

(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 obviously, from every standpoint, unsupportable.

10 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 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).

30 [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.

35 [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

of a defaulting judgment debtor on proof of his ability to pay the instalments of a judgment debt (page 11, lines 5—24) and (*per* McDonnell, Ag. J. at page 10, lines 21—31; page 10, line 40 — page 11, line 4) the evidence establishing the debtor's ability to pay should be evidence of his means since the date of the instalment order.

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The plaintiffs applied to the Supreme Court for a writ of attachment against the person of the defendant for failure to pay the prescribed instalments of a judgment debt.

In 1914 the plaintiffs obtained judgment against the defendant for breach of contract and were awarded damages. The defendant failed to satisfy the judgment and eventually the plaintiffs obtained an instalment order against him on a judgment debtor summons. The defendant again defaulted and the plaintiff brought the present proceedings for a writ of attachment against his person under s. 27 of the Debtors Ordinance, 1883. The trial judge (Purcell, C.J.) found that the defendant was able to pay the judgment debt, but this finding was based upon evidence of the defendant's means before the date of the instalment order. He granted leave to the plaintiffs to issue a writ of attachment but stayed execution of his order until the Full Court should have given its decision upon a special case stated.

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The Full Court was asked whether the court below had the power to issue a writ of attachment against the person of a judgment debtor under s. 27 of the Debtors Ordinance, having regard to the terms of s. 15 which abolished imprisonment for debt subject to specified exceptions, not including the imprisonment of a defaulting judgment debtor on proof of his ability to pay.

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The defendant asked the court to send back the case stated to the court below for amendment under the Supreme Court Amendment Ordinance, 1912, r. 30, so that the court might also consider whether the trial judge erred in not having before him evidence of the defendant's means after the date of the instalment order.

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The court gave its opinion that the Supreme Court had power to issue a writ of attachment in these circumstances and did not send back the special case stated for amendment.

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Legislation construed:

Debtors Ordinance, 1883 (No. 7 of 1883), s. 15:

"Subject to the provisions in this Ordinance contained, no person shall after the commencement of this Ordinance be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment:—

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(1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract. . . .”

s. 27: “. . . [I]f it is proved to the satisfaction of the Court by any examination of a judgment debtor or other evidence:—

5 (1) That the judgment debtor has, or has had since the date of the judgment or decree, sufficient means to pay the money directed to be paid by him, or part thereof, and refuses or neglects to pay the same . . .

then and in such case the Court may issue a warrant for the arrest of the judgment debtor and his detention in custody”

10 s. 29: “If such judgment debtor does not show cause to the satisfaction of the Court why he should not be committed to prison, the Court may commit him to prison . . . for any period not exceeding six weeks.”

Supreme Court Amendment Ordinance, 1912 (No. 14 of 1912), Schedule, r. 30:

15 “Every such special case shall be jointly agreed upon by the parties whenever practicable, and settled by the Court below. Every such special case shall state concisely such facts and documents as shall be necessary to enable the full court to decide the questions raised thereby The full Court may send back such case for amendment, if
20 necessary . . . and may require the Court below to certify its finding upon any question of fact arising in the suit . . . and may make such order as it shall deem fit, and judgment . . . shall be entered in terms of such order. But such judgment shall not . . . preclude any of the parties . . . from bringing any appeal which he might otherwise, under these rules, have brought from such judgment.”

25 *Shorunkeh-Sawyers* for the plaintiffs;
Boston for the defendant.

McDONNELL, Ag. J.:

The case stated by Purcell, C.J. is as follows:

30 “In 1914 the French company obtained a judgment against the defendant in the Circuit Court for £161.0s.8½d., and such judgment remaining unsatisfied, the plaintiffs subsequently, under the provision of s. 16 of the Debtors Ordinance, 1883, brought the defendant before this court
35 on a judgment debtor summons, when the court, after hearing evidence and arguments of counsel, and being satisfied that the defendant had the ability to pay the said judgment by instalments, made an order. Subsequently, on the application of counsel for the defendant, the court made an
40 order suspending the operation of the writ of attachment on certain terms, pending the statement of this special case.

The Ordinance under which these proceedings have been initiated, is entitled 'An ORDINANCE for the Abolition of Imprisonment for Debt, and for the Punishment of Fraudulent Debtors,' being No. 7 of 1883, and is modelled on the English Debtors' Act, 1869 regarding which statute Cockburn, C.J., remarked in the course of his judgment in *Evans v. Wills* (1 C.P.D. at 233; 34 L.T. at 681): 'It is extremely difficult to understand the principle upon which this legislation proceeds', and I desire to adopt that criticism with regard to the Debtors Ordinance, 1883. In the course of his argument, Mr. Boston raised the point that imprisonment for debt having been abolished by this Ordinance, no order of attachment could issue against the defendant, and further, that in any event, looking at the true nature of the transaction in question between these parties out of which this judgment debt arose, that under the provision of s. 15 (1) of the Debtors Ordinance, 1883, default in payment of a penalty so arising under a contract was specially excepted. A close perusal of this Ordinance seems to me to indicate what was in the mind of the legislature, and that was to deal with four classes of persons, viz.:

- (1) Absconding debtors or persons likely to abscond.
- (2) Recalcitrant debtors specified under s. 15.
- (3) Contumacious debtors as specified under s. 27.
- (4) Persons fraudulently obtaining credit, specified under s. 35.

I came to the conclusion that under the provisions of s. 27, where a person had been brought before the court under a judgment debtor summons, and the court was satisfied that such person had the ability to pay, it was competent for the court to make an order against him, and on failure to comply with such order, a writ of attachment could issue against him. I further pointed out that whatever construction was sought to be placed on s. 15 (1), the provision of such section is subject to the provisions of this Ordinance, and looking to the language used in s. 27 I could entertain no doubt for the reasons I have stated. A writ of attachment could issue in the event of non-compliance with an order made under the provisions of that section.

I desire to place on record that I have stated this case, not because I entertain the slightest doubt on this matter, which

in my opinion is quite plain when once it has been carefully examined and scrutinised, but because, in the course of Mr. Boston's argument, I promised to do so. The question on which the Court of Appeal is invited to express an opinion, therefore, is whether, having regard to the provisions of this Ordinance and the particular language used, more particularly in s. 15 and its various sub-sections, and s. 27 and its various sub-sections, I was right in holding that the court, having found as a fact that the defendant Rochette had the ability to pay the sum of £5 per month, failure on his part to comply with such order gave the court power to issue a writ of attachment against his person."

The Full Court is in this case asked to express an opinion on the question whether, having regard to the provisions of the Debtors Ordinance, 1883, and the language used more particularly in s. 15 and s. 27, the learned Chief Justice was right in holding that the court below, having found as a fact that the defendant had the ability to pay certain monthly instalments, failure on his part to comply with such order gave the court power to issue a writ of attachment against his person.

It was urged before us, on behalf of the defendant, that under the provisions of s. 27 (1), the learned Chief Justice erred in a matter of procedure in not having before him evidence of means at a date subsequent to the making of the instalment order and immediately antecedent to the time of his commitment of the defaulting debtor, and on it being suggested to counsel by the court that to entertain argument on this point was to go outside the terms of the case stated, this court was asked by counsel for the defence, under r. 30 of the schedule to the Supreme Court Amendment Ordinance, 1912 to send back the case stated for amendment by the court below.

I am of opinion that any reference such as this contemplates would raise an altogether new point, involving an enquiry as to the nature of the proof upon which the learned Chief Justice found as a fact that the defendant was possessed of means, and could not be such an amendment as r. 30 contemplates, which must be confined to amendments having a close bearing upon the point submitted to the Full Court.

The last few lines of r. 30 provide that the judgment on a case stated does not preclude a party from bringing any appeal which he might have brought under the appeal rules. The arguments to

which I have referred not being admissible in reference to the case stated, would properly have been addressed to us only if such an appeal had been lodged and had they been so addressed would, in my opinion, have proved irresistible.

The powers conferred by s. 27 of the Debtors Ordinance, 1883, are totally different from the exceptions from the general declaration in s. 15 abolishing imprisonment for default in payment of a sum of money. Those exceptions are set out in sub-ss. (1) to (5). The proviso limits the term of imprisonment for these five defaults to one year. 5 10

Section 27 (1), with which must be read ss. 28 and 29, provides for the committal to prison, with or without hard labour, for a period not exceeding six weeks, of a judgment debtor, proved to have the means of discharging a judgment debt, who has failed to show cause why he should not be so committed. 15

Section 15, which deals with defaults in five specified instances, is independent of, and must be read apart from, s. 27, which covers the ordinary procedure with judgment debtors, and which subjects the defaulting debtor to much less stringent pressure than does s. 15. 20

I am of opinion, therefore, that the court below has the power to issue a writ of attachment against the person of a defendant on proof of his ability to pay the decreed instalments of a judgment debt. 25

PURCELL, C.J. concurred.

SAWREY-COOKSON, J.

I agree. The whole question here turns on whether the point argued by Mr. Boston is raised in the case stated, and the answer to that question can only be that it is not so raised. Nor is it competent to this court to send the case stated for amendment in order, and in the sense that such addition to the case may be made. 30

Any remedy the party aggrieved by the order of the court below may have, must be sought in that court. 35

Order accordingly.

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