

SHAHEEN v. DURALIA

Full Court (Purcell, C.J., Pennington, J. and McDonnell, Ag. J.):
January 23rd, 1920

- [1] Conflict of Laws — contracts — contracts between natives and non-natives — Kambia custom permitting native carrier to take other cargo when non-native hirer contracts for exclusive use of boat not enforceable — contrary to natural justice, equity and good conscience: When a non-native hirer contracts for the exclusive use of a canoe for the carriage of goods from Kambia a native carrier may not rely on any local custom which purports to allow him to take on board any other cargo or passengers during the voyage; such a custom is not only contrary to the express terms of the agreement but also repugnant to natural justice, equity and good conscience and the court may refuse to enforce it by reference to the Protectorate Courts Jurisdiction Ordinance, 1903, s.6 (page 5, lines 2—23; page 5, line 37 — page 6, line 10). 5
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- [2] Jurisprudence — customary law — repugnancy — local custom permitting native carrier to take other cargo when non-native hirer contracts for exclusive use of boat — not enforceable as contrary to natural justice, equity and good conscience: See [1] above. 15
- [3] Shipping — carriage of goods — duties of carriers — native carrier must not take on other cargo when non-native hirer contracts for exclusive use of boat — local custom to contrary not enforceable as repugnant to natural justice, equity and good conscience: See [1] above. 20

The appellant brought an action against the respondent in the Circuit Court for damages for breach of contract. 25

The appellant, a Syrian trader, made a contract with the respondent for the exclusive use of his canoe to carry goods from Kambia to Freetown. The appellant's goods were sufficient to fill the boat but during the journey the respondent took on board passengers and other cargo. As a result of overloading the boat sank and the goods were lost. 30

The appellant brought the present proceedings in the Circuit Court claiming damages on the ground that since he had contracted for the exclusive use of the canoe the respondent was not entitled to take on additional cargo and passengers and that it was as a result of the respondent's breach of contract that his goods were lost. 35

In reply the respondent alleged that his canoe sank during a tornado, not as a result of overloading. He also alleged that under local custom he was entitled to take on additional cargo even when his boat had been hired for the exclusive use of one person 40

and contended that the court should enforce this custom under the Protectorate Courts Jurisdiction Ordinance, 1903, s.6. The Circuit Court (Parodi, J.) dismissed the appellant's claim.

5 On appeal the appellant contended that it was not consistent with natural justice, equity and good conscience for the local custom to be enforced in the circumstances of the case and that the decision of the trial court should therefore be reversed.

The appeal was allowed.

10 **Legislation construed:**

Protectorate Courts Jurisdiction Ordinance, 1903 (No. 6 of 1903), s.6:
The relevant terms of this section are set out at page 5, lines 2-23.

Boston and Beoku-Betts for the appellant;
15 *McCarthy* for the respondent.

PURCELL, C.J.:

This is an appeal from the judgment of Mr. Justice Parodi, dated December 2nd, 1918, when sitting in the Circuit Court at Moyamba.

20 The plaintiff (the appellant in this court) claimed £162.10s.9d. damages for breach of duty in, and about, the carriage and delivery of goods from Kambia to Freetown.

The facts of this case may be here stated as briefly as possible: The plaintiff, who is a Syrian trader, stated that he hired in July
25 1918, a canoe to take his goods from Kambia to Freetown; that such goods were sufficient to entirely fill the canoe, and that he contracted for the exclusive use of this canoe, but that during such voyage the captain of this vessel took on board passengers and cargo, which had the effect of overloading the canoe, and
30 caused her to sink, in consequence of which the plaintiff's loss was occasioned.

The defendant, on the other hand, denies the plaintiff's story in almost every particular, and contends that he merely agreed to convey the plaintiff's load to Freetown, that the plaintiff had not
35 the exclusive use of the canoe and it was open to him (the defendant) to carry other passengers and loads which, in fact, he did, and that the subsequent loss of the cargo was due to a violent storm which arose, and was in no way due to the overloading of the canoe. He further set up that he was entitled to
40 the protection of the provisions of s.6 of the Protectorate Courts Jurisdiction Ordinance, 1903.

Section 6 runs as follows:

“Nothing in this Ordinance shall deprive the Court of the District Commissioner or the Circuit Court, in its civil jurisdiction, in causes or matters between natives and persons not natives where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law, of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the Protectorate and not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial legislature existing at the commencement of this Ordinance, or which may hereafter come into operation. Provided that no party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from the express contract or from the nature of the transaction out of which any suit or question may have arisen that such party agreed that his obligations in connection with such transaction should be regulated exclusively by English law; and in cases where no express rule is applicable to any matter in controversy the Court shall be governed by the principles of justice, equity and good conscience.”

The learned judge found that the canoe sank in deep waters during the course of a strong tornado, and that the plaintiff's loss was caused by the act of God, and he further came to the conclusion that injustice would be done to the defendant were he to be denied the benefit of a local custom by the strict adherence to the rules of English law, such custom being that, even though the canoe in question was hired by the plaintiff for his exclusive use, the defendant was nevertheless entitled to take other cargo and other passengers.

After very carefully considering all the facts of this case, as I now know them, both from the arguments addressed to us from the Bar and from a perusal of the record, I am unable to agree with the conclusion arrived at by the learned judge in the court below. I am satisfied:

(1) that there was a contract between the plaintiff and the defendant for the exclusive hiring of his canoe to convey the plaintiff's goods from Kambia to Freetown, and that the defendant, for the purposes of that particular voyage, was not a common carrier;

(2) that in breach of this contract the defendant, by taking aboard the canoe passengers and other cargo, overloaded her, and caused her to sink;

5 (3) that the loss of the plaintiff's goods was due solely to such overloading of the canoe, and was not due to any storm at all;

(4) that the defendant was not entitled to claim the benefit of a local custom of the kind contended for under the provisions of s. 6 of the Protectorate Courts Jurisdiction Ordinance, 1903, as such custom, even if it were proved — which it was not — is
10 obviously, from every standpoint, unsupportable.

It follows, therefore, that the judgment of the court below must be set aside, with costs, here and in the court below, and judgment must be entered for £162.10s.9d., with costs.

15 PENNINGTON, J. and McDONNELL, Ag. J. concurred.

Appeal allowed.

20 COMPAGNIE FRANCAISE DE L'AFRIQUE OCCIDENTALE v.
ROCHETTE

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell,
Ag. J.): February 14th, 1922

25 [1] Civil Procedure — appeals — case stated — appeal not precluded by judgment on special case stated — different issues may be raised by appeal: Under the Supreme Court Amendment Ordinance, 1912, r.30, the Full Court may send back a special case stated to the court below for any amendment which has a close bearing upon the point submitted to it, but it may not require the addition of an entirely new question for its consideration; since judgment on a special case stated does not
30 preclude an appeal, however, it may be possible to raise on appeal matters not contained in the case stated (page 10, line 26 — page 11, line 3; page 11, lines 29—34).

35 [2] Civil Procedure — case stated — amendments — amendment of special case stated under Supreme Court Amendment Ordinance, 1912, r.30 to have close bearing on point submitted — no addition of entirely new question: See [1] above.

40 [3] Civil Procedure — execution — attachment of person — defaulting judgment debtor may be imprisoned on proof of ability to pay — evidence of means since date of order relevant: Section 15 of the Debtors Ordinance, 1883, which abolishes imprisonment for debt except in specified circumstances, does not affect the procedure relating to defaulting judgment debtors set out in ss. 27 and 29 of the Ordinance, and a court may therefore issue a writ of attachment against the person