STEPHEN KALONG NINGKAN V. TUN ABANG HAJI OPENG AND TAWI SLI

FEDERAL COURT [KUCHING]

OCJ HARLEY A-G (BORNEO), CJ

[KUCHING CIVIL SUIT NO. K 45 OF 1966]

7 SEPTEMBER 1966

JUDGMENT

Harley A-G (Borneo) CJ:

The plaintiff was appointed Chief Minister of Sarawak on 22 July 1963. On 14 June 1966 there was a meeting of Council Negri at which, apart from the Speaker, plaintiff and twenty other members were present. Five members of the Sarawak United Peoples Party and one Machinda member, who normally behave as an opposition, were present among the total of 21 members. Of the 21 members, three were ex officio. Bills were. passed without opposition on that day. One of the members present, Abang Haji Abdulrahim bin Abang Haji Moasili, who gave evidence in this case, was a supporter of the plaintiff on 14 June and indeed up to 16 June. He says that as from the evening of 16 June he would not have supported the plaintiff. The fact remains that there has never been a motion of no confidence put in Council Negri, nor has there been any defeat of a Government bill.

On 14 June a letter was addressed from Kuala Lumpur to the Governor. It is accepted that this letter was signed by 21 persons who are members of Council Negri. (There are 42 members in all of Council Negri plus the Speaker.) The author of the letter was Tan Sri Temenggong Jugah, Federal Minister for Sarawak Affairs (not a member of Council Negri). The letter reads as follows:

> **Letter No. 1**
>
> "TOP SECRET
> c/o YB Enche Thomas Kana,
> Dewan Ra'ayat.
> Kuala Lumpur.
>
> 14hb June 1966.
>
> His Excellency,
> The Governor of Sarawak,
> The Astana,
> KUCHING.
>
> Your Excellency.
>
> We, the undersigned members of Council Negri Sarawak, beg to inform your Excellency that we no longer have any confidence in the Hon Dato' Stephen Kalong Ningkan to be our leader in the Council Negri and to continue as Chief Minister.

2. Since the Hon. Dato' Ningkan has mill to command the confidence of the majority of the members of the Council Negri, he is bound by article 7(1) of the Constitution of the State of Sarawak to tender the resignation of the members of Supreme Council.

3. We respectfully request your Excellency to take appropriate action under that article and to appoint a new Chief Minister pursuant to article 6(3) of the Constitution.

Yours faithfully,

(Signed) T JUGAH.

(A list of names was attached.)

In the list attached to this letter, 25 names are set out. Against 21 of these names are signatures (in one case the signature is a "chop"). This letter was never shown to the plaintiff until after Court proceedings started. it was handed to the Governor (defendant 1) in Kuching on 16 June.

The next letter from the Governor's private secretary to the plaintiff reads as follows:

Letter No. 2

ASTANA,
KUCHING, SARAWAK.

Ref: GOV/SEC/144 16 June 1966.

To The Honourable Dato' Stephen Kalong Ningkan, PNBS PDK Chief Minister,

Sarawak.

Dato',

I am directed by his Excellency to inform you that his Excellency has received representations from members of Council Negri constituting the majority of the council, informing his Excellency, and his Excellency is satisfies, that you have ceased to command their confidence.

2. In order that the provisions under articles 7(1) and 6(3) of the Constitution of the State of Sarawak be complied with, his Excellency requires your presence forthwith at the Istana upon receipt of this letter to tender your resignation.

I have the honour to be,

Sir,

Your obedient servant,

(Signed) ABDUL KARIM BIN ABOL,

Ag Private Secretary to
HE the Governor."

In answer to the above the plaintiff replied:

Letter No. 3

Chief Minister,
Kuching,
Sarawak.
Malaysia.

17 June 1966.

Ref: CM 1/66

A-G Private Secretary to
His Excellency the Governor,
The Astana,
Kuching.

Sir,

GOV/SEC/144 dated 16 June 1966

I have the honour to refer to your above letter received by me late last evening and regret that I am temporarily indisposed and unable to present myself at the Astana last night.

With deepest respect, the proceedings of the meeting of the Council Negri held on 14 June 1966, do not appear to support his Excellency's view that I have lost the confidence of the majority of it's members. In these circumstances, I shall be grateful if I may be supplied with the names of those council members who support the representations referred to in your letter.

I shall be grateful if you will convey to his Excellency that, in my view, the proper course to resolve any doubts regarding my ability to command the confidence of the majority of Council Negri members is to arrange for the council to be convened in order that the matter can be put to the constitutional test.

In addition to believing that this represents both the democratic course and the best one for Sarawak and Malaysia, it is one which I believe would receive the support of the majority of the people of this State and one whose out-come I would be prepared to abide by.

I am,

Sir,

Your obedient servant,

(Signed) SK NINGKAN,

Dato' Stephen Kalong Ningkan,
Chief Minister of Sarawak."

The vital letter comes next:

Letter No. 4

ASTANA,
KUCHING, SARAWAK.

GOV/SEC/144 17 June 1966.

To

The Hon'ble Dato' Stephen Kalong Ningkan, PNBS, PDK Kuching, Sarawak.

Dear Dato',

I have received your letter, Ref CM 1/66 dated 17 June 1966 in reply to my private secretary's letter sent to your yesterday. It is clear from the contents of your letter that you have refused to tender the resignation of the members of the Supreme Council in accordance with art. 7(1) of the Constitution of the State of Sarawak, although you have ceased to have the confidence of a majority of the members of the Council Negri. I, therefore, declare that you and other members of the Supreme Council have ceased to hold the office with effect forthwith.

2. I am now appointing the Hon'ble Penghulu Tawi Sli. ABS Chief Minister of Sarawak with effect for with.

3. As requested, I forward herewith a list of the name of members of the Council Negri who have made representations to me in person that they have ceased to have confidence in you.

Yours sincerely.

Enc: (Signed) TUN ABANG HAJI OPENG

Governor."

The Governor is the first defendant in the present suit and the Honourable Penghulu Tawi Sli is the second defendant. Mr. Kellock has made the point that it was only in this letter and after the dismissal that the names were provided and the names that were provided are a list of 21 names and are the same names that appear on the letter of 14 June.

Again on 17 June the plaintiff wrote:

Letter No. 5

'Pangau Libau'
Kuching.

17 June 1966.

His Excellency the Governor,
Tun Abang Haji Openg, SMN PNBS OBE
Astana,
Kuching.

Your Excellency,

I have received, with surprise, your letter (Ref: GOV/SEC/144) of today's date.

It is not true that I have refused to tender my resignation - the question of tendering my resignation did not arise until after I received a reply to my letter requesting for the names of the members of the Council Negri.

It is clear from the list of the names forwarded to me that the majority of the Council Negri members are not against me, as 21 cannot be the majority of 42.

With the utmost respect I have to inform your Excellency that if you appoint the Hon'ble Pengulu Tawi Sli as Chief Minister you would be acting unlawfully and I will have no option but to question my removal in the Court.

I am, Sir,

Your obedient servant,

(Signed) SK NINGKAN.

(Dato' Stephen Ralong Ningkan)".

On 17 June the Sarawak Government Gazette Extraordinary announced:

Document No. 6

No 117

THE CONSTITUTION OF THE STATE OF SARAWAK

It is hereby published for general information that, with effect from 17 June 1966, the Honourable Dato' Stephen Kalong Ningkan, PNBS, PDK has ceased to be the Chief Minister of Sarawak and the following have ceased to be members of the Supreme Council:-

The Honourable Dato' James Wong Kim Ming, PNBS
The Honourable Dato' Abang Othman bin Abang Haji Moasili. PNBS
The Honourable Dato' Dunstan Endawi anak Enchana, PNBS
Teo Kui Seng, PNBS

No 1118

THE CONSTITUTION OF THE STATE OF SARAWAK

It is hereby published for general information that the Governor has, in exercise of the powers conferred upon him by article 6(8) of the Constitution of the State of Sarawak, appointed by Instrument under the Public Seal dated 17 June 1966. the Honourable Penghulu Tawi Sli, ABS, to be the Chief Minister of Sarawak."

The plaintiff claims:

1. A declaration of Court that the first defendant as Governor of Sarawak acted unconstitutionally by not complying with the provisions of the Constitution of the State of Sarawak when he declared on 17 June 1966, that the plaintiff has ceased to hold the office of Chief Minister of Sarawak.

2. A declaration of Court that the first defendant should not have relieved the plaintiff from the office of Chief Minister of Sarawak on the ground of representations made to him on 16 June 1966, by members of the Council Negri who preferred to boycott the session of the Council Negri on 14 June 1966, on the ground of alleged loss of confidence in the Chief Minister.

3. A declaration that his purported dismissal by the first defendant was ultra vires, null and void.

4. A declaration that the plaintiff is and has been at all material times Chief Minister of the State of Sarawak.

5. An injunction restraining the second defendant from acting as the Chief Minister of the State of Sarawak.

Respecting this claim, the following articles of the Constitution are relevant: article 1, (1) and (2); article 5; article 6 (1), (2) and (3) article 7 (1), (2) and (3); article 10 (1) and (2) article 11; article 13; article 14(1) (a) to (d) and (2) ; article 21 (1) and (2); article 24 (3); article 41 (1) and (2); article 44 (5).

I need not set out all these articles, but would draw particular attention to the following:

> "Governor of the State
>
> 1. (1) There shall be a Governor of the State, who shall be appointed by the Yang di-Pertuan Agong acting in his discretion but after consultation with the Chief Minister.
>
> (2) The Governor shall be appointed for & term of four years but may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong, and may be removed from office by the Yang di-Pertuan Agong in pursuance of an address by the Council Negri supported by the votes of not less than two-thirds of the total number of the members
>
> "Executive authority
>
> 5. The executive authority of the State shall be vested in the Governor but executive functions may by law be conferred on other persons."
>
> "The Supreme Council
>
> 6. (1) There shall be a Supreme Council to advise the Governor in the exercise of his functions.
>
> (2) The Supreme Council shall consist of a Chief Minister and not more than eight nor less than four other members appointed in accordance with cl (2).
>
> (3) The Governor shall appoint an Chief Minister a member of the Council Negri who in his judgment in likely to command the confidence of a majority of the members of the Council Negri and shall appoint the other members in accordance with the advice of the Chief Minister from among the members of the Council Negri.
>
> (6) The Supreme Council shall be collectively responsible to the council Negri."
>
> "Tenure of office of members of Supreme Council
>
> 7. (1) If the Chief Minister to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council.
>
> (2) A member of the Supreme Council may at any time resign his office by writing under his hand addressed to the Governor, and a member of the Supreme Council other than the Chief Minister

shall also vacate his office if his appointment thereto in revoked by the Governor acting in accordance with the advice of the Chief Minister.

(3) Subject to cll (1) and (2), a member of the Supreme Council other than the Chief Minister shall hold office at the Governor's pleasure."

"Governor to act on advise

10. (1) In the exercise of his functions under this Constitution or any other law, or as a member of the Conference of Rulers, the Governor shall act in accordance with the advice of the Supreme Council or of a member thereof acting under the general authority of the council, except as otherwise provided by the Federal Constitution or this Constitution; but shag be entitled, at his request, to any information concerning the government of the State which in available to the Supreme Council.

(2) The Governor may act in his discretion in the performance of the following functions- OPENG

(a) the appointment of a Chief Minister;

(b) the withholding of consent to a request for the dissolution of the Council Negri."

"Procedure of Council Negri

24. (1)..

(2)..

(3) Subject to cll (5) and (6) and to cl (2) of article 41, the Council Negri shall, if not unanimous, take its decision by a simple majority of members voting; and the Speaker or member presiding shall cast a vote whenever necessary to avoid an equality of votes but shall not vote in any other case."

"Interpretation

44. (1) ..

(2) ..

(3) ..

(4) ..

(5) The Interpretation Ordinance, as in force at the commencement of this Constitution, shall apply 2 for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to a written law within the meaning of that Ordinance."

Section 21 of the Interpretation Ordinance (Cap. 1) reads as follows:-

"Power to appoint includes power to dismiss

21. Whenever any written law confers upon any person or authority a power to make appointments to any office or place, the power shall be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended, or in place of any sick or absent holder of such office or place:

> Provided that, where the power of such person or authority to make such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of dismissal shall only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority."

Section 2 (1) of the same Ordinance reads:-

> Application
>
> 2. (1) Save where the contrary intention appears the provisions of this Ordinance shall apply to this Ordinance and to any written law now or hereafter in force made by competent authority in Sarawak and to any instrument made or issued thereunder."

The following definition from the Interpretation Ordinance was not cited by Counsel on either side:

Governor in his discretion and 'Governor acting in his discretion' mean that, in respect of the power concerned, the Governor shall not be obliged to consult with the Supreme Council in the exercise thereof."

The main arguments for the plaintiff are that (a) the Governor has no power of dismissal, and (b) if he has a power or a discretion it must not be exercised arbitrarily or capriciously.

The defence contends that there Is no question of the Governor's power being merely discretionary; in certain circumstances - particularly where there are infractions of the Constitution for which no sanction or remedy is provided - the Governor has not only a power but a duty to act. The defence further contends that lack of confidence describes a state of mind. (Article 7(1).

Whether a Chief Minister has or has not ceased to command the confidence of a majority is a matter for the Governor's personal assessment. Moreover, "the rules for the construction of statutes are like those which apply to the construction of other documents, especially as regards one crucial rule, viz that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat." MPHASIS v. Stovin [1889], 22 QBD 513 at p. 517). "If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council." (Article 7 (1)). The first question which arises is how the lack of confidence is to be expressed: can such lack of confidence be assessed only by a vote on the floor of the House (if I may use this word in its general application) ? The Federal Supreme Court of Nigeria was of opinion that the constitutional method (in Nigeria) of measuring lack of confidence required a decision or resolution on the floor of the House. (Adegbenro v. Akintola [1963] 3 WLR 63 distinguished). The Privy Council took an opposite view and held that there was no limitation as to the material by which lack of confidence should be assessed. Does the same rule of construction apply in Sarawak as in Nigeria? I will not apologise for quoting at length from the case of Adegbenro v. Akintola, and I would draw attention at the start to the following passage (at p. 72): "...there are many good

arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House .... " If one starts, as I think one should start, with the rule that a vote on the floor of the House is the normal test of lack of confidence, then one is in a better position to consider the exceptions to the rule. Now I cite from Adegbenro v. Akintola:

By s. 33 of the Constitution of Western Nigeria:

> '(10) .... the Ministers of the Government of the Region shall hold office during the Governor's pleasure: Provided that - (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; .... '

The Governor of the Western Region of Nigeria, following upon the receipt of a letter signed by 66 members of the House of Assembly - which was composed of 124 members - stating that they no longer supported the Premier, the present respondent, removed him from office and appointed the appellant in his place. There had been no vote adverse to the respondent in the House prior to his removal. Thereafter, in proceedings instituted by the respondent challenging the Governor's right to remove him. the following issues were referred by the High Court of the Western Region to the Federal Supreme Court of Nigeria Pursuant to s. 108 of the Constitution of the Federation: '(1) Can the Governor validly exercise power to remove the Premier from office under s. 33, subs (10), of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House? (2) Can the Governor validly exercise power to remove the Premier from office under s. 33(10) .... on the basis of any materials or information extraneous to the proceedings of the House of Assembly?'

The Federal Supreme Court answered the first question in the negative, thus holding that the respondent had not been validly removed from office, and found it unnecessary to answer the second question. On appeal by the appellant .... Held (1)....(2) There was nothing either the scheme or provision of the Constitution of Western Nigeria which legally precluded the Governor from forming his opinion on the basis of anything but votes formally given on the door of the House. By the use of the words 'it appears to him' in s. 33(10) the Judgment as to the support enjoyed by a Premier was left to the Governor's own assessment and there was no limitation as to the material on which he might resort for the purpose. Accordingly, both the questions referred to the Federal Supreme Court should be answered in the affirmative.

Decision of the Federal Supreme Court of Nigeria reversed."

The judgment of their Lordships was delivered by Viscount Radcliffe:

> .... The question to which an answer has to be found is of obvious importance, but it lies, nevertheless, within a very small compass. Its decision turns upon the meaning to be attached to the wording of s. 33(10) of the Constitution of Western Nigeria, read, an it should be, in the context of any other provisions of the Constitution that may legitimately influence its meaning.

It in clear, to begin with, that the Governor is invested with some power to dismiss the Premier. Logically, that power is a consequence of the enactment that Ministers shall hold office during the Governor's pleasure, for, subject to the saving conditions of provisos (a) and (b) that follow, the Governor has only to withdraw his pleasure for a Minister's tenure of office to be brought to an end. Where the Premier's office in concerned it in so (a) that limits the Governors power to withdraw his pleasure constitutionally, for by that proviso he is precluded from removing the Premier from office 'unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly.' By these words therefore, the power of removal is at once recognised and conditioned: and, since the condition of constitutional action has been reduced to the formula of these words for the purpose of the written Constitution, it is their construction and nothing else that must determine the issue.

What, then, is the meaning of the words "the Premier no longer commands the support of a majority of the member"? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, Constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed, that, so long " the elected House of Representatives is in being, a majority of its members who are prepared to act to together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

It is said, too, that the 'support' that in to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think, however, that it is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meeting, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned.

This, indeed, is the crux of the question that has now been raised. The respondent maintains, and it is implied in the decision that he has obtained from the Federal Supreme Court, that the Governor cannot constitutionally take account of anything in the matter of 'support' except the record of votes actually given on the floor of the House. Consequently, it is said, his action in removing the first respondent from the Premiership on the strength, it appears, of the letter address to him by the 66 members of the House referred to and without waiting until there had been an adverse vote in the House itself was not within the powers conferred upon him by the Constitution.

The difficulty of limiting the statutory power of the Governor in this way is that the limitation is not to be found in the words in which the makers of the Constitution have decided to record their description of his powers. By the words they have employed in their formula, 'it appears to him', the judgment as to the support enjoyed by a Premier is left to the Governors own assessment and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him if it had been intended to do no. For instance, he might have been given power to act only after the passing of a resolution of the House 'that it has no confidence in the Government of the Region', the very phrase employed in an adjoining section of the Constitution (see s. 31 (4), proviso (b)) to delimit the Governor's power of dissolving the House even without the Premier's advice.

According to any ordinary rule of construction weight must be given to the fact that the Governor's power of removal is not limited in such precise terms as would confine his judgment to the actual proceedings of the House, unless there are compulsive reasons, to be found in the context of the Constitution or to be deduced from obvious general principles, that would impose the more limited meaning for which the respondent contends.

Their Lordships have not discovered any such reasons. It is one thing to point out the dangers of a Governor arriving at any conclusion "to his Premier"s support in the House except upon the incontrovertible evidence of votes recorded there on some crucial issue. There are indeed such danger Expressions of opinion, attitude or intention upon such a delicate matter may well prove to be delusive. He may Judge the situation wrongly and so find himself to have taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or of the electorate. Again, if he is not to rely an his Premier for advice as to the balance of support in the House, he is likely to And that he is in effect consulting indirectly the views of opposition leaders who may turn out in the event to be no more than an opposition: or he will find himself backing the political judgments conveyed to him by his own private advisers against the political judgment of the Premier himself

All these are real dangers which any Governor proposing to act under his power of removal would need to bear in mind, since, if he ignores them, he would run the risk of placing the constitutional sovereign power, whose representative he in, in conflict with the will of the elected House of Representatives whose majority is for the time being expressed in the person of the Premier. Anyone familiar with the constitutional history and development of the United Kingdom would naturally dwell upon these aspects of the Sovereign's position, if he was invited to advise a Governor as to the circumstances and occasions upon which he could wisely exercise his power of removal.

But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign in not to be in danger of compromise, the arguments are considerations of policy and propriety which it in for him to weigh on each particular occasion: they are not legal restrictions which a Court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. To sum up, there are many food arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford-to the Governor the evidence he is to look for, even without the testimony of recorded votes.

Another argument has been advanced to the effect that the Nigerian Constitutions are modelled on the current constitutional doctrines of the United Kingdom, and, since the British Sovereign would not be regarded as acting with constitutional propriety in dismissing a Prime Minister from office without the foundation of an adverse vote on a major issue in the House of Commons, so the Governor in Western Nigeria must similarly be treated as precluded from exercising his power of removal in the absence of a vote of the awe kind. This approach to the matter appears to their Lordships to have had some influence upon the view taken by the majority of the Federal Supreme Court in this case, and, since it seems capable of conveying an implication that could be misleading in other situations apart from the present one, their Lordships wish to make two observations upon it.

The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution,

> rather than upon the Sovereign's right of removal, an exercise of which is not treated as being within the scope of practical politics. In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility: and the right or removal which is explicitly recognised in the Nigerian Constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.
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> . ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

In my view the Privy Council's judgment relating to the Constitution of Nigeria does not apply to the Constitution of Sarawak because of the following distinguishing features and circumstances:

(1) In the Nigerian case it was mathematically beyond question that more than half the House no longer supported the Premier.

(2) The measurement in Nigeria was a measurement of "support", not of "confidence". The Sarawak Constitution is dated subsequent to the decision of Adegbenro v. Akintola, and it does seem to me that the "confidence" of a majority of members, being a term of art, may imply reference to a vote such as a vote of confidence or a vote on a major issue.

(3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.

(4) In Nigeria the Governor had express power to assess the situation "as it appeared to him".

(5) In Nigeria all Ministers, including the Premier, held office "during the Governor's pleasure"; although there was an important proviso to this.

All the above five points were peculiar to Nigeria, and not one of them applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri. Men who put their names to a "Top Secret" letter may well hesitate to vote publicly in support of their private views.

The third of the five points listed above obviously requires further consideration. Has the Governor in Sarawak power at all to dismiss the Chief Minister? In considering this question, we may start with s. 21 of the Interpretation Ordinance, the general effect of which is that where there is power to appoint (and it is not disputed that the Governor has power to appoint a Chief Minister) there is power to dismiss. However, where the appointment is "subject to the approval .... of some other person the power of dismissal shall only be exercisable.... subject to the approval....of such other person." If the appointment of a Chief Minister is subject to the approval of Council Negri, then by this s. 21 dismissal also would be subject to its approval. Further, in principle, Council Negri

should manage its own affairs. A Governor is limited by article 6(3) of the Constitution to appointing as Chief Minister a member of Council Negri who in his judgment is likely to command its confidence (and approval) : thereafter it follows, by s. 21 of the Interpretation Ordinance, that only when Council Negri has shown lack of confidence (and lack of approval), can the Governor's power to dismiss, if it exists, be exercised.

Of course, if the Sarawak Constitution lays down that a Chief Minister may not be dismissed at all, then the defendants have no case and the Interpretation Ordinance cannot apply. The Sarawak Constitution does in fact direct in article 7(3) that all Ministers other than the Chief Minister hold office at the Governor's pleasure. According to Mr. Le Quesne this means that Ministers other than the Chief Minister may be dismissed "at the Governor's pleasure", whereas the Chief Minister may only be dismissed for cause. If the cause for dismissal is limited to the case of an adverse vote, then this interpretation does not help defendants. In my view, however, the suggested interpretation is altogether false. Article 7(3) clearly means that the Governor may dismiss Ministers but may not dismiss the Chief Minister in any circumstances.

A lot has been said about the duty and powers and discretion of the Governor. His paramount duty is to "act in accordance with the advice of the Supreme Council or of a member thereof acting under the general authority of the Council". (Article 10(1). There are two occasions when the Governor has a discretion, that is, when he can act without, or even contrary to, the advice of the Supreme Council. Those occasions are in the performance of the following functions -

(a) the appointment of a Chief Minister;

(b) the withholding of consent to a request for the dissolution of the Council Negri. (Article 10 (2)).

As regards (a), nobody could be so foolish as to suggest that a Governor could appoint a second Chief Minister while there was still one in office. As regards (b), this probably has in mind a situation of splinter parties, as has been the case in France, when a general election could not be expected to show an overall majority for any one party. In Sarawak, it seems to me that a Chief Minister may advise a dissolution, even though he has not as yet lost the confidence of Council Negri. In such circumstances, the Governor's refusal to dissolve might be conventionally unconstitutional, although not illegal.

To revert to the comparison of the Constitutions of Sarawak and of Nigeria, these Constitutions are so different that a contrast in powers must be intended: in Sarawak the Chief Minister's dismissal is quite simply beyond the powers of the Governor.

If the Constitution, however, should be construed as giving to the Governor a power to dismiss, that power can only be exercised - and I think that this was conceded by Mr. Le Quesne - when both

(a) the Chief Minister has lost the confidence of the House, and

(b) the Chief Minister has refused to resign and failed to advise a dissolution.

I have already dealt with (a) ; as regards (b), I do not think that the Chief Minister of Sarawak was ever given a reasonable opportunity to tender his resignation or to request a dissolution. He was never even shown the letter on which the dismissal was based until Court proceedings started, although it is true that at the moment of dismissal a list of signatories was sent to him with the letter from the Governor dated 17 June that list and that letter were typed on the same date as the publication in the Gazette of the dismissal of the plaintiff, who was given no time at all to consider the weight or effect of the move against him. Plaintiff did not refuse to resign: he merely expressed doubts whether in fact he had ceased to command a majority and requested "that the matter be put to the constitutional test".

A word may be said on what is the position if a Chief Minister has in fact ceased to command the confidence of a majority, and yet refuses to resign. In this situation at least, Mr. Le Quesne claims that the Governor must have a right of dismissal; otherwise the Constitution would be unworkable. Mr. Le Quesne's argument in effect is: if there is a gap, it must be filled: if there is no express power to enforce the resignation of a Chief Minister, that power must by implication lie with the Governor. I do not agree that stopgaps can be, as it were, improvised. In article 1 of the Constitution, a gap would appear to exist whenever the necessary address to remove the Governor is made to the Yang di-Pertuan Agong, and the latter'y refuses to dismiss him. Just because a Chief Minister or a Governor does not go when he ought to go is not sufficient reason for implying in the Constitution an enforcing power vested in some individual. R is, however, reasonable that in certain situations the Courts could expound the Constitution by declaratory judgments. Articles or clauses to cover all situations need not be set out in a Constitution because the residue of discretionary power is left in the Courts. Extraordinary situations do not often arise, and need not be met or considered until they do. Dicey has a whole chapter on "The Sanction by which the Conventions of the Constitution are enforced". (Chapter XV: The law of the Constitution: AV Dicey (10th Edn.) pp 444 to 457.)

> ....the nation expects that a Minister who cannot retain the confidence of the House of Commons, shall give up his place, and no Premier even dreams of disappointing these expectations." (at p. 444)
>
> But the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land." (at p. 445)
>
> . .. the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament." (at p. 456)
>
> Of course, therefore, a Minister or a Ministry must resign if the House passes a vote of want of confidence." (at p. 457)

Dicey is speaking of the British Constitution, but the same principles apply mutatis mutandis to the Constitution of Sarawak. The constitutional way out both for a British Prime Minister and for a Sarawak Chief Minister is not by dismissal but by resignation.

We need not speculate on what would happen if occasion arose for a resignation, and a Chief Minister refused to resign. 'In the instant case, the Chief Minister has not refused to resign, and there is no power to dismiss him. He has already indicated through his Counsel that he was prepared to consider a dissolution and presently an election. That political solution may well be the only way to avoid a multiplicity of legal complications. Possibly all parties, and the people of this nation, in whom sovereignty is supposed to lie, will wish the same solution.

> In some political situations a judicial duty to rule upon the legal merits of the case may have to be accepted as an inescapable obligation .... In an atmosphere highly charged with political tension the task of the Judges may be acutely embarrassing, especially if they are called upon to decide between two claimants to legitimate political power, of whom one commands the effective means of imposing his will and the other is able to marshal equally or more persuasive legal arguments." ("The New Commonwealth and its Constitutions": SA de Smith, p. 87)

Embarrassing as it may be, my task is simply to interpret the written word of the Constitution. On such interpretation the case presented in the statement of claim is unchallengeable. There will be judgment for the plaintiff as prayed.

Judgment for the plaintiff.