## YASKEY v. THE PRESIDENT AND COUNCILLORS OF FREETOWN CITY COUNCIL and the CITIZENS OF FREETOWN

West African Court of Appeal (Deane, C.J. (G.C.), McRoberts, Ag. C.J. (Sierra Leone) and Sawrey-Cookson, J. (G.C.)): October 14th, 1931

[1] **Civil Procedure — defence — notice of intention to rely on statutory defence — defence only succeeds if five days' notice given of intention to rely on it:** A defence under s. 180(1) of the Freetown Municipality Ordinance, 1927, that the plaintiff has failed to give one month's notice of his intention to issue a writ against the City Council, is a special defence which can only succeed if notice of the defendants' intention to rely on it is filed five clear days before the return date of the summons, as required by O.IX, r. 7 of the County Court Rules, even though the concluding words of s. 180(1) put the burden of proof on the plaintiff to show that he gave appropriate notice in writing of his intention to issue the writ (page 276, lines 11—18; lines 35—39).

[2] **Civil Procedure — writ of summons — notice of intention to issue writ — want of notice defence under Freetown Municipality Ordinance, 1927, s. 180(1) — defence only succeeds if five days' notice given of intention to rely on it:** See [1] above.

[3] **Local Government — Freetown City Council — legal proceedings against Council — notice of intention to issue writ — want of notice defence under Freetown Municipality Ordinance, 1927, s. 180(1) — defence only succeeds if five days' notice given of intention to rely on it:** See [1] above.

[4] **Local Government — legal proceedings — proceedings against local government body — notice of intention to issue writ — want of notice defence under Freetown Municipality Ordinance, 1927, s. 180(1) — defence only succeeds if five days' notice given of intention to rely on it:** See [1] above.

The plaintiff brought an action against the defendants in the Supreme Court to recover a sum of money.

At the trial of the action the defendants contended that the plaintiff had failed to prove service of notice of his writ one month prior to the issue of it as required by s. 180(1) of the Freetown Municipality Ordinance, 1927 which protected officers of the Council acting under its provisions. The plaintiff contended that the defendants could not rely on this defence as they had not complied with O.IX, r. 7 of the County Court Rules, which provided that any defendant intending to rely on a statutory defence must file a notice of such intention five clear days before the return date of the summons.

The trial judge found that the plaintiff had failed to prove service of notice of action as required by s. 180(1) of the Ordinance, and entered judgment for the defendants. The plaintiff applied for a new trial on the ground that the trial judge had misdirected himself on the law.

In considering the application, the trial judge held that the defence under the Freetown Municipality Ordinance, 1927, s. 180(1) was in fact a statutory defence, but that it was taken out of the rule requiring five days' notice to be given of the defendants' intention to avail themselves of it by the concluding words of the sub-section which stated that the plaintiff had to prove notice of action, in the absence of which proof the court was obliged to give judgment for the defendants. The trial judge therefore held that the plaintiff had failed to prove service of notice of the action as required by s. 180(1) and gave judgment for the defendants. He stated a case to the West African Court of Appeal, however, for a ruling as to whether his decision was correct.

The case stated was answered in the negative.

**Cases referred to:**

(1) *Conroy v. Peacock*, [1897] 2 Q.B. 6; (1897), 76 L.T. 465.

(2) *Davey v. Warne* (1845), 14 M. & W. 199; 153 E.R. 448.

(3) *Law v. Dodd* (1848), 1 Exch. 845; 17 L.J.M.C. 65, followed.

(4) *Shearwood v. Hay* (1836), 5 Ad. & El. 383; 111 E.R. 1210, distinguished.

(5) *Wagstaffe v. Sharpe* (1838), 3 M. & W. 521; 150 E.R. 1252.

**Legislation construed:**

Freetown Municipality Ordinance, 1927 (No. 38 of 1927), s. 180(1):
The relevant terms of this sub-section are set out at page 273, lines 10—21.

County Court Rules, O.IX, r. 7:

> "Where the defendant intends to rely upon any of the grounds of defence hereinafter mentioned . . . he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return-day of the summons . . . ."

*Beoku-Betts* for the plaintiff;
*Boston* for the defendants.

**DEANE, C.J. (G.C.):**

This is a case stated for the opinion of the court under s. 4 of the West African Court of Appeal (Civil Cases) Ordinance, 1929. From the statement of the case and from the written judgment of the learned Chief Justice, which is referred to in the statement and attached to it, it appears that the plaintiff sued the defendants for the sum of £56.1s.0d. The defendants are persons who are entitled to the protection afforded by s. 180 (1) of the Freetown Municipality Ordinance, 1927, which reads as follows:

> "A writ or process shall not be sued out against or served on the Council, or any member or officer thereof, or any person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Ordinance, until the expiration of one month after notice in writing has been served on such Council, member, officer or person clearly stating the cause of action and the name and place of abode of the intended plaintiff and of his solicitor (if any) in the cause; and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved the judge shall find for the defendant."

At the close of the plaintiff's case on the trial of the action the defendants' counsel submitted that, the plaintiff having failed to prove service of the notice required by the section, the defendants were entitled to judgment. To this contention the learned Chief Justice acceded and entered judgment for the defendants with costs, although the plaintiff had contended that the defendants could not claim the benefit of this defence inasmuch as they had not complied with the provisions of O. IX, r. 7 of the County Court Rules by which the procedure of the court in its summary jurisdiction is governed, and by which in effect it is provided that any defendant who intends to rely upon a special defence, which term covers and includes a defence by statute, must file a notice of such intention five clear days before the return date of the summons.

The plaintiff having subsequently applied for a new trial on the ground that the learned Chief Justice had misdirected himself on the law, the learned Chief Justice refused the application subject, however, to the opinion of this court on the question whether or not he was right in holding that on a correct interpretation of s. 180 (1) of the Freetown Municipality Ordinance, 1927, the

objection raised by the defendants was not a special defence of which it was necessary to give notice, but that it was part of the plaintiff's case to prove that he had given notice of his intention to commence the action; and it is on this question that the court is asked in the case stated to express an opinion.

Now at the outset I must confess that on reading the case stated along with the judgment which is embodied with it, I found at first considerable difficulty in reconciling the one with the other. In the judgment the following passage occurs: "There is no definition of the term 'statutory defence' but it is sufficient to say that I have no doubt that a defence founded on s. 180 (1) of the Freetown Municipality Ordinance, 1927, *does come* within that description." [Emphasis supplied.] The question at once presented itself: How is this passage to be reconciled with the clear averment by the learned Chief Justice in the case stated that on a correct interpretation of this s. 180 (1) the objection raised by the defence was *not* a special defence of which it was necessary to give notice. If the term special defence includes statutory defence, as seems to be conceded in the judgment, how are these statements to be reconciled? Counsel for the defendants suggested that the word "not" had been inadvertently omitted in the judgment between "does" and "come"; but that rough and ready way of meeting the difficulty does not commend itself to me, since, if I may respectfully say so, the learned Chief Justice would not have been likely to come to the conclusion that a defence founded on a statute and which but for the statute would not exist was not a statutory defence. The marginal note to s. 180 (1) of the Ordinance is "Provisions for protection of persons acting under Ordinance." Were it not for that sub-section the defendants could not invoke the failure of the plaintiff to give notice of action in their defence and in my opinion, therefore, it is abundantly clear that it is a statutory defence and nothing else. The true explanation of the difficulty, it seems to me, is to be found in the qualification of the statement in the case that it is not a special defence by the additional words "of which it is necessary to give notice." In other words, what I think the learned Chief Justice means is that while it is a statutory defence and therefore a special defence, it is not a special defence of which it is necessary to give notice. That this is in fact the true interpretation of the averment is, I think, also show by a passage which follows that passage I have already quoted from the judgment and which runs,

"I held that the concluding words of the sub-section put the onus on the plaintiff to prove that notice had been given, and that such proof not having been adduced by him, I was bound to enter judgment for the defendants."

The position may, I take it, be summarised thus: The learned Chief Justice held (a) that the defence outlined in s. 180 (1) was in fact a statutory defence, but (b) that it was taken out of the rule requiring five days' notice being given by the defendants that they intended to avail themselves of it by the concluding words of the sub-section which, in effect, negative the rule and throw the onus of proving notice of action on the plaintiff, and make it necessary for the court to give judgment in favour of the defendants should the plaintiff fail to discharge that onus.

Now as I have indicated, I am in complete agreement with the learned Chief Justice that this is a statutory and therefore a special defence. By the County Court Rules the defendant has to give five clear days' notice if he intends to rely on a special defence, and the question therefore which this court has to decide is whether the concluding words of s. 180 (1) render nugatory the obligation of the defendants under the Rules to give notice of their intention to rely on this special defence. The learned Chief Justice, in deciding that they did, relied upon the case of *Wagstaffe v. Sharp* (5), which follows the decision in *Shearwood v. Hay* (4). The circumstances of those cases were that an apothecary who sued to recover charges as an apothecary, and who failed at the trial to prove either that he was in practice as an apothecary prior to or on August 5th, 1815, or that he had obtained a certificate to practice as an apothecary from the Master Wardens and Society of Apothecaries as required by s. 21 of the Apothecaries Act, 1815, was non-suited. Lord Denman, C.J. observed in *Shearwood v. Hay* (5 A. & E. at 388; 111 E.R. at 1212):

> "The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The under-sheriff . . . held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative upon him to prove . . . . I think that the ruling was right."

The plaintiff's title to sue depended on the statute, and he could not sue without bringing himself within its provisions.

In this case, however, the circumstances are entirely different. The plaintiff's title to sue is complete apart from the statute

which, so far from conferring on him the right to sue, limits that right which he has already in favour of the defendants in the manner provided by the section, and thereby allows them to set up that limitation as a defence in case the plaintiff does not observe the requirements of the section. It is true indeed that in both cases the defendant may be benefited by the statute if it is not followed, but the cases are very different since, in the apothecary cases, the statute was passed to confer a right upon the plaintiff as a member of a class, while in this case the Ordinance was passed to provide protection for the defendants.

The words, therefore, at the end of s. 180 (1) of the Ordinance must, in my opinion, be read as having application only when the special defence which the sub-section provides for the defendants has been pleaded according to the Rules. The proof that the things prescribed in that sub-section have been done is not a necessary part of the plaintiff's case until he has received notice that the defendant intends to avail himself of the special defence provided for him by the Ordinance. Then he must prove the *facta probanda*, and if he fails to do so the court must find for the defendant.

But it is said that in the cases quoted on behalf of the plaintiff, *viz. Davey v. Warne* (2) and *Conroy v. Peacock* (1) in which it was held that notice of the statutory defence must be pleaded, there are no words at all similar to the concluding words of s. 180 (1), and it is true that in those cases there is no definite statement that judgment must be given for the defendant on the plaintiff failing to prove the notice required. But in the case of *Law v. Dodd* (3) language is used which seems to me to be entirely parallel. In that case it was provided by the Metropolitan Paving Act that no action should be brought against any person for anything done in pursuance of the Act until after 21 days' notice in writing "and if it shall appear that such action was brought before 21 days' notice was given" the jury should find a verdict for the defendant, and it was held that the defendant could not avail himself of a want of notice without specially pleading it. Thus, notice of that special defence was held necessary to entitle the defendant to the benefit of the statute, even though there was a positive direction to the jury to find for the defendant if it appeared that action was brought before 21 days. So also in this case it is made incumbent on the judge, in the absence of proof of the prescribed notice, to find for the defendant.

I find, therefore, that the answer to the question propounded to this court by the learned Chief Justice, *viz.* Whether he was right in holding that on a correct interpretation of s. 180 (1) of the Freetown Municipality Ordinance, 1927, the objection raised by the defendants was not a special defence of which it was necessary to give notice of his intention but that it was part of the plaintiff's case to prove that he had given notice of his intention to commence the action, is in the negative. The plaintiff is entitled to costs.

McROBERTS, Ag. C.J. (Sierra Leone) and SAWREY-COOKSON, J. (G.C.) concurred.

*Case stated answered in the negative.*

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## NEWLAND v. SAVAGE

Supreme Court (McRoberts, Ag. C.J.): October 19th, 1931

[1] **Evidence — character — previous convictions — evidence of accused as to previous conviction inadmissible except as provided in Criminal Evidence Ordinance (cap. 44), s. 4(f) — otherwise reception fatal even though court not influenced:** By reason of the Criminal Evidence Ordinance (*cap.* 44), s. 4(f) the evidence of an accused in cross-examination as to a previous conviction is inadmissible, except in the circumstances stated in the section, and its reception is fatal to the conviction even though it does not influence the court (page 278, lines 10—23).

The appellant was charged in the Police Court, Freetown, with assault.

It was alleged that the appellant assaulted the Imam in the Mosque. He was asked in cross-examination whether he had not been previously convicted of a similar offence and he answered that he had. He was convicted and appealed to the Supreme Court against his conviction on the ground that the evidence about his previous conviction had been wrongly admitted in the court below.

The court considered whether the evidence appealed against might not have influenced the magistrates and whether, in any event, the conviction should not be quashed having regard to the provisions of s. 4(f) of the Criminal Evidence Ordinance (*cap.* 44).

The appeal was allowed.

**Case referred to:**

(1) *Charnock v. Merchant*, [1900] 1 Q.B. 474; (1900), 82 L.T. 89, applied.