

GENET v. SCHUMACHER AND STRAUMANN (No. 2)

Full Court (Purcell, C.J., McDonnell and Butler-Lloyd, Ag. JJ.):
February 9th, 1923

- 5 [1] Civil Procedure — appeals — leave to appeal — application under Appeals
to Privy Council Order in Council, 1909, r.2(a) purely formal, not con-
10 tinuation of hearing — court may be constituted differently from that
which gave judgment: Since under the Appeals to Privy Council Order in
Council, 1909, r.2(a), an applicant may have leave to appeal as of right if
the matter in dispute on appeal is valued in excess of £300, an appli-
cation under that sub-section is purely formal, the court having power
only to settle the amount of security required and any other conditions
of appeal; as such an application is not a continuation of the hearing of
the case it is not necessary that the court should be constituted in
15 exactly the same way as that from whose judgment the appeal is taken
(page 83, lines 18—39).
- [2] Civil Procedure — change of judge — application for leave to appeal —
court hearing application under Appeals to Privy Council Order in
Council, 1909, r.2(a) may be constituted differently from that which
gave judgment: See [1] above.
- 20 [3] Courts — Full Court — constitution — court hearing application for leave
to appeal to Privy Council may be constituted differently from that
which gave judgment appealed from: See [1] above.

The applicant applied for leave to appeal to the Privy Council.

25 The applicant announced his intention to appeal to the Privy
Council after the Full Court had delivered judgments dismissing
his appeal. One of the three judges constituting the court (Sawrey-
Cookson, J.) was urgently required in his court in the Gambia and
was due to sail within a few days of the date of the judgment. The
applicant was therefore asked to expedite his application but was
30 unable to do so, although both parties agreed that the matter in
dispute on appeal was valued in excess of £300 so that the appli-
cant could appeal as of right.

35 An arrangement was made whereby Sawrey-Cookson, J. was
able to sail as he had intended, and an acting puisne judge was
appointed to constitute the court so that the application could be
heard. The applicant objected to the constitution of the court,
however, arguing that it should be constituted exactly as that
against whose judgment he was appealing.

The court held that the application had been abandoned.

40 *Shorunkeh-Sawyer* for the applicant;
C.E. Wright for the respondents.

McDONNELL, Ag. J.:

The present sitting of the Full Court began on Thursday, January 18th, 1923.

The court was constituted by the Chief Justice of this Colony, Sir Gilbert Purcell, as President, the Judge of the Colony of the Gambia, Sawrey-Cookson, J. and myself, the Attorney-General of this Colony, who had been appointed, as at the two previous sittings of the court, to act as puisne judge by letters patent under the public seal of the Colony. See ss.4 and 5 of the Supreme Court Amendment Ordinance, 1912, and s.2 of Ordinance No. 9 of 1915. 5 10

Among the appeals which came before us for hearing was the present case of *Genet v. Schumacher & Straumann* in which Mr. Sawyerr appeared for the appellant and Mr. Wright for the respondents. 15

On a preliminary point being taken on Thursday, January 25th, by the respondents' counsel, the Full Court announced orally that it must on that ground dismiss the appeal, and stated that it would deliver a considered judgment on Monday, January 29th.

On that day a judgment was delivered by me, to which the learned President assented. My brother, Sawrey-Cookson, delivered a short judgment concurring with my view. 20

Thereupon Mr. Sawyerr stated that he proposed to appeal from the judgment to the Privy Council, and indicated that under s.4 of the Order of His Majesty the King in Council dated February 15th, 1909, governing appeals to the Privy Council, he had 14 days in which to apply by motion or petition for conditional leave to appeal. 25

It was pointed out to Mr. Sawyerr that the presence of my brother Sawrey-Cookson was urgently needed in his court in the Colony of the Gambia several hundred miles from this Colony, that a ship for that place, the *S.S. Bodnant* was sailing in the course of four or five days, and that if Sawrey-Cookson, J., were to miss that ship his return would in all probability be delayed at least two weeks. 30 35

It was agreed by both parties that the matter in dispute on the appeal amounted to upwards of the value of £300 sterling. The court thereupon pointed out to Mr. Sawyerr that, under s.2(a) of the above cited Order of the King in Council, he could appeal as of right; and that his application would be purely formal, and he was asked if, in consequence, he would not expedite his application, 40

short notice of which Mr. Wright, for the respondents, expressed himself prepared to accept.

5 In spite of this request and assurance, Mr. Sawyerr expressed his inability to accelerate his application, and the court adjourned until the return day of the petition which he announced it was his intention to file.

10 On Friday, February 2nd, Mr. Sawyerr filed a petition, supported by an affidavit, and a notice to move the Full Court for conditional leave to appeal at 9 a.m. on Wednesday, February 7th. In the meanwhile, the learned President, in consultation with my brother Sawrey-Cookson and myself, came to the conclusion, in which we both concurred, that if Sawrey-Cookson, J., sailed by the *S.S. Bodnant*, which was leaving on the following day, a Full Court for the purpose of hearing this purely formal application could be constituted, provided that His Majesty approved the appointment of the Police Magistrate of Freetown, Mr. William Butler-Lloyd, Barrister-at-Law, as a puisne judge for the purpose in question.

20 In conformity with this decision, His Excellency the Governor was invited, and agreed, to send the following telegram to the Right Honourable the Secretary of State, which, with its reply, His Excellency has given me permission to quote in this judgment:

“Date February 1st, 1923.

25 With reference to your telegram of January 9th sitting of the Full Court concluded except one outstanding application for leave appeal Privy Council. Applicant has 14 days in which move court. Return of Sawrey-Cookson Gambia urgently required. I propose to release him and with your approval and His Majesty’s instructions appoint Butler-Lloyd third judge for purpose of hearing the application. Vide s.4 Ordinance No. 14 of 1912.

Slater.”

Sawrey-Cookson, J. consequently sailed on the *S.S. Bodnant* on Saturday, February 3rd.

35 On Monday, February 5th, the following telegram was received by His Excellency.

“Date February 5th, 1923.

40 With reference to your telegram of February 1st, His Majesty is pleased to approve appointment of Butler-Lloyd to be acting puisne judge.

Secretary of State.”

In conformity with this instruction, letters patent under the great seal of the Colony were executed on Tuesday, February 6th, by His Excellency appointing Mr. Butler-Lloyd a puisne judge. Mr. Butler-Lloyd on the same day took the oath of allegiance and the judicial oath before His Excellency, who simultaneously addressed a letter to the learned Chief Justice in compliance with s.10 of the Supreme Court Amendment Ordinance, 1912 giving approval to his requesting Butler-Lloyd, Ag. J.'s attendance at the sitting of the Court. On the Chief Justice's request, Butler-Lloyd, Ag. J., attended at 9 a.m. on Wednesday, February 7th, the return day of Mr. Sawyerr's petition, and the court which sat was constituted by the Chief Justice, Butler-Lloyd, Ag. J., and myself.

Mr. Sawyerr immediately objected to the constitution of the court, emphatically demanding the presence of Sawrey-Cookson, J. He refused to address the court, but stated he was addressing the Chief Justice alone.

The latter assured him that the court was properly constituted. Mr. Sawyerr persisted that the only court which could have cognisance of his application was one which was constituted exactly as was that against whose judgment he was appealing. He then stated in conclusion that the court before him was neither the Full Court nor the Supreme Court, and refused to proceed with his application, stating that he would apply direct to the Privy Council for leave to appeal to that tribunal.

The court then adjourned until to-day, in order that a considered judgment in the matter, setting out the whole facts might be prepared.

I am of opinion that there is no ground in Mr. Sawyerr's objection.

The application before the court was entirely formal, involving no question as to the merits of the appeal, and was in no sense a continuation of the hearing, judgments in which had been delivered on January 29th. The court had no discretion to grant or refuse leave to appeal: its power was confined merely to settling the security to be given, the time in which such security was to be given, and the conditions, if any, as to the time within which the appellant should take the necessary steps for the purpose of procuring the preparation of the record and despatch thereof to England under ss.5 (a) and (b) of the Order of the King in Council.

If there were anything in Mr. Sawyerr's objection, the illness of one of the judges of the Full Court for 14 days after the judgment

appealed from, or the death of such judge in that period, would effectually stop any leave to appeal being granted by the Full Court.

5 By his withdrawal of his application Mr. Sawyerr has deprived his client — who, I learn from para. 3 of the affidavit, is absent from the Colony — of the right of appeal, except by the far more expensive process of going to the Privy Council direct, a right saved by s.28 of the Order of the King in Council.

10 The application not having been pursued must be taken to have been abandoned. It seems to me that the frivolous nature of Mr. Sawyerr's objection brings it dangerously near those cases in which the court has to order the solicitor to pay the costs, but in all the circumstances I hold that the costs entailed by to-day's proceedings and those of Wednesday, February 7th, should be borne
15 by the appellant.

BUTLER-LLOYD, Ag. J. and PURCELL, C.J. concurred.

Application deemed abandoned.

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ROLLINGS v. BARROW and BARROW

Supreme Court (Purcell, C.J.): April 23rd, 1923

25 [1] Employment — inducing breach of contract — act of third party — third party knowingly procuring servant to break contract, or harbouring servant already in breach, liable in damages for consequential loss to master: Anyone who knowingly interferes with the contractual relations subsisting between a master and servant by procuring the servant to leave
30 his master during the stipulated period of service or by harbouring a servant who has already left his master in breach of his contract of service, is liable in damages for any loss caused to the master by his own wrongful act (page 86, lines 19–25).

[2] Tort — inducing breach of contract — contract of employment — third party knowingly procuring servant to break contract, or harbouring
35 servant already in breach, liable in damages for consequential loss to master: See [1] above.

The plaintiff brought an action against the defendants for damages for the loss of the services of her servant consequent upon the defendants' enticement of him away from her.

40 The plaintiff employed a boy whom the second defendant, her next-door neighbour, found injured in the street and took into her