1932.
Nov. 26.

REX
v.
SUTTON.

[STRONGE, C.J., THOMAS AND FUAD, JJ.]

REX

v.

JOHN GILBERT SUTTON.

Criminal Law—Procedure—Power of the Supreme Court to grant bail to a prisoner convicted in the Colony but undergoing sentence in England—Inherent powers of Court.

The applicant was convicted of manslaughter by the Assize Court of Limassol and sentenced to six months' imprisonment. Under the Colonial Prisoners Removal Act, 1884, he was sent to England to serve his sentence. He obtained special leave to appeal to the Privy Council and thereupon applied to the Supreme Court here to be released on bail pending the hearing of his appeal.

Held, that the Supreme Court had no power to grant bail to a prisoner undergoing sentence outside the Colony.

Semble, the Supreme Court cannot have inherent powers on such a matter as bail which is specifically provided for in the Order in Council by which the Court is created, and its powers and jurisdiction defined.

Triantafyllides for applicant.

Blackall, Attorney-General, for the Crown.

Triantafyllides: The Privy Council has no powers to suspend execution of sentence. There is no explicit authority in the Cyprus Courts of Justice Order, 1927, to support the present application. I, therefore, rely on the inherent power of this Court to grant bail. Cites *R.* v. *Thompson* (1). Refers to case of *R.* v. *Lawrence* (2) (unreported). Lawrence was sentenced to three years' imprisonment by the Assize Court of Nigeria and transferred to England to undergo sentence. After special leave to appeal was given by the Privy Council the Supreme Court of Nigeria granted bail to the prisoner pending the hearing of his appeal by the Privy Council.

Cites *Brown* v. *Attorney-General of New Zealand* (3).

Blackall, Attorney-General: The Crown does not oppose the application for bail and if the Court sees fit to make such an order effect will be given to it in England.

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(1) 12 Cr. App. R. 270.
(2) Now reported as *B. R. Lawrence* v. *The King* (1933) A.C. 699.
(3) 14 *Eng. and Emp. Digest* 165.

JUDGMENT:—

STRONGE, C.J.: The facts relevant to the present application are as follows:—

On the 7th of October last the applicant was convicted by the Limassol Assize Court of manslaughter and sentenced to six months' imprisonment with hard labour. His application to the Cyprus Supreme Court for leave to appeal against his conviction was refused on 15th October, and under the Colonial Prisoners Removal Act, 1884, he was removed to England, where we are given to understand he is at present serving his sentence. On 18th November the Privy Council granted him special leave to appeal.

Counsel for the applicant admitted that he was unable to find in the Cyprus Courts of Justice Order, 1927, the present charter of the jurisdiction of the Cyprus Courts—any explicit authority for the present application and preferred to base it upon the inherent power of the Court and upon Section 8 of the Colonial Prisoners Removal Act, 1884.

In England the Court of King's Bench does undoubtedly possess an inherent power to grant bail (*R.* v. *Spilsbury*) (1). That power is, however, rooted in history, almost cœval seemingly with the Court of King's Bench itself. If it were equally clear that every English superior Court possessed a like inherent power to grant bail, I conceive that Section 14 of the Criminal Appeal Act, 1907, giving the English Court of Criminal Appeal created by that Act express power to grant bail, would have been omitted as unnecessary and the decision in *R.* v. *Arthur Thompson* (2) would also, in all probability, have been rested expressly on such inherent power, whereas the decision as reported is silent as to which power the Court in granting bail was purporting to exercise. In Cyprus, however, the Supreme Court is not a historical growth but the creation of an Order in Council of comparatively recent date, which Order also defines its powers and jurisdiction including express powers of bail in certain cases (Clause 129 of the Cyprus Courts of Justice Order, 1927). It is, consequently, in my judgment more than doubtful whether any inherent power of granting bail similar to that possessed by the King's Bench in England can be said to exist in Cyprus; and in the case of *R.* v. *Ierodiaconos Constantinou and another* the Supreme Court held that it had no power to grant bail in a pending appeal from Assize unless the requirements of Clause 129 (*c*) of the Cyprus Courts of Justice Order, 1927, were complied with.

(1) (1898) 2 Q.B. 622.
(2) 12 Cr. App. R. 278.

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Furthermore, we have not had cited to us, and have been unable to discover any case in which the Court of King's Bench in England has ever expressed the view that its inherent power to grant bail extends to a case where the person sought to be bailed is outside England. So that even if it be assumed that the Supreme Court of Cyprus has an inherent power similar to that possessed by the Court of King's Bench in England, such assumption furnishes no authority for granting the present application, the prisoner being no longer in Cyprus. The few authorities in point that the diligent research of counsel for the applicant has been able to discover are, with a single exception, cases where the person applying for bail was apparently inside the confines of the country to the Courts of which such application was made. The one exception referred to is the case of *R.* v. *Lawrence* (unreported) where the Supreme Court of Nigeria some months ago granted bail pending the hearing of an appeal to the Privy Council by a prisoner who had been removed to and was in England at the time such bail was granted by the Nigerian Court. Whether the *ratio decidendi* of the Nigerian Court in that case rests upon the exercise of an inherent power to grant bail or upon provisions relating to bail contained in the Statute Law of that Colony is a matter upon which we are without information, and the decision is, consequently, of no assistance in enabling us to arrive at a decision regarding the present application.

It is a matter of common knowledge that Courts will not stultify themselves by making orders which they have no means of enforcing, a familiar instance being the refusal to order specific performance of contracts of work or employment. If this application for bail were granted, part of the necessary consequences would be an order by this Court directing the governor of the prison in England where the applicant is confined to release the applicant upon his furnishing bail. Should the governor of the prison see fit for any reason to refuse to release the applicant in compliance with this order, this Court, so far as we can see would be without any means of enforcing obedience. A problem presenting a difficulty of a somewhat similar description might also conceivably arise in a case where circumstances render necessary the enforcement of the bail recognizance as against the sureties.

The intimation by the learned Attorney-General that he is instructed to say that if this Court sees fit to make such an order, effect will be given to it in England, is, of course, of no help towards deciding the question whether we have jurisdiction to make the order. An expression of willingness in a particular case to comply with an order if made by the Court is neither a test nor a proof of jurisdiction

to make such an order. The action of the department concerned in proffering through the Attorney-General such an assurance may proceed *ex abundanti cautela* or may, possibly, looked at from a different standpoint, be regarded as indicative of its opinion as to the question of the Court's jurisdiction to make the order. It is clear, however, that if obedience to such an order is not, as I think it is not, enforceable by the Court, it belongs to that kind of orders which Courts refuse to make on the ground of their being nugatory, and the fact that in an individual case intimation is given beforehand to the Court that the order, if made, will be complied with, does not in my view dispose of this objection.

The provisions of section 8 of the Colonial Prisoners Removal Act, 1884, were also relied on by counsel for the applicant. Sub-section 1 of that section provides in substance that a prisoner is to be subject after removal to the laws and regulations in force in that part of the British Dominions to which he is removed, but that his conviction judgment and sentence may still be questioned in the Colony from which he has been removed, and his sentence may be remitted and his discharge ordered in the same manner and by the same authority as if he had not been removed. I am unable to read into this provision any express or implied power to grant bail in such circumstances as are now under consideration. The effect of the concluding portion of Sub-section 1, as I read it, is to give power to remit the prisoner's sentence and order his discharge where, and only where, an appellate Court of the country from which he has been removed has set aside his conviction.

The provisions of Clause 129 (*c*) of the Cyprus Courts of Justice Order, 1927, obviously apply only to the local Courts and have, consequently, no application to a case such as the present. I am of opinion, therefore, that this application must be refused.

THOMAS, J.: This is an application to grant bail to or suspend execution of the sentence upon a prisoner pending the hearing of his appeal by the Privy Council. The prisoner was sentenced to six months' imprisonment by the Assize Court, Limassol, and is stated by his counsel to be undergoing sentence in a prison in England.

The application is based upon certain facts which do not appear on the record and are not within the knowledge of the Court. Facts which form the foundation for an order of the Court require to be proved by some kind of evidence. The mere mention of them in the application is wholly insufficient, and in the absence of proper proof of such essential facts the application should not be entertained.

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As to the merits of the application, counsel stated that he could find no explicit authority in the Cyprus Courts of Justice Order, 1927, for the grant of bail, but he makes the application to the inherent powers of the Court to grant bail. The Supreme Court of this Colony was created by an enactment which set out in great detail what its jurisdiction and powers were to be. The Order in Council of 1927 contains detailed provisions as to the granting of bail; and in these circumstances I do not think there can be any residue in the way of inherent powers on a matter so specifically dealt with by the enactment. Secondly, even if there were an inherent power of granting bail in addition to those set out in the Order in Council, those powers of necessity are co-extensive with the jurisdiction of the Court which is limited to the Colony.

Counsel relied upon the case of *Rex* v. *Lawrence*, where the prisoner was convicted by the Assize Court in Nigeria and sentenced to a term of imprisonment. He appealed to the Supreme Court of Nigeria which dismissed his appeal. He then obtained special leave to appeal to the Privy Council, and later, when in prison in England, was released on bail by an order of the Supreme Court of Nigeria. This Court has no information as to the powers of the Nigerian Court, nor as to the law or enactment under which the Court acted.

Counsel relied upon Section 8 of the Colonial Prisoners Removal Act, 1884. This provides that every prisoner removed shall be dealt with in that part of His Majesty's dominions to which he is removed, as if sentenced in that part, and shall be subject to all laws and regulations in force in that part, subject to one qualification. In the first place I should like to point out that it is very doubtful whether this section has any application to the present case. Section 8 refers only to those persons who are to be returned to the Colony in which they were convicted. The applicant by virtue of the proviso to Section 3 is excluded from that class of removed prisoner. Counsel for the applicant submitted that the Court had power under this section to release the prisoner on bail; or alternatively that the words "same authority" in the last part of the sub-section should be taken to include the Executive and, therefore, permit the Executive to authorize the prisoner's release pending the hearing of the case by the Privy Council. As to counsel's claim that power lies in the Executive to order the prisoner's release it is only necessary to say that whatever powers the Executive possesses they do not extend beyond the territorial limits of the Island of Cyprus. Section 8 is quite clear in its meaning; it provides that the prisoner is to be treated in all respects as if his conviction had occurred in the country to which

he is removed, subject to one important exception and one exception only. That is where the conviction is questioned in the Colony in which it was given, with the consequential remission of sentence and discharge from prison in the event of the conviction being held to be bad. In such a case, and in such a case only, the Court can give a valid remission of sentence, and can issue a valid order discharging the prisoner from the prison where he is held. The present case does not come within the precise exception contemplated by Section 8, and there is, therefore, no statutory power enabling the Courts of the Colony to issue any order in respect of a prisoner undergoing sentence in England.

I would refer to the case of *Balmukand* v. *The King-Emperor* (1). A prisoner under sentence of death by the Court of the Sessions Judge, Delhi, affirmed on appeal by the Chief Court of the Punjab, applied for special leave to appeal. The Lord Chancellor delivering the judgment of the Privy Council stated that not being a Court of Criminal Appeal they could not stay execution of the sentence of death. The Court suggested that the petitioners might move the Executive in India to stay the sentence. The Privy Council appear to have been of opinion that neither the trial Court nor the appellate Court in India had power to suspend execution of its judgment. In the case of *Brown* v. *the Attorney-General of New Zealand*, cited in the English and Empire Digest, Vol. 14, p. 165, the Court of Appeal held that neither the Supreme Court nor the Court of Appeal had power to admit the prisoner to bail or suspend the execution of the sentence pending determination of the appeal in the Privy Council. In the Nigeria case of *Rex* v. *Lawrence* this Court is unaware upon what power or authority the order granting bail was made.

In my view the principle is clear that a Court cannot issue any order to operate outside the limits of its jurisdiction unless such an order is specifically authorized by statute. If authority is required I prefer to rest my view on the case which is evidently considered by the learned editors of the English and Empire Digest to be good law. This decision indicates that once sentence has been pronounced and affirmed on appeal by the Colonial Court, those Courts are each *functus officio* as regards suspending sentence.

In the present case the learned Attorney-General stated that effect would be given in England to any order that this Court might make. It is obvious that this Court cannot be sure that this assurance would be given in other cases in future; and the fact that the Attorney-General

(1) (1915) A.C. 629.

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has been so instructed seems to my mind to indicate clearly that the Home authorities are doubtful whether the governor of a prison in England would obey an order of this Court unless it were reinforced by Executive action in England.

For the reason given above I am of opinion that an order granting bail to a prisoner outside the jurisdiction is an order which this Court has no power to make, and an order which the authority holding the prisoner is under no obligation to obey. I, therefore, think that the application should be refused.

FUAD, J.: I concur in the views expressed in the judgment of the Chief Justice.

Application for bail refused.

1933. April 12.

[STRONGE, C.J., THOMAS AND SERTSIOS, JJ.]

OTTOMAN BANK *Appellant,*

v.

ANGELOS DASCALOPOULOS (No. 1) *Respondent.*

Practice—Appeal to Privy Council—Courts of Justice Order, 1927, *Clause* 41—*Appeal to Privy Council Order*, 1927, *Clause* 3—*Appeal indirectly involving a claim respecting property or civil right of the value of* £300.

Respondent obtained judgment against the appellant for a monthly pension of £26. 3*s.* 8*cp.* gold. The appellant admitted liability to pay respondent a pension of £26. 3*s.* 8*cp.* paper currency, the difference in dispute amounting to £11. 4*s.* 6½*cp.* a month. At the date of the application for leave to appeal the amount due by appellant under judgment was £145. An affidavit was put in by appellant stating that, if its obligation was to pay salaries and pensions in gold as ordered by the judgment, it would involve the bank in an increased annual expenditure of about £4,500. Neither in the affidavit or elsewhere did the appellant give any undertaking as regards other claims for the payment of salaries and pensions on a gold basis that he would be bound by the decision in the present case.

Held: (1) that the matter in dispute was the basis upon which pensions and salaries were payable, a purely domestic question between the bank and its servants, and, consequently, not a matter of great or public importance;

(2) that, as payment of salaries and pensions upon a gold basis would involve appellant in a substantial increased annual expenditure, the appeal indirectly involved a question respecting property or a civil right of the value of £300 or upwards;