have a retrospective effect.

Secondly, No. 39 of 1962 is in the very same manner made retrospective as from 27th April, 1961. 10

Also Sec. 2 - N.B. -
The Certificate to show that Act was passed for "the second time and in accordance with the provisions of sub-sections (1) and (3) of Section 43 of the Constitution.

The effect of all this is that Plaintiff between 27th April, 1961 and 7th January, 1964 - (p.2 of Record - para. 6 of Particulars) - was not a citizen of Sierra Leone. 20

How did the Chief Justice apply these principles ?

(1) See p. 32 line 8 - p.33 - line 18. No conclusion was arrived at y the Chief Justice. 30

(2) See also p.34 - line 35 and p. 35 - lines 1 - 7.

"From this it would appear that Parliament had no power to deprive the Plaintiff of his Citizenship . . . ."
This is fallacious and wrong.
The answer to that of course . . . . . ." I accept this as the true statement of the law. 40

(3) See also p. 41 - line 19. I concede Judge was right as regards the procedure in passing Act No. 39 of 1961.

(4) See also p. 55 - lines 19 - 25.

"In my mind what makes the matter worse was that the so called amendments were retrospective.

10 In stating that the amendments were justified, he was applying a moral yardstick which he had no right to do. A Judge should interpret the law as he sees it and not bring his own moral or philosophical approach to the problem. It is Parliament alone that should consider whether a law is justified or not or

20 whether it causes hardship. Refers to D.P.P. v. Chike Obe - 1 W.L.R. - 1961 Vol. 1 at p. 186. See Brett J's comment at p. 197 is pertinent.

In so far as measures are justifiable or reasonable, deference ought to be given to the views of the elected representatives of the people in

30 Parliament in matters of this nature. The statement of the law at p. 55 on Record is not the proper judicial approach to the problem. The Chief Justice was making a moral pronouncement when he said that the amending enactments were completely unjustified and contrary to the spirit of

40 Sections 42 and 43 of the Constitution.

One matter that prevails throughout the judgment is the fact that he made no categorical

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pronouncement, but left inferences to be drawn.

Refers to p. 55 - line 10 "Can this be said . . . . . ."

"If the numbers involved . . . . . such legislation".

The Chief Justice ought not to have made such a pronouncement on the law. We all know that there has been no breach of the peace since the law was passed - - - - - - - pure speculation.

The effect of all this is that once a legislature has passed a law which expressly states that it should be retrospective, the Court shall give effect to it, however great the hardship maybe. Public opinion and extra judicial forces may force Government to change the Law.

The submission is that the amending Acts had a retrospective effect, even though they appeared to take away a vested right and appear to cause hardship.

Vested Right - Citizenship is not a right but a Status conferred upon by the State and every State has a right to legislate who should be its Citizens.

Ground 2: Particulars - See p. 38 - line 7 of Record. "The altered section 1 of the Constitution certainly appears to contravene 23(1) in that it is discriminatory by affording different treatment to persons like the Plaintiff - attributable to his description by race.

This statement of the Chief Justice is manifestly wrong.

Section 42 gives power to Parliament to make Laws and Sec. 43 gives power to alter the Constitution and especially Sub-sec. 5 (b). Parliament has power to modify etc. "Alteration" does not necessarily mean an amendment.
Sub-sec. 5 (b) was enacted to safe-guard the position of the average citizen of Sierra Leone. Without 5(b), it would have been competent for Parliament to amend any of the provisions of the Constitution without following the provisions laid down in the other Sub-sections of Section 43. But 5(b) extends the meaning of "alteration" to "modification" and to this extent the procedure laid down in Sec. 43 must be followed.

Sec. 51 states the mode of exercising legislative power. In order to pronounce a legislation untra vires, one has to look at the powers granted to Parliament to make legislation and to see whether Parliament exceeded its power. Secondly, one has to look at the other provisions of the Constitution to see if the new law passed is in conflict with any of the provisions of the Constitution. To give effect to Sec. 42 of the Constitution, Parliament in amending the Constitution may do so either expressly or by necessary implication. There is no provision in the Constitution of Sierra Leone that a Constitutional amendment should be specifically stated in the Act - namely, that it is a Constitutional amendment. Any legislation whether stated as an amendment to the Constitution or not which is inconsistent with any of the provisions of the Constitution, the legislation is

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said to have amended the provision of the Constitution by necessary implication. Provided the procedure laid down in Sec. 43 is followed.

See Kariapper v. Wijesinha & Anor. - 1967 - 3 A.E.R. 485. 1967 1 W.L.R. - 1460. The Ceylon Constitution by its Sec. 29 is similar to our Sec. 42, 43 and 51. 10

Adjourned to 6.3.68.

(Sgd) S.B. Jones,
President.

6th March, 1968

Same representation as before.

Ground 2 (Continued) Kariapper's case is authority that if a legislation is inconsistent with any provision of the Constitution, that legislation is said to have amended by necessary implication that provision of the Constitution. 20

See p. 494 of Case, last paragraph for the law. See also p. 492.

Applying the principle of this case to Act No. 12 of 1962, unless Act No. 12 violates any of the restrictions imposed on Parliament by the Constitution and if it does not, then if Act No. 12 of 1962 is inconsistent with any provision of the Constitution, this Act is said to have amended that provision by necessary implication. 30

Act No. 39 of 1962 is a clear amendment of the Constitution. It amended Sec. 23 (4) by adding a new section (g). This Act was passed by the requisite legislative process under Sec. 43. (See Certificate endorsed at end of Act). The submission is that this Act is valid 40

and if this is so, then it has retrospective effect and amends Sec. 23(4) by addition of sub-section (g).

Applying the principles of the law to the Judgment -

(1) See p. 54 lines 20 - 34. This statement is wrong. It was within the competence of Parliament to amend the Constitution in the manner it did.

(2) P. 57 - line 6 ...... "For all the reasons set forth above......"

(i)

(ii)

These two Acts were within the competence of the legislature to pass. Subject to the provisions of the Constitution, any Act passed which fulfils these provisions cannot be ultra vires and null and void.

See Hughes Jurisprudence - 1955 at p. 272.

Grounds 3, 4, & 5.

In Ground 3, the Judge stated as follows:-

"One is entitled to consider whether the proposed alteration .....Constitution." (P.30 of Record - lines 35 - 39).

Refers to p.44 of Record - lines 9 --

"In my view..... Coke in Bonhams case .... and adjudge such Act as void."

My submission is that the law

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here relied on is old and archaic and not applicable. This dictum was a product of Coke's thinking ---- the Common Law must prevail against prerogative Writs.

As far as 1871 there has been a departure from what Coke advocated in Bonham's case. See Lee & Anor. v. The Bude and Torrington Junction Railway Company - L.R. 1870 - 1 C.P. Vol. 6 at p.576 at 582. 10

The modern attitude of Judges to the interpretation of Constitutions in Commonwealth Countries is referred to in Adegbenro v. Akintola - 3 A.E.R. 1963 at p. 544 at 550 - paragraph T. Therefore in interpreting the Constitution of Sierra Leone, one has to in the final 20 analysis, decide the issue involved on the written Constitution itself.

Applying this principle to Ground 3, the Judge was wrong. Refers page 30 of Record - lines 32 - 39. "At this stage ----- Constitution." One is not entitled to consider whether the Act violates the spirit and general intention of the Constitution. One must always 30 interpret the words of the Constitution as the Court sees it. Does an Act violate the provisions of the Constitution --- "Subject to the provisions . . . . . . Constitution."

Ground 4: Refers to Sec. 23 (1) of the Constitution - - - not applicable to sub-section 4 (f) of Section 23.

".... is reasonably justifiable 40 in a Democratic Society." This expression has been used in Sec. 24 of the Nigerian Constitution of 1960.

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Refers (1) Reg. v. The Amalgamated Press of Nigeria Ltd. and Ibidapo Fatadum A.N.L.R. - 1961 Vol. 1 - page 199.

(2) D.P.P. v. Cheke Obi - A.N.L.R. - 1961 Vol. 1 - page 186 at p.197.

In deciding what is reasonably justifiable a cautious warning has been given by Justice Brett. Therefore the statement of the Chief Justice at page 52 - lines 27 - 33 and p. 53 - lines 1 - 15 is wrong. This is a castigation on Parliament an undeserved one at that.

Ground 5: The word "alter". The learned Chief Justice failed to give this word in Sec. 43 of the Constitution its plain and ordinary meaning - see p. 41 from line 22 to p. 42 and p. 43.

Sec. 43 (1) of the Constitution speaks of "alteration".

The effect of Sub-section 5 (b) is that alter includes amendment, modification, etc. "Alter" does not mean amendment by itself nor modification by itself. Alter includes all this. There is a difference between an inclusive definition and a restrictive definition which gives the meaning of the word.

See Odgers Construction of Deeds and Statues - 4th Edition - p. 222.

Adjourned to 7.3.68.

(Sgd) S.B. Jones.
President.

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Same representation as before.

Ground 6: This ground has been argued in ground 2.

Refers to Sec. 23 (1) - also Sec. 23 (4). This latter sub-section excludes the application of 23(1) to many matters and places.

Act No. 39 of 1962 amended sub-section 23(4) by addition of sub-section (8). The submission is that the Respondent cannot complain that Act No. 12 of 1962 is discriminatory in the sense that Sec. 23(1) is not applicable to this Section. It cannot be discriminatory, because the amending Acts are of retrospective in effect. Even if it is discriminatory, the Respondent cannot complain, because by virtue of Act No. 12 of 1962, he was not a citizen of Sierra Leone - Sec. 23 (4) (b).

To be elected into Parliament is a <u>privilege</u> and not a right which flows from citizenship. He had a privilege or a liberty to enter Parliament. As a result of Act No. 12 of 1962. Before Act No. 12 of 1962 was passed, Plaintiff had no right to be elected into Parliament. He merely had a privilege.

If the first leg of Ground 6 is in our favour, we do not ask for a consideration of the second leg.

Ground 7: The Chief Justice held that amendments were discriminatory - See p. 38 lines 7 - 11.

"The altered Sec. 1 of the Constitution ----" - race Also p. 52 lines 27 - 32.

"Now what is the pith or substance . . . . . . Representatives?"

The amending Acts dealt with Citizenship legislation and nothing else. The Judge held that the amending legislation was not purely one on Citizenship - see p. 52 - lines 3 - 25 and p. 53 lines 1 -

10

The Learned Judge's statement here is contradictory.

The Respondent should prove that the amending legislations were not legislations on Citizenship if they so contend. Unless the presumption is rebutted, the legislations are on Citizenship.

(1) Pillar's case - 2 A.E.R. 1955 - p. 833 at p.837(F).

20

"It is for the Respondent to prove that amendments are discriminatory. The maxim "Omnia Praesumtor . . . . . ." applies to legislations.

(2) Sec. 24 of Constitution - "Subject . . . . if any person alleges that any provisions . . . ."redress-" Throughout the record there is no evidence led to prove that amendments were discriminatory. My submission is that Parliament intended the Acts to be legislation on Citizenship. There was no satisfactory argument put forward that amendments were discriminatory.

30

Was Plaintiff of Lebanese nationality because his father was a Lebanese? The Judge held that the Respondent was

40

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discriminated against because he was of Lebanese origin.

There was no evidence that Plaintiff was discriminated against because of his race. "Lebanese" is not a description of race, but of nationality.

The Citizenship laws of Sierra Leone are not founded on race, but on descent. There is a race known as Negroes. 10

Act No. 12 does not discriminate against any race. The Plaintiff has not proved that he was discriminated against in accordance with Sec. 23(3). The Chief Justice said Plaintiff was discriminated against because of race, but there was no evidence of Plaintiff's race. There was evidence of his nationality - "Lebanese origin." If it is held that Act No. 12 of 1962 is discriminatory on race, then by virtue of Act No. 39 of 1962, the Respondent cannot complain, because of the addition of the sub-section (8). 20

If Court holds that Respondent is of Lebanese nationality and was also a British Protected Person on 26th April, 1961, then on the 27th April, 1961, he had dual nationality. Then by virtue of Sec. 6(2) of the Constitution, he should have taken positive steps to have renounced his Lebanese Citizenship if he intended to remain in Sierra Leone Citizenship. My submission is that Plaintiff is not a Lebanese. There was no legal proof of Plaintiff being a Lebanese and no proof of his belonging to a race including Lebanese. 30 40

It is the right of every State

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to determine who should be its Nationals and in doing this, the State can discriminate against certain persons.

See Pillar's case - p. 838 "C" with the words beginning - "Is it in the present case a legislation - - - and Citizenship --------."

10 MR. J.H. SMYTHE FOR THE RESPONDENT

SMYTHE: I refer to the pleadings - Statement of Claim and Defence.

Before case started, Counsel on both sides admitted the facts as pleaded and agreed to argue questions of Law. The Passport of Plaintiff was put in by consent as - Exh. "A". Page 23 - Line 22.

I submit that date of birth of Plaintiff up to the coming into operation of the Sierra Leone Independence Act, showed he was a British Protected Person. (20)

Refers to Section 10(1) of The Constitution.

Definition of "British Protected Person" - - - to be found in Sec. 9(1) of British Nationality Act, 1948 - (See p. 359 - Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland by Clive Parry. The Foreign Jurisdiction Act, 1890 consolidated all previous Acts passed. In 1913, the English Parliament gave the Governor power to make laws for Sierra Leone. In 1924, the Sierra Leone (Legislative Council) Order-in-Council conferred the right to have a Legislative Council. This Order conferred the right of a British (30) (40)

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Protected Person to sit in the Legislative Council. In fact, it named 3 Chiefs by nomination (Sec. 4). Public Notice No.50 of 1951 made provisions for persons from the Protectorate to be elected by District Councils into Parliament. (Sec. 7(1)).

In April and May, 1960, there was a Communal Paper No. 1029 stating the prerequisites for the grant of Independence. The matter of Citizenship was adverted to and agreed by all parties. As a result of this, Sec. 1(1) of the Constitution was passed. 10

The Constitution of Sierra Leone is the Second Schedule to the Sierra Leone (Constitution) Order-in-Council, 1961. The first Chapter contains sections 1 - 10 which deal exclusively with Citizenship. 20

In Sec. 1(1), Citizenship was acquired by birth and Parliament cannot take that right away.

Adjourned to 8.3.68. 30

(Sgd) S.B. Jones.
President.

8th March, 1968

Same representation as before.

Mr. Smythe continues: By depriving Plaintiff of his citizenship of Sierra Leone, the amendments deprived him of the Status of British Protected Person.

The effect of the Acts (amending) was that Plaintiff 40

was liable to be deported, deprived of the security of the provisions contained in Secs. 11 - 24 - (discriminated against). Also under Sec. 9 (b), a Citizen of Plaintiff's class could be deprived of his Citizenship. Also he cannot be elected to Parliament for 25 years. See Sec. 9 of No. 10 of 1962; also Sec. 10.

FOUR CLASSES:

1. Citizenship by birth is a right which cannot be taken away by Parliament.

2. Citizenship by descent also cannot be taken away.

3. Citizenship by Registration.

4. Citizenship by Naturalisation.

The first two cannot be taken away. Refers to "Nationality and Citizenship Laws of the Commonwealth and Ireland by Clive Parry." At p.22 - 3. Before the 27th April, 1961, Plaintiff was a British Protected Person by birth. Sec.(1) (1) merged this class of persons with those who were British Subjects as Citizens of Sierra Leone with a proviso.

If Parliament can make legislation to take away the Citizenship from a member of the group of British Protected Persons, then Parliament can deprive any other group from being a Citizen or British Subjects.

Between 27th April, 1961 and January, 1962, Plaintiff was a full Citizen of Sierra Leone until the Act of No. 12 of 1962 took away this Citizenship.

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The functions of Courts in deciding issues raised here.

Refers (1) Colymore and Abraham v. The Attorney-General International Commission of Jurists - Special Edition of 1968 - Vol. 8 - No. 2.

(2) Constitutional Government in India by Pylee - 2nd Edition - 1965 - page 495.

10

(3) Pillar's case referred to in Chief Justice's judgment. See p. 837.

Parliament had no power whatever to amend Section 1(1) of the Constitution. Refers - (1) Public Notice No. 87 of 1961 - The Sierra Leone Independence Act - See Sec. 6 of Second Schedule. The Constitution can only be amended in the way laid down by the Constitution itself. This means that there can be no repeal by implication. Sec. 9(b) gives power to Parliament to amend Sec. 1(1). This Section not having been expressly revoked or amended, any purported amendment of Sec. (1) (1) is null and void.

20

30

It cannot be revoked or amended by implication.

Sec. 9 of the Constitution is an enabling Section and not a declaratory one. This Section lays down the powers of Parliament when dealing exclusively with Citizenship. These powers cannot be amended or revoked by implication.

40

Refers to Sections 42 and 43 of the Constitution.

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The amendments - (Acts No. 12 and No. 39 of 1962) were made under Section 43 and this Section is declaratory. It states how alterations, amendments etc. to the Constitution should be done. If Section 9 is alive, Section 43 cannot be applied. The only way Section 9 (b) beginning "otherwise than - - - - - - Constitution," can be revoked or amended is under Section 43.

10

KARIAPPER'S CASE: Sections 42 and 43 of the Sierra Leone Constitution are similar to Sections 29(1) and 29(4) of the Ceylon Constitution. There is no Section similar to our Section 9 or some such section in the Ceylon Constitution. The Parliament of Ceylon was not restricted from passing the law they did. Our Constitution restricts Parliament by its Section 9 from passing that law. When there is no fetter on Parliament to pass an Act, then that Act can by implication amend an inconsistent provision in the Constitution. If there is a fetter, it cannot do it.

20

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See Liyanage v. Regina - 1966 - 1 A.E.R. 650.

Adjourned to 12.3.68.

(Sgd) S.B. Jones
President.

Same representation as before.

9th March, 1968

Mr. Smythe continues - Kariapper's case decided -

(1) That subsequent legislation may amend a Constitution by implication.

40

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(2) That this can only be done if there are no restrictions imposed by the Constitution itself. Sec. 13 of the Ceylon Constitution is the section which was held to have been amended by implication. There is no restriction in the Constitution with reference to the amendment of this Section. In our Constitution, Sec. 1 was amended by Act No. 12 of 1962. There is a restriction to be found in Sec. 9 (b) of the Constitution on the amendment of Sec. 1 of the Constitution. In accordance with the pre-Constitutional agreement as set out in the Command Paper and Sec. 9(b) - Parliament cannot deprive a person who has been a Citizen under sec. 1 (1) of the Constitution of his Citizenship. If ever Parliament has the power to amend Sec. (1), it must first repeal Section 9(b). Refers - The Bribery Commissioners v. Ranasinghe - 1964 - 2 A.E.R. - 785.

Section 9 (b) - "otherwise than . . . . . ." is mandatory.

Section 1 (1) should have been amended by a two-thirds majority. Act No. 12 of 1962 the amending Act did not pass Parliament with the required majority as Act. No. 39 of 1962 and is therefore invalid. To alter any of the provisions of the Constitution, there must be a two-thirds majority but for the entrenched Clauses, there must be a dissolution of the House in between and a two-thirds majority in two successive Sessions of

Parliament. Act No. 12 of 1962 should have stated that it was passed by a two-thirds majority. See Section 49(1). Refers to Ware v. O'Ffori Atta & Ors. - 1959 Ghana Law Reports - p. 181. See Section 6 of Public Notice No. 87.

10 The manner provided for amending Section 1 (1) are - (1) By Section 43(3) - two-thirds majority. I submit that Section 9(b) cannot be amended and so also Section (1) (1).

Sierra Leone adhered to the Convention of Human Rights and one of these Conventions is that a man's Citizenship cannot be taken away. What Parliament
20 did was un-Constitutional.

DESCRIMINATION AS TO RACE:
Refers p. 23 lines 8 - 27. It was agreed by both sides that the deprivation of the Plaintiff's Citizenship was discriminatory of his race. See para. 10 of Particulars of Writ and which Mr. Chenery accepted.

Refers also to p. 5 - A
30 Motion to argue a point of Law. This Motion was lost. Act No. 12 of 1962 makes it clear that it is a legislation that is discriminatory as to race. The wording of Section 1 (3) is based on discrimination of race.

Adjourned to 13. 3. 68.

(Sgd) S.B. Jones
40 President

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Same representation as before, except that the Attorney-General is absent. He sought permission to be so absent as he is leaving the Country in a day or two.

Mr. Smythe Continues

The amending Act - No. 12 of 1962 speaks of "a person of Negro African descent." This is clearly discriminatory in character. See Dictionary meaning of Race in the Concise Oxford Dictionary, as well as Webster's Dictionary. - "The descendant of a Common Ancestor," - - - - a lineage. It is quite clear therefore that the amending Act itself is discriminatory as to race. When Section 1 (1) was passed, the question of race did not enter into the consideration. 10 20

The Plaintiff was a Sierra Leonean, despite his father was a Lebanese. This incident in his birth is irrelevant. He was a Sierra Leonean, because he was born by a Sierra Leonean mother and was born in Rotifunk in the then Protectorate.

Refers to The Order-in-Council, 1924 containing the Royal Instructions. See Instruction 16 (9). It appears that the Policy has been to prevent discrimination as to race. 30

Act No. 12 discriminates between one British Protected Person and another British Protected Person by reason of race.

Parliament attempted to validate this discrimination. 40

Parliament passed No. 39 of 1963 by adding a new Sub-section (8).

No. 12 of 1962 was passed on the 17th January, 1962. No. 39 of 1962 was passed on 3rd August, 1962. At the time No. 12 of 1962 was passed, there was no 23(4)(8) Section 23(1) prohibits the provision of discriminatory legislation.

Parliament had to amend by adding Sub-section (8) as obviously an acknowledgment that the amendment Act No. 12 of 1962 was discriminatory.

REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY:

Having regard to its nature and special circumstances pertaining to those persons - -. The special circumstances were that before Constitution was made, there was an agreement as to who should be the Citizens of Sierra Leone. Consequent on which the Constituion of Sierra Leone was promulgated by an Order-in-Council - was passed in the British Parliament. Is it then reasonably justifiable to pass Act No. 12 of 1962?

See Olivier & Anor. v. Butthegieg - 1966 - 2 A.E.R. at p. 459 at 468 - para. 2. It is reasonably justifiable for Parliament to legislate who should be its Citizens. Deprivation is suspensory. Section 43 gives Parliament power to alter any provision in the Constitution with regard to certain provisions - (sections). The procedure of altering the Constitution is laid down by Section 9 which gives certain powers to Parliament - states that Parliament can make provision to deprive persons who became Citizens by registration or naturalisation, but that

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Parliament cannot make provision to deprive a person of his Citizenship acquired under Section 1(1) of the Constitution. If Parliament intended to alter Section 9, they cannot do it in such a way as to deprive a person of his Citizenship acquired under Section 1 (1). This is subject to my argument that Parliament cannot deprive a person of the Citizenship acquired under Section 1 (1). 10

Parliament is not Supreme. It is the Constitution which is Supreme. Parliament is subject to the Constitution. Refers "Constitutional Government in India," by Pylee - 2nd Edition - p.496 - 498. 20

"A Statute or Law to be valid must in all cases be in conformity with the Constitutional requirements. And it is for the Judiciary to decide whether any enactment is un-Constitutional or not." Also p. 498.

Applying these principles, Section 9 (b) is a limitation to the legislative powers of Parliament. It is an absolute limitation - a total prohibition. By amendment of Section 1(1) by Act No. 12 of 1960, Plaintiff was deprived of a Citizenship acquired on 27th April, 1961. Amendment wholly took away his Citizenship. 30

Citizenship is far more important than the provision contained in the entranched Clauses. Section 11 - 23 - Section 1 (1) is a vested right and that is why Section 9 (b) declares that Section 1 (1) cannot be touched. 40

Refers: Wade and Philip - 7th Edition - p. 254.

Refers to 23 (4) (b) - Persons who are not Citizens of Sierra Leone may be subjected to discriminatory laws made by Parliament.

WHETHER AMENDING ACTS HAVE A RETROSPECTIVE EFFECT:

10 Act No. 12 of 1962 cannot be retrospective, even if Parliament intended it to be so by reason of the fact that it preceded Act No. 39 of 1962. In any case, No. 12 of 1962 cannot amend Section 1 (1) of the Constitution. Section 23 (1) is mandatory - "no law shall make any provision - - - - - -"

20 Both Acts were not made contemporaneously. Because of the discriminatory nature of Act No. 12 of 1962, it was void. There was not then in being Section 23(4) (8). This was passed to bolster Act No. 12 of 1962. Act No. 12 of 1962 was then law when it was assented to on 17th March 1962 by Her Majesty. On that 30 date the law became law and therefore void. Section 23 (4) (8) not yet having been passed on that date.

Adjourned to 14. 3. 68.

(Sgd) S.B. Jones.
President.

14th March, 1968

Same representation as before.

Mr. Smythe Continues: Refers Pylee's. The passages 40 I read yesterday from Pylee were under heading - "Supreme Court and Judicial Review," and not

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under "Fundamental Rights". Refers to page 176 - Chapter 12 - Citizenship. See Article 11 - - - -

Refers - The International Declaration of Human Rights adopted by the United Nations Organisation on 10th December, 1948 - Article 15 (1) (2) - A man cannot arbitrarily be deprived of his Nationality. 10

Section 9 (3) of Ceylon is surplusage - "Subject to the provisions of this Constitution," - in our Constitution means - subject to Section 9 (b) - i.e. Section 1 (1) should never be amended.

If Acts clearly state that the provisions are retrospective, then they are retrospective. If No. 12 of 1962 and No. 39 of 1962 are retrospective, then they are ultra vires and void, because of Section 9(b) - cannot be amended in such a manner as to deprive a person of his Citizenship under Section 1 (2). 20

Refers - (1) The Law of the Constitution by Sir Ivor Jennings - 5th Edition - page 323 - where Coke's quotation is to be found. See also Ivor Jennings comment at page 159. See page 44 of Record. Was Judge right? 30

In order to test the validity of a legislation, the legislation must be looked at to discover whether (a) Parliament has the power to make it - (b) whether it offends against any of the fundamental rights. i.e. "Subject to the provisions of the Constitution". See cases referred to in Jennings - 40

(a) Ndlwana v. Hofmeyer - page 154.

(b) Harris v. The Minister of the Interior at page 155 of Jennings - page 55 of Hood Philips, - Constitutional and Administrative Law - 3rd Edition.

SUMMARY OF ARGUMENTS:-

(1) Parliament cannot amend Section 1 (1) in such a way as to deprive a person of his Citizenship, because Section 9 forbids it.

10

(2) Section 9 (b) cannot be repealed by implication, because of the restriction imposed by the very sub-section itself - (b) - the subject-matter of No. 12 of 1962 is completely different from that of Section 9 (b), (c) by virtue of Section 6 of the Second Schedule of Public Notice No. 87 - The Independence Act. Act can repeal amend or modify any of the provisions of the Constitution otherwise than in such manner as the Constitution itself provides.

20

(3) That the amending Act No. 12 of 1962 was discriminatory against race and that it therefore offended Section 23(1) of the Constitution and therefore even though it appears to be retrospective as from 27th April, 1961, it is void. That Act became void on 17th March, 1962 - i.e. - the date on which the Queen's assent was given.

30

(4) That when Act No.12 of 1962 was passed, there was not in existence Section 23 (4) (8) - therefore Section 23 (4) (8) could not save Act No. 12 of 1962.

40

(5) The enactment of Section 23(4) (8) clearly indicates that Parliament itself was aware that Act No. 12 of 1962 was

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discriminatory.

(6) That it is the function of this Court to consider whether the amending Acts were - having regard to their nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a Democratic Society. 10

(7) That there is no case on record in which a Citizen by birth has been deprived of his Citizenship and offered in its place an inferior Citizenship with the following disabilities -

(a) The Citizenship could be withdrawn from him.

(b) The person could be declared a prohibited immigrant. 20

(c) The person could be deported.

(d) The person should not be eligible for election to the House of Representatives, District Councils and Local Authorities for a period of 25 years after registration.

MR. C.S.DAVIES - replies:- My first submission is that Citizenship by birth can be taken away from a person under certain conditions. Counsel's general proposition in which he propounded was founded on a passage in Wade and Philip. This was a statement relating to the British Nationality Act, 1948. This is the only authority cited to bolster his proposition that Citizenship by birth cannot be taken away. 30 40

Now see Section 6(1) which can deprive a person born a Citizen of Sierra Leone of that Citizenship in certain circumstances.

Is Section 9 (b) a much more important provision than the entrenched provisions in the Constitution? The portion referred to - "otherwise than - - - - - - Constitution" - 9(b) is part of a subsection. It seems odd that such an important matter should be relegated to such an insignificant place.

CONSTRUCTION OF SECTION 9:

The word "may" in the first line can generally be construed in one or two ways:

(a) "May" can be construed as "permissive."

(b) "May" can be construed as creating a duty to exercise a power.

I submit that (b) applies in this case. When the donee of the power does not have to consult the interests of others, but only his own, then "may" is "permissive." If there is a duty to others created, then the exercise of the power is imperative. Refers to Odgers Construction of Deeds and Statues - 3rd Edition - page 273. Section 9 gives Parliament powers to do certain things. Section 9 (b) is saying that Parliament has a duty to make provisions for the deprivation of Citizenship acquired otherwise than by Section 1(1) of the Constitution. As to the question of making provisions for persons under Section 1 (1), this can be due subject to the provisions of the Constitution.

Adjourned to 15. 3. 68.

(Sgd) S.B. Jones - President.

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Proceedings 15th March, 1968

Same representation as before.

C.S. Davies: Continues - Section 9 (b) should be construed as follows:-

(a) "Parliament will have to make provision - - - - -"

(b) For depriving of the Citizenship of Sierra Leone any person who is a Citizen of Sierra Leone by virtue of Sections 2, 3, 4, 5, 7 and all those persons who shall acquire or shall have acquired Citizenship by taking advantage of the provisions that have been made or shall have been made by virtue of Section 9(a).

10

I do not agree that Section 9(b) - - - - - - "otherwise than - - - - -" imposes a Constitutional restraint on the legislative power of Parliament. If however it does, then Act No. 12 of 1962 amends it by necessary implication - Kariapper's case. I submit however that Section 1 can be amended by Section 43 (3) as any other now entrenched provisions of the Constitution.

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At this stage, I will deal with Ground 7 of Counsel's Summary.

(7) There may not have been produced in the Court any record of a Citizen by birth being deprived of his Citizenship but it has been demonstrated that by virtue of Section 6

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this can happen. The Plaintiff's right for eligibility to Parliament was merely postponed. It is therefore not discriminatory in accordance with Section 23 (3). This State has accepted all we want from the Declarations of Human Rights Convention - - See Section 11 - 25 - (Chapter 2). We did not adopt the provision that no man can be arbitrarily deprived of his Citizenship. Before Treaties became Municipal Laws must be enacted. The Human Rights Convention as a whole have not been adopted into our Municipal Laws.

I submit that the Courts should not look at the Command Papers if the intention could be got from the Constitution itself. See Craies on Statute Law - 6th Edition - page 509. There was no agreement that a Citizen should not be deprived of his Citizenship.

It is not necessary for a Certificate to be placed on any Bill which alters the Constitution. See "Ceylon's Constitution - Legislative Powers and Procedure." Section 29(4). See Act No. 63 of 1961 as to the requirements to be placed on a Bill when it has passed the House. The maximum "omnia praesumtur rite acta - - -" would apply to Act No. 12 of 1962.

It had the required Certificate to be found in the Schedule of Act No. 63 of 1961.

<u>Was Act No. 12 of 1962</u>

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discriminatory as to race?

One has to look at Section 23(3) to say whether it was or not. Discrimination must be attributable wholly or mainly to the respective descriptions by race, tribe etc..

Is the discrimination complained of here wholly or mainly racial? The person who was discriminated against must fall within a racial group - he must fit a racial description. The Court is entitled to know what race the Plaintiff belonged to. Section 24 puts the burden of proof on the Plaintiff to show that he belonged to a certain race which was being discriminated against. 10

Refers - Pillar's case - 1955 - 2 A.E.R. at page 838 (c). 20

"Is it in the present case legislating a Citizenship?"

"It is perfectly natural - - - -." The Constitution of Sierra Leone was given to the State. It is necessary to prove what race he was. It was not proved what race the Plaintiff belonged to. What would offend is where discrimination is wholly or mainly as to race. It was necessary to prove his race. The Act No. 12 of 1962 was based on descent and not on race. It was a Citizenship Act based on descent. It is not race that is the main consideration. It is descent. This is not new. It is to be found in the Independence Act itself - Public Notice No. 87 - Section 2(2). 30 40

My submission is that selection by descent is an accepted and acceptable principle. In the British Nationality Act - Section 2 -

(1958) descent is used.

Even if it is held that Act No. 12 of 1962 is discriminatory, Section 23 (4) (8) puts the matter out of all doubts by the amendment - No. 39 of 1962.

"REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY:"

Refers (1) Mallam Mohamed Arzika v. The Governor of Northern Nigeria - 1961 - 1 A.N.L.R. -379 at page 382. High Court decision by Bale, J.

(2) D.P.P. v. Chike Obi - same Report - page 186 at page 197.

10

If Court rules that Act is discriminatory, then we have to consider whether Act is reasonably justifiable in a Democratic Society.

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RETROSPECTIVE LEGISLATION - -

The effect is that it relates back to the time when it is meant to be operative. Section 1 (1) was removed because in effect it never existed and replaced by No. 12 of 1962, because that was what was intended to have existed as from 27th March, 1961.

30

Judgment reserved. Notices to be sent out.

(Sgd) S.B. Jones
President.

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JUDGMENT

Civ. App. 1/68

IN THE COURT OF APPEAL FOR SIERRA LEONE

General Sittings held at Freetown in The Western Province of the State of Sierra Leone.

CORAM: Hon. Sir Samuel Bankole Jones President.

Hon. Mr. Justice G.F. Dove-Edwin Justice of Appeal. 10

Hon. Mr. Justice J.B. Marcus-Jones Justice of Appeal

B E T W E E N:

THE ATTORNEY-GENERAL OF SIERRA LEONE Appellant

- and -

JOHN JOSEPH AKAR Respondent

A.A. Koroma, Esq., Attorney General and with him C.S. Davies, Esq., Assistant Legal Draftsman and N.D. Tejan-Cole, Esq., Senior Crown Counsel for the Appellant. 20

J.H. Smythe, Esq., and with him Dr. W.S. Marcus-Jones and G. Gelega-King, Esq., for the Respondent.

Judgment delivered on Friday 5th April, 1968

SIR SAMUEL BANKOLE JONES: - P. - This is an appeal from the Judgment of the learned Chief Justice of the Supreme Court in which he granted the declarations sought by the plaintiff, now the respondent against the defendant, the Attorney-General, now 30

the appellant, who was sued in his capacity as legal representative of the Government of the State of Sierra Leone. The declarations were as follows: firstly, that the purported amendments to section (1) of the Constitution by Act No. 12 of 1962 were ultra vires the Constitution and therefore null and void and secondly, that the purported amendment by Act No. 39 of 1962 of section 23 of the Constitution was also ultra vires the Constitution and therefore null and void.

The story goes back to the 27th April, 1961 when Sierra Leone became an independent nation. By the Sierra Leone (Constituion) Order in Council, Public Notice No. 78 of 1961, provisions were made relating to citizenship in sections 1 - 10. Section 9, for example, granted powers to Parliament for making provisions for the acquisition, the deprivation and the renunciation of the citizenship of Sierra Leone.

The respondent, who claimed to be a citizen of Sierra Leone, was born in Rotifunk in the Moyamba District in the Southern Province of Sierra Leone on the 20th May, 1927 by an indigenous Sierra Leonean mother belonging to the temne tribe and a Lebanese father born and bred in Senegal in Africa, who has lived in Sierra Leone for 56 years and has never been to Lebanon. It is admitted that the status of the respondent on the eve of independence was that of a British Protected person as defined in the British Nationality Act, 1948 - see section 10 (1) of the Constitution of Sierra Leone. It is also admitted that on the day of independence, by virtue of sub-section (1) of section 1 of the Constitution, the respondent became a citizen of Sierra Leone. This sub-section reads:-

"1(1) Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April,

1961 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961:

Provided that a person shall not become a citizen of Sierra Leone by virtue of this sub-section if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone."

10

As such citizen of Sierra Leone, the respondent as of right qualified to become a member of the House of Representatives or of any District Council or Local Authority in Sierra Leone, if he fulfilled certain conditions.

Then came the passing by Parliament of Act No. 12 of 1962 on the 17th January, 1962, the provisions of which were specifically made retrospective as from the 27th April, 1961. The title of the Act was - "An Act to provide for the Amendment of certain sections of the Constitution." The relevant provisions are as follows:-

20

"2. Section 1 of the Constitution is hereby amended.

(a) by the insertion immediately after the words "Every person" in the first line of sub-section (1) thereof of the words "of negro African descent;" and

30

(b) by the addition at the end thereof of the following new sub-sections -

(3) For the purposes of this Constitution the expression "person of negro African descent" means a person whose father and his father's father are or were negroes of African origin.

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> (4) Any person, either of whose parents is a negro of African descent and would, but for the provisions of subsection (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any District Council or other local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the Civil or regular Armed Services of Sierra Leone for a continuous period of twenty-five years."

The effect of this Act was to deprive the respondent of the citizenship which he acquired by virtue of section 1(1) of the Constitution, but albeit, the Act offered him if he chose to accept, a Sierra Leone citizenship with certain limitations attached thereto, as described in sub-section (4) (supra). The respondent chose to register and did so on the 7th January, 1964 and he now holds a Sierra Leone passport which declares him a citizen of Sierra Leone and the Commonwealth.

Act No. 39 of 1962 intitled "An Act to amend the Constitution in order to effect the avoidance of doubts," was passed by Parliament on the 3rd August, 1962 and its provisions were also specifically made retrospective to the 27th April, 1962. The relevant portion reads:-

> "2. Sub-section (4) of section 23 of the Constitution is hereby amended by -
>
> (a) the substitution of a semi-colon

and the word "or" for the fullstop at the end of paragraph (f); and

(b) the addition immediately thereafter of the following new paragraph -

"(g) for the limitation of citizenship of Sierra Leone to persons of negro African descent, as defined in sub-section (3) of section 1 of this Constitution, and for the restrictions placed upon certain other persons by sub-section (4) of the said section." 10

Passed in the House of Representatives for the second time and in accordance with the provisions of sub-sections (1) and (3) of section 43 of the Constitution this 3rd day of August, in the year of our Lord one thousand nine hundred and sixty-two. 20

Now, the relevant portion of section 23 of the Constitution reads:-

"23 (1) Subject to the provisions of sub-section (4), (5) and (7) of this section, no law shall make any provision which is discriminatory either of itself or in its effect. 30

(2) Subject to the provisions of sub-sections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment 40

to different person attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Sub-section (1) of this section shall not apply to any law so far as that law makes provisions -

(a)......................

(b)......................

(c)......................

(d)......................

(e)......................

(f) whereby persons of any such description as is mentioned in sub-section (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

Sub-sections (5), (6), (7) and (8) do not concern this appeal.

I do not think that it can be denied that when the Sierra Leone (Constitution) Order-in-Council 1961 and the Sierra

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Leone Independence Act 1961, 9 and 10 Eliza. 2, Chapter 16, both of which were frequently referred to by Counsel in the course of this appeal, came into operation, their joint effect was to give to the Sierra Leone Parliament the full legislative powers of an independent sovereign state. This Order-in-Council and the Independence Act are almost ipssissima verba the Ceylon Order-in-Council 1946 and the Ceylon Independence Act 1947, as to the provisions for the legislative powers of the Parliament of Ceylon. In the case for example of Liyanage v. Reginam 1 A.E.R. 1966 page 650, where the question of the sovereignty of the Ceylon Parliament was adverted to by the Privy Council, it was held that the legislative power of the Ceylon Parliament was not limited by inability to pass laws which even offended fundamental principles of justice. And this, I opine, applies with equal force to the Parliament of Sierra Leone. Lord Pearce delivering the Judgment of the board in that case, and at page 657E had this to say:-

> "Those powers, however, as in the case of all countries with written Constitutions, must be exercised in accordance with the terms of the Constitution from which the power derives."

I find that the second schedule of the Sierra Leone Independence Act 1961, deals with the legislative powers of the Sierra Leone Parliament, and its section 6 provides as follows:-

> "Nothing in this Act shall confer on the legislature of Sierra Leone any power to repeal, amend or modify the Constitutional provisions otherwise than in such manner as may be provided for in those provisions."

The Constitution of Sierra Leone itself is to be found in the second schedule of the Sierra Leone (Constitution) Order-in-Council, 1961 referred to above. The

relevant sections for the purposes of this appeal, which deal with the legislative powers of Parliament are 42 and 43, and they read as follows:-

"42 Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Sierra Leone.

10 43 (1) Parliament may alter any of the provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) any of the provisions of the Sierra Leone Independence Act, 1961:

Provided that in so far as it alters -

(a) this section;

20 (b) sections 11 to 25 (inclusive), section 29, section 44, sub-section (2) of section 54, section 55, sections 56, 73, 74, 75, 76, 77, 79, 80, 81, 84, 85, 86, 87 to 93 (inclusive), 94, 95, 96, 97, 98, 99, 102 and 103;

(c) section 107 in its
30 application to any of the provisions specified in paragraph (a) or (b) of this sub-section; or

(d) any of the provisions of the Sierra Leone Independence Act, 1961 a bill for an Act of Parliament under this section shall not be submitted to the Governor-
40 General for his assent unless the bill has been passed by the House of Representatives in two

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successive sessions, there having been a dissolution of Parliament between the first and second of those sessions.

(2) For the purposes of sub-section (1) of this section, a bill passed by the House of Representatives in one session shall be deemed to be the same bill as a bill passed by the House in the preceding session if it is identical with that bill, or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since that bill was passed in the preceding session. 10

(3) A bill for an Act of Parliament under this section shall not be passed by the House of Representatives in any session unless at the final vote thereon in that session it is supported by the votes of not less than two-thirds of all the members of the House. 20

(4) The provisions of this Constitution or (in so far as it forms part of the law of Sierra Leone) the Sierra Leone Independence Act, 1961, shall not be altered except in accordance with the provisions of this section. 30

(5) In this section -

(a) references to any of the provisions of this Constitution or the Sierra Leone Independence Act, 1961, include references to any law that amends, modifies, re-enacts with or without 40

amendment or modification or makes different provision in lieu of, that provision; and

(b) references to the alteration of any of the provisions of this Constitution of the Sierra Leone Independence Act, 1961, include references to the amendment or modification, or re-enactment, with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of different provision in lieu of that provision."

Firstly, Counsel for the respondent argued that Act No. 12 of 1962 is invalid because there is no evidence on the face of it that it was passed "by the votes of not less than two-thirds of all the Members of the House" as is required by section 43(3) above. He buttressed this argument by pointing out that in the case of Act No.39 of 1962, there is a certificate attached, to the effect that the procedural requirements of section 43(1) and (3) were fulfilled. Now, section 1 (1) of the Constitution, which Act No. 12 of 1962 purported to amend is not an entrenched clause as section 23 which requires an extra-special treatment for its amendment. However, I do not find any provision in our Constitution which requires a certificate to the effect as suggested, when an amendment is made to any of the provisions of the Constitution. Section 29(4) in the Ceylon Constitution, which is conceded to be similar to our section 43(1), has the following proviso which is not found in ours:-

"Provided that no bill for the amendment or repeal of any of the provisions of this order shall be

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presented for the Royal assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amount to not less than two-thirds of the whole number of Members of the House (including those not present). Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any Court of Law."

It is therefore my view, that in the absence of a specific provision, such as the above, in our Constitution, the maxim, omnia praesumuntur rite et solleniter esse acta donec probetur in contrarium applies. We must therefore presume that Act No. 12 of 1962 was passed in accordance with section 43(3) of our Constitution and Counsel's argument as to the invalidity of this Act therefore fails. Apart from this, however, this Act complied with the provisions laid down by Act No. 63 of 1961 - "An Act to make Provision for the Administrative Procedure, for the Publication Authentication and Recording of Acts of Parliament" which came into operation on the 6th January, 1962.

Secondly, Counsel submitted a two-pronged proposition and in the alternative with respect to the purported amendments by Parliament of Section 1 (1) and section 9 (b) of the Constitution. Section 1 (1) has been set out earlier in this Judgment. Section 9 (b) reads:-

"Parliament may make provision -

(b) for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of sub-section (1) of section 1 or section 4 of the Constitution."

Section 4 is not of importance here as it makes provision for persons born in Sierra Leone after 26th April, 1961. The first proposition is that Parliament has no power whatever to amend section 1 of the Constitution in the way it purported to have done by Act No. 12 of 1962 to the detriment of the respondent, because such an amendment would deprive him of his status of citizenship which he acquired at birth, in that he was a British Protected person before independence, and by law a Sierra Leonean citizen, (with all the rights and privileges which that status carried) when Sierra Leone attained independence on the 27th April, 1961. "Once a citizen always a citizen," was how Counsel put in a nutshell this proposition of his. Also, included in this proposition he argued that Parliament had no power whatever to revoke or amend or modify section 9 (b) by implication for the sole purpose of amending section 1 of the Constitution, so as to deprive the respondent of his status of citizenship which was his by law on the attainment of independence. His second proposition and which is in the alternative, is that it at all Parliament had the power to amend section 1 of the Constitution, it must first amend section 9(b) as to that portion which reads, "Otherwise than by virtue of sub-section 1 of section 1......... of the Constitution." Not having specifically done so by a Bill introduced in Parliament to that effect, he postulated that any purported amendment of section 1 of the Constitution was ultra vires and of no effect, whilst section 9 (b) was still alive and in full force and vigour. As to the first proposition, I refuse with respect, to accept as the law, that Parliament cannot amend section 1 of the Constitution in the manner it did by Act No. 12 of 1962. The Constitution itself states that Parliament may "alter" (and this includes an amendment) any of its provisions. (See sections 43(1) and 43 (5)(b) of the Constitution), but it can only do so if section 6 in the second

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schedule of the Independence Act is complied with. This section has been set out earlier in this judgment.

The question now is, did Parliament comply with the provisions of section 6. The answer to my mind is yes, because it obeyed the provisions of section 43(3) which stipulate the manner in which an amendment could be effected, namely by a two-thirds majority of all the members of the House. It is therefore my considered opinion that in this respect Act No. 12 of 1962 was intra vires the Constitution. Whether it was a right thing, or a just thing for Parliament to have amended the Constitution in the way it did, is, in my opinion not the concern of this Court. This Court does not sit in judgment of this kind over Parliament.

It follows then that on the same footing, Parliament can amend section 9 (b) or any part of it, either directly or by implication, provided that the provisions of section 43(3) are complied with.

Counsel urged that section 9 (b), as to that portion which reads:-

> (b) ....
> otherwise than by virtue of sub-section (1) of section 1..........
> of the Constitution,"

is a constitutional restriction and a complete prohibition imposed on the power of Parliament to amend section 1 of the Constitution. In the recent Privy Council case of Mohamed Samsudeen Kariapper and S.S. Wijesinha 1967, 3 W.L.R. 1460, it was said that the intention of a statute was to be gathered from its operation, and that as a general rule, an inconsistent law amended, unless some provision denying the Act constitutional effect was to be found in the constitutional restrictions imposed on the power of amendment. If, as it was urged, that section 9 (b) contains a constitutional restriction imposed on the power of Parliament to amend section 1 of the

Constitution, then on the authority of the above case, there should be found some provision in that section which would deny Act No. 12 of 1962 constitutional effect. Is there such a provision to be found in section 9(b)? The above cited case was an appeal from the Supreme Court of Ceylon, and looking at the Ceylon Constitution dealing with legislative
10 powers and procedure, it is to be found, for example, that constitutional restrictions were imposed on the power of the Ceylon Parliament to amend section 29(2) which reads as follows:-

"29(2) No such law shall -

(a) prohibit or restrict the free exercise of any religion or

(b) make persons of any
20 community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable, or

(c) ....

(d) ....

provided that in any case where a religious body is incorporated
30 by law no such alteration shall be made except at the request of the governing authority of that body."

Immediately after these provisions is to be found a sub-section (3) which reads:-

"Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void."

40 No such provision is to be found in our section 9(b) which would deny its amendment, constitutional

effect. The conclusion therefore is, that if there is none, then Act No. 12 of 1962 must be taken to have amended section 9 (b) by necessary implication for the purpose of giving effect to the amendments contained in that Act as relates to section 1 of the Constitution. The answer therefore to Counsel's second proposition is, that it was not necessary for Parliament to have pioneered a Bill through the House for the purpose of specifically amending section 9 (b) or any part of it.

The board in the above case, concurred with the opinion of Sir Rowdell Palmer and Sir Robert Collier, the law officers of the day given in 1864. Part of that opinion reads as follows:-

> "It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the object, the purpose and the intention of the enactment is the same; it need not be expressed in any recital or preamble; and it is not (as we conceive) competent for any court judicially to ascribe any part of the legal operation of a statute to inadvertence."

Also, Sir Douglas Menzies delivering the judgment of the board had this to say:-

> "In the course of argument a good deal was made of the doubts and complexities that must follow if the Constitution can be amended by laws which do not, as it were show their colours.......... ....The board is thoroughly aware of the difficulties that are likely to result from altering the Constitution except by laws which plainly and expressly amend it with particularity. Considerations of this sort, powerful as they ought to be with the draftsman, cannot in a Court of Law weigh against the considerations which have brought the board to its conclusions that a

bill, which upon its passage into law would amend the Constitution, is a bill for its amendment."

Finally, I, for my part, find it inconceivable to accept the proposition, that contrary to the express provisions in section 43 of the Constitution, there can be found any other section within its framework which could be construed as
10 having the effect of creating a complete prohibition and an everlasting fetter on the legislative power of Parliament to amend.

In the final analysis, it has always been the wording of the Constitution itself that has to be interpreted and applied. See Adegbenro v. Akintola and Anor 1963, 3 A.E.R. 544 and at p. 551A.

However, the submission of the appellant is that no portion of section 9 (b) imposes
20 a constitutional restriction on the legislative power of Parliament. According to him, what this section does, is merely to cast a duty on Parliament to make provisions for the deprivation of citizenship acquired otherwise than by section 1 sub-section (1). As to the question of making provisions for persons who come under that sub-section, this is a matter which he submitted, may be done, but only
30 subject to the provisions of the Constitution, and that this was legally accomplished by Act No. 12 of 1962. Now, I prefer to construe section 9 (b) as containing a constitutional restriction on the power of Parliament to deprive persons of their citizenship who by virtue of Section 1 sub-section (1) of the Constitution became citizens of Sierra Leone on the 27th April, 1961. However, I do not
40 find in that sub-section, any provision which denies constitutional effect to Act No. 12 of 1962. It is therefore my view that that Act by necessary implication amended the last three lines of section 9(b) beginning with the words "Otherwise than............. Constitution," in order to give effect

to its provisions. If I am wrong, and the appellant is right, then section 9(b) need not at all be amended before Act No. 12 of 1962 can take effect.

Much argument was centered around the question as to whether or not Act No. 12 of 1962 was discriminatory as to race. The respondent claimed that it was so as to his race. And the learned Chief Justice had this to say about it:- 10

> "Now what is the pith or substance of the amendment to the legislation commented on by the Privy Council in Pillai's case (1955, 2 A.E.R., 833)? Is it not in reality to exclude certain persons particularly of Lebanese origin from being elected to the House of Representatives? That it is not purely legislation on citizenship is shown by its allowing such persons to 20 register as citizens albeit not quite the same sort of citizens as before."

Having carefully considered the arguments on both sides, and with respect to the learned Chief Justice, I have come to the conclusion that the Act in question was purely legislation on citizenship. A close scrutiny of it will reveal, that the only consideration taken into account by Parliament, was not race but descent, descent from a person's father's 30 father. And this consideration is recognised in the nationality or citizenship laws of many other countries. See for example section 2 of the British Nationality Act 1958. I do not therefore agree that the Act was discriminatory as to race or at all. In any case even if it were, there was no legal proof as to what race the respondent belonged. Again also, even if it were, then Act No. 39 of 1962 which amended section 40 23 sub-section 4 of the Constitution by adding a new paragraph (g) to that sub-section placed the matter beyond all doubts.

Although Counsel for the respondent conceded that Parliament has the power

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to pass retrospective legislations, he however contended that Act No. 12 of 1962 cannot be construed as retrospective even if Parliament intended it to be so, by reason of the fact that it preceded in time Act No. 39 of 1962. As Act No. 12 of 1962 received the Royal assent on the 17th March, 1962, Counsel submitted that as from that date it was void, because by
10 its very nature, being discriminatory, it offended section 23(1) of the Constitution. Act No. 39 of 1962 on the other hand, received the Royal assent on the 3rd October, 1962. Counsel therefore submitted that this Act was passed allegedly to take effect retrospectively when it became palpably clear to Parliament that Act No. 12 of 1962 was discriminatory. But it was too late, he said, because that Act could not have revived
20 Act No. 12 of 1962 which was void <u>ab initio.</u> I must confess that I find this argument ingenious, but as I have held earlier that Act No. 12 of 1962 was not discriminatory, the argument fails. But even if it were discriminatory, it was saved by section 23 sub-section (f) of the Constitution (supra) because in my view there was no necessity to have passed Act No. 39 of 1962, except <u>ex abundantia cautela.</u>

30 The law as to the effect of retrospective legislations as I find it, is that once it is clear that Parliament intends to give retrospective effect to an Act, then it is none of the business of the Courts to question it. It matters not whether they have respect for it. They must give effect to it, even though the result may create hardship and injustice. And this is why many Parliaments shrink from passing
40 retrospective legislations especially if those legislations operate to interfere with vested rights and the like. The result is, that when Act No. 12 of 1962 was passed retrospectively, it operated as if section 1 sub-section (1) had never been enacted. This means that on the 27th day of April, 1961 the respondent never acquired the status of the citizenship of Sierra Leone

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but was merely a person within the state who could, if he chose, acquire a Sierra Leone citizenship by registration, with all the limitations attached to such a status by law. The same principle applies to Act No. 39. It operated as if Section 23 (4) (g) was in existence on the 27th April, 1961. What my own feelings are about this exercise by Parliament of its power of amendment, whether they be those of revulsion or shock, the fact remains that Parliament acted legally within the powers conferred upon it by the Constitution. The learned Chief Justice perhaps, understandably must have felt that injustice had been done to the respondent because he said inter alia in his judgment:-

> "In my mind what makes the matter worse was that the so-called amendments were retroactive. One realises that there are occasions where retroactive legislation is necessary, but it should be passed very sparingly and only when fully justified. In my view the making of the amendments by Act No. 12 of 1962 to section 1 and by Act No. 39 of 1962 to section 23 retroactive was completely unjustified and contrary to the spirit of sections 42 and 43 of the Constitution."

Whilst I share the view of the Learned Chief Justice that retrospective legislations ought to be passed sparingly, yet, with respect, I find that the Acts in question found legal justification under the provisions of the Constitution. Whether the passing of them was morally justified, is a matter on which I hesitate to express an opinion. Suffice it to say, that I have come to the conclusion that Act No. 12 of 1962 and Act No. 39 of 1962 were not ultra vires the Constitution and accordingly the appeal must be allowed and I so allow it.

(Sgd) S.B. Jones - President

I agree (Sgd) G.F. Dove-Edwin - Justice of Appeal.

I agree (Sgd) J.B. Marcus-Jones - Justice of Appeal.

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No.18

Order
5th April 1968

NO. 18

ORDER

IN THE COURT OF APPEAL FOR SIERRA LEONE

Certificate of the Order of the Court.

Appeal from the judgment of the Honourable Mr. Justice Banja Tejan-Sie - Chief Justice - dated the 26th day of October, 1967.

(L.S.) C.C.58/67.....Petition

Civ.App.1/68......Appeal No.

10 The Attorney-General of Sa.Leone...... Appellant

John Joseph Akar.....Respondent.

(Sgd) S.B. Jones - President.

THIS APPEAL coming on for hearing on the 4th, 5th, 6th, 7th, 8th, 12th, 13th, 14th and 15th days of March, 1968 and the 5th day of April, 1968 - before the Honourable Sir Samuel Bankole Jones - President - the Honourable Mr. Justice G.F. Dove-Edwin - 20 Justice of Appeal and the Honourable Mr. Justice J.B. Marcus-Jones - Justice of Appeal in the presence of A.A. Koroma, Esq., C.S. Davies, Esq., and N.D. Tejan-Cole, Esq., - Counsel for the Appellant and J.H. Smythe, Esq., - Dr. W.S. Marcus-Jones and G. Gelaga-King, Esq., - Counsel for the Respondent.

I hereby certify that an Order was made as follows:-

30 "Appeal is allowed. No Order as to Costs."

Given under my hand and the Seal of the Court this 5th day of April, 1968.

(Sgd) A. Nithianandan - Registrar
Court of Appeal for Sierra Leone.

No.19

Order granting Final Leave to Appeal to Her Majesty in Council 22nd May 1968

NO. 19

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL FOR SIERRA LEONE

Certificate of the Order of the Court.

Appeal from the judgment of the Honourable Mr. Justice Banja Tejan-Sie - Chief Justice - dated the 26th day of October, 1967.

(L.S.) C.C.58/67.......Petition. 10

Civ.App.1/68...........Appeal No.

John Joseph Akar.......Respondent/ Appellant.

The Attorney-General of Sierra Leone..Appellant/ Respondent

(Sgd) S.B. Jones - President.

THIS APPEAL coming on for hearing on the 22nd day of May, 1968 - before the Honourable Sir Samuel Bankole Jones - President - The Honourable Mr. Justice G.F. Dove-Edwin - Justice of Appeal - and the Honourable Mr. Justice R.B. Marke - Acting Justice of Appeal in the presence of J.H. Smythe, Esquire - Counsel for the Applicant and C.S. Davies, Esquire - Counsel for the Respondent: 20

I hereby certify that an Order was made as follows:

"FINAL LEAVE GRANTED".

Given under my hand and the seal of the Court this 22nd day of May, 1968. 30

(Sgd) A. Nithianandan - Registrar

COURT OF APPEAL FOR SIERRA LEONE

IN THE PRIVY COUNCIL No. 20 of 1968

ON APPEAL FROM

THE COURT OF APPEAL

FOR SIERRA LEONE

B E T W E E N :

JOHN JOSEPH AKAR
(Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL
OF SIERRA LEONE
(Defendant) Respondent

R E C O R D O F P R O C E E D I N G S

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