

MELTZER

v.

Curam : THE NETHERLANDS SOUTH AFRICAN RAILWAY
 KOTZÉ, C.J. COMPANY.
 AMES-
 HOFF, J.
 ESSER, J.

PUBLIC CARRIERS—LIABILITY.

1897
 11 November. *A public carrier is by common law responsible for goods entrusted to him to be carried, and must deliver them safely, unless he can show that a special contract has been concluded between himself and the consignor limiting his common law liability, or that the loss is not due to his negligence.*

THIS was an appeal from the decision of the First Judicial Commissioner of Pretoria under the following circumstances:—

The appellant sued the defendant company for the payment of 69*l.* 10*s.*, being the balance of 75*l.*, which represented the value of a box of clothes which had been entrusted by the plaintiff to the company for conveyance. The plaintiff alleged in his summons that the box had been lost through the negligence of the defendant. The defendant had paid 5*l.* 10*s.* on the amount of 75*l.*, and refused to pay any more. The defendant company alleged in its special plea that its tariff only allowed compensation at the rate of 1*s.* per pound weight, and that it had accordingly tendered 5*l.* 10*s.* on 110 lbs. weight, and that moreover the plaintiff had accepted this tender.

It appeared from the evidence that the plaintiff had appointed one Beyers as his agent for the purpose of forwarding the box. When the plaintiff became aware that the box had been lost, he wrote a letter on 5th May, 1897, to the company, intimating that he held it responsible for the loss or for the payment of 75*l.* On the 27th August the company replied by sending a cheque for 5*l.* 10*s.*, considering that it was liable for this amount according to its tariff. Thereupon the company received a letter from the plaintiff's attorney stating that the plaintiff had received the cheque in settlement of the 75*l.*, but that he claimed payment of the balance within forty-eight hours. The plaintiff also gave evidence as to the value of the articles which were in the box,

which was not disputed. The plaintiff's agent, Beyers, testified that the plaintiff had given him the box to be despatched, whereupon he went to the stationmaster at Crocodile Poort and instructed him to take charge of the box until it could be sent on. The box was locked, and Beyers was present when the box was sent off. He had not made any agreement as to 1s. per pound in case of loss. In cross-examination he stated that he was a merchant, and in that capacity had had a good deal to do with the defendant company in the despatch and receipt of goods. He did not know that goods could be sent assured and unassured. He was aware there were different tariffs. He had given instructions to send the box as a parcel. He knew that regulations of the company existed under which goods were conveyed. On re-examination he stated that he had not signed any way-bill. The rate of freight for the parcel was more than the usual rate for goods.

After hearing the argument of the respective attorneys, the Judicial Commissioner gave judgment in favour of the defendant company with costs, on the ground that it must be taken that Mr. Beyers was acquainted with the different tariffs, inasmuch as he had stated that he had been a trader for some years. It was therefore open to him to have sent the articles under the tariff applicable to assured goods.

The plaintiff appealed from this judgment.

Curlewis, for the appellant. The common law must be followed, unless there be a special law which alters the ordinary law, or a special contract has been entered into which would take the case out of the common law.

Coster (with him *Esselen*), for the respondent. The parties can contract themselves out of the common law. Practically a contract has been entered into between Beyers and the company, for Beyers says he was aware that the company had regulations. Why, then, did he not inquire into them? Beyers was the plaintiff's agent, and therefore the plaintiff must be taken to have contracted subject to the regulations. The tender of 5l. 10s. was accepted by the plaintiff. See the letter of 8th September, 1897, which was only written twelve days after the receipt of the cheque.

1897
 MEITZER
 C.
 THE N. S. A.
 RAIL. Co.
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1897
 MELTZEL
 v.
 THE N. S. A.
 RAIL. Co.

The Court held that the plaintiff was entitled to succeed in his claim, for the reasons advanced by *Curlewis*, and allowed the appeal with costs. The respondent was condemned in the payment of 69*l.* 10*s.*, with costs.

Appellant's attorneys: *Klyn and Cloete*.

Respondent's attorney: *S. K. H. Lingbeek*.

Coram :
 KOTZÉ, C.J.
 AMES-
 HOFF, J.
 ESSER, J.

EXECUTORS TESTAMENTARY OF THE ESTATE OF D. J. VAN WYK

v.

C. J. JOUBERT.

1897
 12 November.

PARATE EXECUTION PERMISSIBLE.

The tendency of the later writers on Roman-Dutch law and the practice existing in this State recognize parate execution, provided the proceedings are bonâ fide and not open to objection.

THIS was a claim for provisional sentence for the sum of 1,100*l.*, with interest thereon from the 18th February, 1891, at 10 per cent. per annum, less 28*l.* 17*s.* 8*d.* and 119*l.* 16*s.* 6*d.* paid off as interest, due on a mortgage bond passed by the defendant in favour of the plaintiff on the 18th February, 1891, and payable on the 18th February, 1892, and calling on the defendant to show cause why certain seven lots of land, portions of the farm Waterval No. 446 in the district of Lydenburg, and described in the bond, should not be declared executable.

JORISSEN, J., gave the following judgment on this claim: "The plaintiffs ask provisional sentence for a sum of 1,100*l.*, with interest at 10 per cent., on a mortgage bond over seven lots of land, portion of the farm Waterval No. 446, situate in the ward Crocodile River, in the district of Lydenburg. The defendant admits the debt, but maintains that having assigned his estate to a certain Mr. Spence as trustee with the consent of his creditors, including the plaintiffs, the latter have now no claim against him personally. This contention