Privy Council Appeal No. 127 *of* 1927.

Eshugbayi Eleko - - - - - - - - *Appellant*

v.

The Officer administering the Government of Nigeria and another - *Respondents*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

The facts which give rise to this appeal can be shortly stated ; but the question of law involved is one of grave constitutional importance to His Majesty's subjects in this country as well as in the Overseas Dominions.

By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that :—

> " When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor . . . the Governor may : (*a*) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . by an Order under his hand direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor." " (2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the Governor . . . shall be liable to imprisonment for six months, and the Governor may by writing under

his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct."

On the 6th August, 1925, the acting Governor purported to make an order under the said Ordinance in the following terms :—

"Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office : Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent."

On the 8th August, 1925, the acting Governor made a further order reciting the order of the 6th August, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the Province of Oyo.

Immediately upon service of the order of the 6th August, the appellant gave notice of motion for leave to set aside the order and to stay execution upon it. This motion was heard on the 7th and 8th August by the acting Chief Justice of Nigeria, and on the 8th August the motion was dismissed. Upon the dismissal of the motion the appellant gave notice of motion on the 8th August for leave to issue a writ of habeas corpus, and on the 10th August leave was granted for a rule *nisi* for a writ of habeas corpus returnable on the 13th August. On the 13th August, cause was shown against the rule and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same 8th August had issued a writ against the acting Governor and the Chief Secretary of the Government of Nigeria, claiming a declaration that the order of the 6th August, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the Order. On the 19th August the Attorney-General moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the Court. The motion was heard by the acting Chief Justice and on the 7th September, 1925, he ordered that the action should be dismissed on these grounds.

On the 18th September, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of habeas corpus, and on the 12th October, 1925, the acting Chief Justice gave judgment refusing the motion. The learned Judge held that the orders of the 6th and 8th August had been validly made and that the detention of the appellant was therefore lawful. On the 4th December, 1925, the appellant gave a fresh notice of motion for a writ of habeas corpus. This motion was heard before Mr. Justice Tew on the 8th December, 1925, when the Attorney-General took a preliminary objection that a similar application based on the

same material had been made by the appellant and had been dismissed by the acting Chief Justice, and that in view of that refusal the application could not be entertained; and on the 14th December, 1925, the learned Judge gave judgment upholding the objection and dismissing the motion on that ground. The appellant appealed against this decision and, on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground; and the Court directed that the case should be returned to the learned Judge in order that evidence might be filed upon these points. Accordingly, on the 9th March, 1926, an affidavit was filed by the Solicitor-General, and on the 15th March, 1926, Mr. Justice Tew reheard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on the 1st June, 1926, the Full Court in a considered judgment dismissed the appeal and upheld the view of Mr. Justice Tew that the preliminary objection prevailed and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended in the first place that there never had been a decision on the merits of his application and that the dismissal of the second motion for a habeas corpus by the acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the acting Chief Justice, and that the refusal was based expressly upon the learned Judge's view upon the merits of the application.

But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of habeas corpus, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even if the grounds urged are exactly the same. On behalf of the respondent, Mr. Stafford Cripps admitted the existence of the right to make successive applications; but he argued that the applications must be to different Courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that Court had determined the matter by dismissing the application on the 12th October, no fresh application based upon the same materials could be entertained by that Court. In support of this argument he cited the language of Lord Esher in *Ex parte Cox* (20 Q.B.D. at p. 13): "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession." He pointed out that, although the

decision of the Court of Appeal had been overruled in the House of Lords, where the case is reported under the name *Cox* v. *Hakes* (15 App. Cas. 506), none of the learned Lords had dissented from Lord Esher's statement of the law, and Lord Bramwell's language at p. 523 seemed to indicate that his view of the old practice was the same. He further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (18 N.Z.L.R. 601) and of the Court of Appeal of British Columbia in *Re Loo Len* No. 2 (1924, 1 Dom. L.R. 910) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in Hale's Pleas of the Crown, Vol. II, p. 143 ; in Bacon's abridgement under the title " Habeas Corpus, Section B " ; in Sir William Blackstone's Commentaries, Vol. III, p. 131 *et seq.*, and in the Discussion of Blackstone's Opinion appearing in Lord Eldon's Judgment in *Crowley's* case (2 Sw. at p. 39 *et seq.*). From these authorities it appears that the writ of habeas corpus was originally issuable out of the Court of King's Bench and out of the Court of Chancery ; but that in very early days the Courts of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the seventeenth century the Habeas Corpus Act, 1640 (16 Chas. I, c. 10), expressly recognises the right and duty of the Court of Common Pleas to order the writ to issue ; and the Habeas Corpus Act, 1679 (31 Chas. II, c. 2, sec. 10), enacts that it shall be lawful to move and obtain habeas corpus as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or any one of His Majesty's Justices might grant a habeas corpus in vacation and imposed heavy penalties upon any Judge who wrongfully refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive Judges of the same Court. This led to the curious result upon the respondent's argument that if application were made in vacation it could be renewed to each Judge of the Court, but that if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of Common Law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873. That statute combined into one Court the old High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes. If,

therefore, the respondent is right in contending that an application for a writ of habeas corpus can only be entertained once by any one Court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three Common Law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of habeas corpus is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

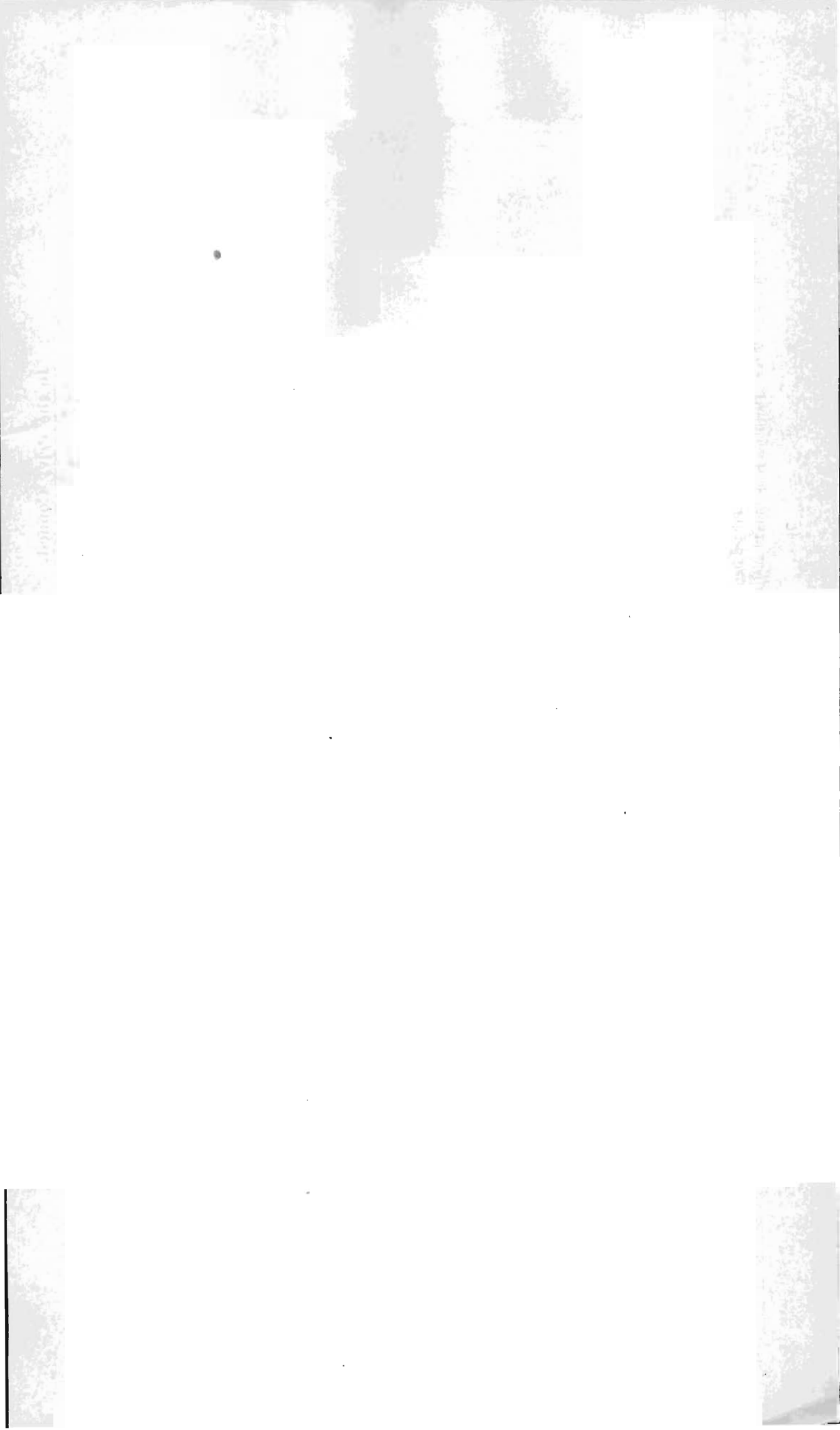
It is true that there is no reported case before the year 1873 of applications being made to successive Judges of the same Court; but it must be remembered that the Common Law Courts usually sat *in banco* so that an application to the Court was in effect an application to all the Judges of the Court sitting together; and there is a precedent for application being made to a Judge of the Court of Exchequer sitting in Chambers and a subsequent application being made to the Court of Exchequer in the case of *Ex parte Partington* (13 M. & W. 679), where Baron Parke says :—

> "This case has already been before the Court of Queen's Bench on the return of a habeas corpus and before my Lord Chief Baron at Chambers on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment and therefore we have thought it proper to examine attentively the provisions of the Statute without considering ourselves as concluded by these decisions."

If it be conceded that any Judge has jurisdiction to order the writ to issue, then in the view of their Lordships each Judge is a tribunal to which application can be made within the meaning of the rule and every Judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each Judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other Judge has already refused a similar application. The same principle must apply in the case of the Judges of the Supreme Court of Nigeria.

It follows that, in the opinion of this Board, the learned Judge was wrong in refusing to hear the application in the present case on its merits, and the appeal must be allowed. In expressing that view, their Lordships must not be taken to be offering any opinion upon the merits of the application or upon the validity of the orders impugned. These matters will be investigated by

the learned Judge who hears the application and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of his appeal here and below ; the costs of the application before Mr. Justice Tew must abide the result of the re-hearing. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

ESHUGBAYI ELEKO

v.

THE OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR.

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